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WITH KEY-NUMBER ANNOTATIONS

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IN THE
CIRCUIT COURTS OF APPEALS AND
DISTRICT COURTS OF THE
UNITED STATES

MARCH — APRIL, 1914

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CASES REPORTED

	Page		Page
Abramson, In re (C. C. A.)	878	Bolton-Pratt Co. v. Chester (C. C. A.)....	253
Ackoury, Hartman v. (D. C.).....	188	Bonbright v. Geary (D. C.).....	44
Adams v. Chicago Great Western R. Co. (D. C.).....	362	Brey, Gunderson v. (C. C. A.).....	401
A. D. Howe Mach. Co. v. Dayton (C. C. A.)	801	Brigman, Covington v. (D. C.).....	499
Adzenoska v. Erie R. Co. (D. C.).....	571	British & American Mortg. Co. v. Stuart (C. C. A.)	425
A. Gaglione & Son, In re (C. C. A.)....	161	Brown v. American Bonding Co. of Balti- more, Md. (C. C. A.)	844
Alabama Coal & Coke Co., In re (D. C.)..	940	Buchanan v. W. M. Ritter Lumber Co. (C. C. A.).....	144
Alabama & N. O. Transp. Co. v. Doyle (D. C.).....	173	Buckley, Pennsylvania R. Co. v. (C. C. A.)	268
Alaska-Juneau Gold Min. Co., Ebner Gold Min. Co. v. (C. C. A.).....	599	Buell, Constad v. (C. C. A.).....	410
Alderson v. General Electric Co. (C. C. A.)	775	Burman, In re (D. C.).....	512
American Bonding Co. of Baltimore, Md., Brown v. (C. C. A.).....	844	Burnett v. Spokane, P. & S. R. Co. (D. C.)	94
American Foundry & Supply Co., In re (C. C. A.).....	583	Callaham v. Marshall (C. C. A.).....	230
American Smelting & Refining Co., Willcox, Peck & Hughes v. (D. C.).....	89	Callaham v. United States (C. C. A.).....	230
Anderson v. Louisville & N. R. Co. (C. C. A.)	689	Cambria Steel Co., Central Imp. Co. v. (C. C. A.).....	696
Angle v. Bankers' Surety Co. (D. C.).....	289	Cambria Steel Co., Guardian Trust Co. v. (C. C. A.).....	696
Anglo-South American Bank v. McCleary, Wallin & Crouse (C. C. A.)	891	Canada Atlantic Transit Co. v. Chicago (C. C. A.).....	7
Argo, The (C. C. A.).....	872	Cantalupo, Lacorazza v. (C. C. A.).....	875
Armstrong Cork Co., City of Camden v. (C. C. A.).....	818	Caponigri, In re (C. C. A.).....	897
Arnao, In re (D. C.).....	395	Case v. Mountain Timber Co. (D. C.).....	565
Assessor of Vernon Parish, La., v. Gould (C. C. A.)	894	Case Threshing Mach. Co. v. Road Imp. Dist. No. 3 of Pulaski County, Ark. (D. C.)	366
Assets Realization Co. v. Sovereign Bank of Canada (C. C. A.).....	156	Cash-Papworth, Grow-Sir, In re (C. C. A.)	24
Atchison, T. & S. F. R. Co., Smith v. (D. C.)	988	Central Imp. Co. v. Cambria Steel Co. (C. C. A.)	696
Atlanta Journal Co., United States v. (C. C. A.).....	275	Chappell & Co. v. Fields (C. C. A.).....	864
Atlantic Coast Line R. Co., Smith v. (C. C. A.).....	761	Cheatham, In re (D. C.).....	376
Atlas Underwear Co. v. Cooper Under- wear Co. (D. C.).....	347	Chester, Bolton-Pratt Co. v. (C. C. A.)....	253
Bacon, In re (C. C. A.).....	129	Chicago Great Western R. Co., Adams v. (D. C.).....	362
Bainbridge, The (C. C. A.).....	622	Chicago, M. & St. P. R. Co., Jackson v. (D. C.).....	495
Baldwin v. Grier Bros. Co. (D. C.).....	560	Chicago, St. P., M. & O. R. Co., Engemoen v. (C. C. A.).....	396
Ball v. Coker (C. C. A.).....	278	Chicago & N. W. R. Co. v. Smith (D. C.)..	632
Ball, C. W. Raymond Co. v. (C. C. A.)....	217	Cincinnati Traction Co. v. Pope (C. C. A.)	443
Baltimore & O. R. Co., Smith v. (C. C. A.)	414	City of Akron, Cuyahoga River Power Co. v. (D. C.).....	524
Bankers' Surety Co., Angle v. (D. C.).....	289	City of Camden v. Armstrong Cork Co. (C. C. A.)	818
Barker, St. Louis & S. F. R. Co. v. (D. C.)	902	City of Chicago, Canada Atlantic Transit Co. v. (C. C. A.).....	7
Beach Front Hotel Co. v. Sooy (C. C. A.)	265	City of Forsyth v. Crellin (C. C. A.).....	835
Belmont Coal Min. Co., Grabsky v. (D. C.)	553	City of Montgomery, The (D. C.).....	673
Benjamin Menu Card Co. v. Rand, McNally & Co. (C. C.).....	285	City of Portland, Portland Ry., Light & Power Co. v. (D. C.).....	667
Benner Line v. Fendleton (D. C.).....	67	City State Bank of Mangum, Okl., Mc- Lean v. (C. C. A.).....	21
Bentley v. Young (D. C.).....	202	Coffield Motor Washer Co., Neff v. (C. C. A.).....	166
Bernard v. Lea (C. C. A.).....	583	Coker, Ball v. (C. C. A.).....	278
Bissinger & Co., Wanner v. (D. C.).....	96	Colosino v. Pittsburgh & L. E. R. Co. (D. C.)	550
Blau, Richmond Light & R. Co. v. (C. C. A.)	887		
Bleyer, In re (D. C.).....	391		
Board of School Directors of Tangipahoa Parish, John W. Hood & Co. v. (D. C.)..	384		

	Page		Page
Columbia Cotton Oil & Provision Corp., In re (C. C. A.)	824	Engemoen v. Chicago, St. P., M. & O. R. Co. (C. C. A.)	896
Columbus Buggy Co., Counts v. (C. C. A.)	748	Epstein v. Steinfeld (C. C. A.)	236
Commercial Union Assur. Co. v. Dalzell (C. C. A.)	605	Erie R. Co., Adzenoska v. (D. C.)	571
Commons, Hallowell v. (C. C. A.)	793	Fairfield Cotton Mills, Thomas B. Whitted & Co. v. (C. C. A.)	725
Commons, Hallowell v. (C. C. A.)	801	Fielding v. Shands (C. C. A.)	889
Constad v. Buell (C. C. A.)	410	Fields, Chappell & Co. v. (C. C. A.)	864
Cook v. Hale & Ward (D. C.)	340	Firemen's Fund Ins. Co., J. E. Davis Mfg. Co. v. (D. C.)	653
Cooper Underwear Co., Atlas Underwear Co. v. (D. C.)	347	First Nat. Bank v. First Nat. Bank (D. C.)	542
Corrigan, Young v. (C. C. A.)	442	Foster Paint & Varnish Co., In re (D. C.)	652
Counts v. Columbus Buggy Co. (C. C. A.)	748	Fountain v. Detroit, M. & T. S. L. R. Co. (D. C.)	982
Covington v. Brigman (D. C.)	499	Fountain Electrical Floor Box Corp. v. Trustees Masonic Hall and Asylum Fund (D. C.)	169
Crellin, City of Forsyth v. (C. C. A.)	835	Franklin Sugar Refining Co., In re (C. C. A.)	24
Cressler v. Moloney (C. C. A.)	104	Fullhart, Thrush v. (C. C. A.)	1
Cronen v. Moore (C. C. A.)	239	Gaglione & Son, In re (C. C. A.)	161
Crown Cork & Seal Co. of Baltimore City v. Sterling Cork & Seal Co. (D. C.)	26	Geary, Bonbright v. (D. C.)	44
Cuyahoga River Power Co. v. Akron (D. C.)	524	Geary, Kelley v. (D. C.)	44
C. W. Raymond Co. v. Ball (C. C. A.)	217	General Electric Co., Alderson v. (C. C. A.)	775
Dalzell, Commercial Union Assur. Co. v. (C. C. A.)	605	Gerstell v. Shirk (C. C. A.)	223
Dalzell, London & Lancashire Fire Ins. Co. v. (C. C. A.)	605	Gill, Eliot Nat. Bank v. (D. C.)	933
Daniel Green Felt Shoe Co. v. Dolgeville Felt Shoe Co. (C. C. A.)	164	Gold, In re (C. C. A.)	410
Dart v. Saylor Electric Co. (D. C.)	462	Goleb, Owl Creek Coal Co. v. (C. C. A.)	209
Davide, San Pedro, L. A. & S. L. R. Co. v. (C. C. A.)	870	Goshorn v. Murray (C. C. A.)	880
Davis v. Hanover Sav. Fund Soc. (C. C. A.)	768	Gould, Assessor of Vernon Parish, La., v. (C. C. A.)	894
Davis Mfg. Co. v. Firemen's Fund Ins. Co. (D. C.)	653	Grabsky v. Belmont Coal Min. Co. (D. C.)	553
Dayton, A. D. Howe Mach. Co. v. (C. C. A.)	801	Grafton Woodworking Co., Warner v. (C. C. A.)	12
Desnoyers Shoe Co., In re (D. C.)	533	Green Felt Shoe Co. v. Dolgeville Felt Shoe Co. (C. C. A.)	164
Detroit, M. & T. S. L. R. Co., Fountain v. (D. C.)	982	Gregory, Ex parte (D. C.)	680
Dolgeville Felt Shoe Co., Daniel Green Felt Shoe Co. v. (C. C. A.)	164	G. Ricordi & Co. v. Mason (C. C. A.)	277
Double Star Brick Co., In re (D. C.)	980	Grier Bros. Co., Baldwin v. (D. C.)	560
Doyle, Alabama & N. O. Transp. Co. v. (D. C.)	173	Guaranty Trust Co. of New York v. Han-nay (C. C. A.)	810
Ducktown Sulphur, Copper & Iron Co., Vestal v. (D. C.)	375	Guardian Trust Co. v. Cambria Steel Co. (C. C. A.)	696
Dugan Piano Co., Stone & McCarrick v. (D. C.)	399	Gunderson v. Brey (C. C. A.)	401
Du Pont de Nemours Powder Co., Schlott-man v. (D. C.)	356	Gytll, Ex parte (D. C.)	918
Du Puy v. Post Telegram Co. (C. C. A.)	883	Hale & Ward, Cook v. (D. C.)	340
Dwight Mfg. Co., United States v. (D. C.)	74	Hallowell v. Commons (C. C. A.)	793
Dwight Mfg. Co., United States v. (D. C.)	79	Hallowell v. Commons (C. C. A.)	801
Dwight Mfg. Co., United States v. (D. C.)	81	Hannay, Guaranty Trust Co. of New York v. (C. C. A.)	810
Dwight Mfg. Co., United States v. (D. C.)	85	Hanover Sav. Fund Soc., Davis v. (C. C. A.)	768
Eagle Pharmacy, In re (D. C.)	499	Harlow, Varney v. (C. C. A.)	824
Eberhard v. Northwestern Mut. Life Ins. Co. (D. C.)	520	Hartman v. Ackoury (D. C.)	188
Ebner Gold Min. Co. v. Alaska-Juneau Gold Min. Co. (C. C. A.)	599	Haskell Golf Ball Co. v. Sporting Goods Sales Co. (D. C.)	624
Edward Rutledge Timber Co., West v. (D. C.)	189	H. B. Hollins & Co., In re (D. C.)	965
E. I. Du Pont de Nemours Powder Co., Schlottman v. (D. C.)	356	Headley v. Warren (C. C. A.)	620
Eliot Nat. Bank v. Gill (D. C.)	933	Herold v. Park View Building & Loan Ass'n (C. C. A.)	577
Elk Valley Coal Min. Co., In re (D. C.)	386	Hickey, Pennsylvania R. Co. v. (C. C. A.)	786
Eng v. Southern Pac. Co. (D. C.)	92	Hicks v. Penn Mut. Life Ins. Co. (D. C.)	464
		Hill v. Wilson (C. C. A.)	200
		Hobbs Mfg. Co., National Lock Washer Co. v. (D. C.)	516
		Hocking Val. R. Co. v. United States (C. C. A.)	735

	Page		Page
Hogeboom, Ex parte (D. C.).....	965	Marshall, Callaham v. (C. C. A.).....	230
Hollins & Co., In re (D. C.).....	965	Marshall, United States v. (C. C. A.).....	595
Home Bond Co. v. McChesney (C. C. A.)..	893	Martin, In re (C. C. A.).....	620
Hood & Co. v. Board of School Directors of Tangipahoa Parish (D. C.).....	384	Mason, G. Ricordi & Co. v. (C. C. A.).....	277
Howe Mach. Co. v. Dayton (C. C. A.).....	801	Melton, Pensacola State Bank v. (D. C.)...	57
		Merida, The (C. C. A.).....	440
Jackon v. Chicago, M. & St. P. R. Co. (D. C.).....	495	Metallic Specialty Mfg. Co., In re (D. C.)	663
Jameson v. United States Farm Land Co. (C. C. A.)	885	Milford, A. & W. St. R. Co., Murphy v., two cases (C. C. A.).....	135
J. E. Davis Mfg. Co. v. Firemen's Fund Ins. Co. (D. C.).....	653	Milford, A. & W. St. R. Co., Murphy v., two cases (C. C. A.).....	137
J. I. Case Threshing Mach. Co. v. Road Imp. Dist. No. 3 of Pulaski County, Ark. (D. C.).....	366	Miller, Laderburg v. (C. C. A.).....	614
John L. Whiting-J. J. Adams Co., Rubber & Celluloid Harness Trimming Co. v. (D. C.).....	393	Moloney v. Cressler (C. C. A.).....	104
John Pell & Son v. Protector Last Rein- forcing Co. (C. C. A.).....	167	Monongahela River Consol. Coal & Coke Co. v. River & Rail Storage Co. (C. C. A.).....	611
John W. Hood & Co. v. Board of School Directors of Tangipahoa Parish (D. C.)..	384	Moore, Cronen v. (C. C. A.).....	239
Johnson v. Latty (D. C.).....	961	Morse, In re (D. C.).....	900
Kantor v. Murchie (D. C.).....	573	Mountain Timber Co., Case v. (D. C.)...	565
Kawneer Mfg. Co. v. Ventwell Store Front Co. (D. C.).....	459	Mt. Vernon Woodberry Cotton Duck Co., Whitridge v. (D. C.).....	302
Kelley v. Geary (D. C.).....	44	Mulert v. National Bank of Tarentum (C. C. A.).....	857
Keystone Trading Co. v. Zapota Mfg. Co. (D. C.)	456	Munroe, In re (D. C.).....	326
Klotawah, The (D. C.).....	677	Murchie, Kantor v. (D. C.).....	573
Knox Automobile Co., In re (D. C.).....	569	Murphy v. Milford, A. & W. St. R. Co., two cases (C. C. A.).....	135
Kootenai County, Washington Water Pow- er Co. v. (C. C. A.).....	867	Murphy v. Milford, A. & W. St. R. Co., two cases (C. C. A.).....	137
Kramer, In re (D. C.).....	977	Murray, Goshorn v. (C. C. A.).....	880
Kulp v. United States (C. C. A.).....	249	Murray v. Southern Bell Telephone & Tele- graph Co. (D. C.).....	925
Lackawanna, The (C. C. A.).....	262	National Bank of Tarentum, Mulert v. (C. C. A.)	857
Lacorazza v. Cantalupo (C. C. A.)	875	National Lock Washer Co. v. Hobbs Mfg. Co. (D. C.).....	516
Laderburg v. Miller (C. C. A.).....	614	Neff v. Coffield Motor Washer Co. (C. C. A.).....	166
Lamar, In re (D. C.).....	685	Nelson v. Wood (C. C. A.).....	18
Lamar, United States v. (D. C.).....	685	New York, N. H. & H. R. Co. v. Vizvari (C. C. A.).....	118
Lane Lumber Co., In re (D. C.).....	82	N. Jim Quan v. United States (C. C. A.)	617
Latham v. United States (C. C. A.).....	159	Northwestern Mut. Life Ins. Co., Eberhard v. (D. C.).....	520
Latty, Johnson v. (D. C.).....	961	Nubone Corset Co., Spirella Co. v. (D. C.)	453
Lea, Bernard v. (C. C. A.).....	583		
Ledgerwood, Wood v. (C. C. A.).....	163	O'Connell, Potlatch Lumber Co. v. (C. C. A.).....	434
Leshar Warner Dry Goods Co., Podolin v. (C. C. A.).....	97	Oregon-Washington R. & Nav. Co., United States v. (D. C.).....	378
Libby, McNeill & Libby v. United States (C. C. A.).....	148	Outlook Envelope Co. v. Sherman Envelope Co. (D. C.).....	630
London & Lancashire Fire Ins. Co. v. Dal- zell (C. C. A.).....	605	Owl Creek Coal Co. v. Goleb (C. C. A.)...	209
Loo Shew Ung, Ex parte (D. C.)	990		
Louisville & N. R. Co., Anderson v. (C. C. A.).....	689	Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co. (D. C.).....	958
Lueders v. United States (C. C. A.).....	419	Page v. Warrenton (C. C. A.).....	431
Lynch, In re (D. C.)	558	Palmer v. Superior Mfg. Co. (C. C. A.)...	452
		Park View Building & Loan Ass'n, Herold v. (C. C. A.).....	577
McChesney, Home Bond Co. v. (C. C. A.)..	893	Patterson, Robinson Bros. & Co. v. (C. C. A.).....	839
McCleary, Wallin & Crouse, Anglo-South American Bank v. (C. C. A.).....	891	Pell & Son v. Protector Last Reinforcing Co. (C. C. A.).....	167
McLean v. City State Bank of Mangum, Okla. (C. C. A.).....	21	Pendleton, Benner Line v. (D. C.).....	67
McLean Hardwood Lumber Co., South Memphis Land Co. v. (C. C. A.).....	257	Penn Mut. Life Ins. Co., Hicks v. (D. C.)..	464
McWeeny v. Standard Boiler & Plate Co. (D. C.)	507	Pennsylvania Casualty Co. v. Whiteway (C. C. A.).....	782
Manhattan Canning Co., Wilson v. (D. C.)	898	Pennsylvania R. Co. v. Buckley (C. C. A.)	268

	Page		Page
Pennsylvania R. Co. v. Hickey (C. C. A.)..	786	Shirk, Gerstell v. (C. C. A.).....	223
Pensacola State Bank v. Melton (D. C.)..	57	Smith v. Atchison, T. & S. F. R. Co. (D. C.)	988
Philips & McEachin, In re (C. C. A.).....	889	Smith v. Atlantic Coast Line R. Co. (C. C.	
Pierce, In re (D. C.).....	389	A.)	761
Pittsburgh & L. E. R. Co., Colosino v.		Smith v. Baltimore & O. R. Co. (C. C. A.)	414
(D. C.)	550	Smith v. Chicago & N. W. R. Co. (D. C.)..	632
Podolin v. Leshar Warner Dry Goods Co.		Smith v. Reed (D. C.).....	968
(C. C. A.).....	97	Smith v. Smith (D. C.).....	947
Pope, Cincinnati Traction Co. v. (C. C. A.)	443	Smith Incandescent Light Co. v. Welsbach	
Portland Ry., Light & Power Co. v. Port-		Gas Lamp Co. (C. C. A.).....	450
land (D. C.).....	667	Soforenko, In re (D. C.).....	562
Post Office Site in Borough of the Bronx,		Sooy, Beach Front Hotel Co. v. (C. C. A.)	265
In re (C. C. A.).....	832	Southern Bell Telephone & Telegraph Co.,	
Post Telegram Co., Du Puy v. (C. C. A.)...	883	Murray v. (D. C.).....	925
Potlatch Lumber Co. v. O'Connell (C. C.		Southern Hardware & Supply Co., In re	
A.)	434	(D. C.).....	381
Potter, Williams v. (D. C.).....	318	Southern Pac. Co., Eng v. (D. C.).....	92
Priest, Sandoval v. (C. C. A.).....	814	South Memphis Land Co. v. McLean Hard-	
Priest, United States v. (D. C.).....	332	wood Lumber Co. (C. C. A.).....	257
Printograph Sales Co., In re (D. C.).....	567	South & North Alabama R. Co. v. Railroad	
Protector Last Reinforcing Co., John Pell		Commission of Alabama (D. C.).....	465
& Son v. (C. C. A.).....	167	Sovereign Bank of Canada, Assets Realiza-	
Pullman Co., Riegel v. (C. C. A.).....	273	tion Co. v. (C. C. A.).....	156
Railroad Commission of Alabama, South &		Spirella Co. v. Nubone Gorset Co. (D. C.)..	453
North Alabama R. Co. v. (D. C.).....	465	Spokane, P. & S. R. Co., Burnett v. (D. C.)	94
Rand, McNally & Co., Benjamin Menu		Spokane & I. R. Co. v. United States	
Card Co. v. (C. C.).....	285	(C. C. A.).....	243
Randel v. United States (C. C. A.).....	832	Sporting Goods Sales Co., Haskell Golf	
Rankin, In re (D. C.).....	529	Ball Co. v. (D. C.).....	624
Raymond Co. v. Ball (C. C. A.).....	217	Standard Boiler & Plate Co., McWeeny v.	
Redfern, United States v. (D. C.).....	548	(D. C.).....	507
Reed, Smith v. (D. C.).....	968	Steel & Masonry Contracting Co. v. Reilly	
Reid, United States v. (D. C.).....	486	(C. C. A.).....	437
Richmond Light & R. Co. v. Blau (C. C. A.)	887	Steinfeld, Epstein v. (C. C. A.).....	236
Ricordi & Co. v. Mason (C. C. A.).....	277	Sterling Cork & Seal Co., Crown Cork &	
Riegel v. Pullman Co. (C. C. A.).....	273	Seal Co. of Baltimore City v. (D. C.)....	26
Reilly, Steel & Masonry Contracting Co. v.		Stockwell, Walker v. (D. C.).....	575
(C. C. A.).....	437	Stone Canon Mercantile Co., In re (D. C.)	986
Ritter Lumber Co., Buchanan v. (C. C. A.)	144	Stone & McCarrick v. Dugan Piano Co.	
River & Rail Storage Co., Monongahela		(D. C.).....	399
River Consol. Coal & Coke Co. v. (C.		Stuart, British & American Mortg. Co. v.	
C. A.).....	611	(C. C. A.).....	425
Road Imp. Dist. No. 3 of Pulaski County,		Sunday Creek Co. v. United States (C. C.	
Ark., J. I. Case Threshing Mach. Co. v.		A.)	747
(D. C.).....	366	Superior Mfg. Co., Palmer v. (C. C. A.)....	452
Robinson Bros. & Co. v. Patterson (C. C. A.)	839	Tacoma Ry. & Power Co., Tweeten v. (C.	
Roebuck Weather Strip & Wire Screen		C. A.)	828
Co., Vose v. (D. C.).....	687	Teipel, Walton v. (C. C. A.)	161
Rosenthal, United States v. (D. C.).....	555	Thames & Mersey Marine Ins. Co., Pacific	
Rubber & Celluloid Harness Trimming Co.		Creosoting Co. v. (D. C.).....	958
v. John L. Whiting-J. J. Adams Co.		Third Nat. Bank, Torrance v. (C. C. A.)...	806
(D. C.).....	393	Thirty-Six Bottles of London Dry Gin,	
Rutledge Timber Co., West v. (D. C.).....	189	United States v. (C. C. A.).....	271
St. Louis & S. F. R. Co. v. Barker (D. C.)	902	Thomas B. Whitted & Co. v. Fairfield Cot-	
Sandoval v. Priest (C. C. A.).....	814	ton Mills (C. C. A.).....	725
San Pedro, L. A. & S. L. R. Co. v. Davide		Thrush v. Fullhart (C. C. A.).....	1
(C. C. A.).....	870	Torrance v. Third Nat. Bank (C. C. A.)...	806
Saxoline, The (D. C.).....	683	Town of Warrenton, Page v. (C. C. A.)....	431
Sayer, In re (D. C.).....	337	Transit, The (D. C.).....	575
Saylor Electric Co., Dart v. (D. C.).....	462	Trustees Masonic Hall and Asylum Fund,	
Schaap v. United States (C. C. A.).....	853	Fountain Electrical Floor Box Corp. v.	
Schenkemeyer v. Tusek (C. C. A.).....	151	(D. C.).....	169
Schlottman v. E. I. Du Pont de Nemours		Tusek, Schenkemeyer v. (C. C. A.).....	151
Powder Co. (D. C.).....	356	Tweeten v. Tacoma Ry. & Power Co. (C.	
Shands, Fielding v. (C. C. A.).....	889	C. A.)	828
Sherman Envelope Co., Outlook Envelope		Uhl, United States v. (C. C. A.).....	860
Co. v. (D. C.).....	630	United States v. Atlanta Journal Co. (C. C.	
Sherwoods, In re (C. C. A.)	754	A.)	275

	Page		Page
United States, Callaham v. (C. C. A.).....	230	Walker v. Stockwell (D. C.).....	575
United States v. Dwight Mfg. Co. (D. C.)..	74	Walton v. Tepel (C. C. A.).....	161
United States v. Dwight Mfg. Co. (D. C.)..	79	Wanner v. Bissinger & Co. (D. C.).....	96
United States v. Dwight Mfg. Co. (D. C.)..	81	Warner v. Grafton Woodworking Co. (C. C. A.).....	12
United States v. Dwight Mfg. Co. (D. C.)..	85	Warren, Headley v. (C. C. A.).....	620
United States, Hocking Val. R. Co. v. (C. C. A.).....	735	Washington Steel & Bolt Co., In re (D. C.)	984
United States, Kulp v. (C. C. A.).....	249	Washington Water Power Co. v. Kootenai County (C. C. A.).....	867
United States v. Lamar (D. C.).....	685	Watmought, In re (D. C.).....	539
United States, Latham v. (C. C. A.).....	159	Weber, United States v. (D. C.).....	973
United States, Libby, McNeill & Libby v. (C. C. A.).....	148	Welsbach Gas Lamp Co., Smith Incandescent Light Co. v. (C. C. A.).....	450
United States, Lueders v. (C. C. A.).....	419	West v. Edward Rutledge Timber Co. (D. C.).....	189
United States v. Marshall (C. C. A.).....	595	Western Meat Co., Withoft v. (D. C.).....	986
United States, N. Jim Quan v. (C. C. A.)..	617	Whiteway, Pennsylvania Casualty Co. v. (C. C. A.).....	782
United States v. Oregon-Washington R. & Nav. Co. (D. C.).....	378	Whiting-J. J. Adams Co., Rubber & Celluloid Harness Trimming Co. v. (D. C.).....	393
United States v. Priest (D. C.).....	332	Whitridge v. Mt. Vernon Woodberry Cotton Duck Co. (D. C.).....	302
United States, Randel v. (C. C. A.).....	832	Whitted & Co. v. Fairfield Cotton Mills (C. C. A.).....	725
United States v. Redfern (D. C.).....	548	Wiener, United States v. (C. C. A.).....	832
United States v. Reid (D. C.).....	486	Williams v. Potter (D. C.).....	318
United States v. Rosenthal (D. C.).....	555	Willcox, Peck & Hughes v. American Smelting & Refining Co. (D. C.).....	89
United States, Schaap v. (C. C. A.).....	853	Wilson, Hill v. (C. C. A.).....	200
United States, Spokane & I. E. R. Co. v. (C. C. A.).....	243	Wilson v. Manhattan Canning Co. (D. C.)	898
United States, Sunday Creek Co. v. (C. C. A.).....	747	Withoft v. Western Meat Co. (D. C.).....	986
United States v. Thirty-Six Bottles of London Dry Gin (C. C. A.).....	271	W. M. Ritter Lumber Co., Buchanan v. (C. C. A.).....	144
United States v. Uhl (C. C. A.).....	860	Wood v. Ledgerwood (C. C. A.).....	163
United States v. Weber (D. C.).....	973	Wood, Nelson v. (C. C. A.).....	18
United States v. Wiener (C. C. A.).....	832	Woodruff v. Yazoo & M. V. R. Co. (C. C. A.).....	849
United States Farm Land Co., Jameson v. (C. C. A.).....	885	Wylly, In re (D. C.).....	954
Vandiver, In re (C. C. A.).....	425	Yazoo & M. V. R. Co., Woodruff v. (C. C. A.).....	849
Varney v. Harlow (C. C. A.).....	824	Young, Bentley v. (D. C.).....	202
Ventwell Store Front Co., Kawneer Mfg. Co. v. (D. C.).....	459	Young v. Corrigan (C. C. A.).....	442
Vestal v. Ducktown Sulphur, Copper & Iron Co. (D. C.).....	375	Yunghauss, In re (D. C.).....	545
Vizvari, New York, N. H. & H. R. Co. v. (C. C. A.).....	118	Zapota Mfg. Co., Keystone Trading Co. v. (D. C.).....	456
Vose v. Roebuck Weather Strip & Wire Screen Co. (D. C.).....	687		

CASES
ARGUED AND DETERMINED
IN THE
UNITED STATES CIRCUIT COURTS OF APPEALS
AND THE DISTRICT COURTS

THRUSH v. FULLHART.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1913.)

No. 1,170.

1. EVIDENCE (§ 340*)—CERTIFIED COPY OF RECORD—ADMINISTRATOR'S LIST.

Where, in an action for breach of marriage promise, it appeared that defendant had been one of the administrators of his father's estate, and a certified copy of a list of his father's personal property had been attested by the certificate of the administrators as correct, and it also appeared that defendant was entitled to an aliquot part of such estate, such appraisalment was properly admitted in evidence to show defendant's financial condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1294-1301; Dec. Dig. § 340.*]

2. BREACH OF MARRIAGE PROMISE (§ 35*)—DEFENSES—LIMITATIONS—INSTRUCTIONS.

Where, in an action for breach of marriage promise, defendant testified that he broke off the engagement in a letter written plaintiff in June, 1907, and, on July 19th of the following month, plaintiff replied asking for a continuance of friendship only, such correspondence indicated an intention on defendant's part to break his promise to marry her, whether she consented or not, and there being no evidence of a subsequent promise on which suit could be brought, the statute of limitations against her right to sue for breach of promise began to run at that time, and it was error to refuse to charge that if the jury believed from the evidence that defendant wrote plaintiff in June, 1907, breaking off their engagement, they must find for defendant on his defense of limitations, whether plaintiff agreed to the breach or not, and to charge instead that if the jury believed that defendant wrote to plaintiff in June, 1907, breaking off their engagement, the action not having been brought within a year, they must find for defendant, provided they did not further find that the engagement had been renewed; there being no evidence of any new promise.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. § 51; Dec. Dig. § 35.*]

3. EVIDENCE (§ 271*)—SELF-SERVING DECLARATIONS—LETTERS.

In an action for breach of marriage promise, letters written by plaintiff to defendant nearly three months after the incident with which they were sought to be connected, and after she had consulted with counsel

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—1

and had in contemplation a suit against him, and to which he did not reply, and containing declarations in her own interest, were inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1084; Dec. Dig. § 271.*]

In Error to the District Court of the United States for the Northern District of West Virginia, at Martinsburg; Alston G. Dayton, Judge.

Action by Iva Lea Fullhart against William V. Thrush. Judgment for plaintiff, and defendant brings error. Reversed.

William MacDonald, of Keyser, W. Va. (Frank C. Reynolds, of Keyser, W. Va., on the brief), for plaintiff in error.

W. H. Griffith, of Keyser, W. Va. (Roscoe A. Heavilin, of Marion, Ind., on the brief), for defendant in error.

Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

KNAPP, Circuit Judge. This is an action for breach of promise of marriage. It was tried to a jury, and the defendant in error (hereinafter called the plaintiff) had a verdict on which judgment was entered. The plaintiff in error (hereinafter called the "defendant") prosecutes this writ to reverse the judgment against him.

The declaration of plaintiff is in the usual form. The defendant, in addition to the general plea of non assumpsit, filed two special pleas; one alleging that his promise to marry was void under the statute of frauds of West Virginia, the other alleging that plaintiff's cause of action was barred by the statute of limitations of that state.

The parties to the suit became engaged in the spring of 1894, when they were both students at Otterbein University, at Westerville, Ohio. The plaintiff was then upwards of 23 years of age, the defendant a year older. The defendant was preparing for the ministry, and plaintiff knew that he intended to take a theological course at Lane Seminary, Cincinnati, Ohio. He did in fact attend that institution during the three years following his graduation from Otterbein in June of the year named. The plaintiff testified that their marriage was to take place "as soon as defendant was able to be married," but she evidently understood that this would not be until he completed his studies and "was located in some employment." The record does not show definitely when or for what reason defendant abandoned his intention to become a minister, but it appears that after leaving the seminary in 1897 he was employed for about two years as a clerk in his brother's store at Piedmont, W. Va., and in 1899 returned to his father's farm near Burlington in that state, where he has since resided. His father was then advanced in years and in failing health. He died intestate in April, 1910, leaving a considerable estate which passed to his five sons and his widow, their stepmother.

At the time of their engagement the plaintiff lived at North Manchester, Ind., but some two years later removed to Marion, in that state, where she has continued to reside. She left Otterbein soon after

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

er the engagement, and for a while was employed as a school teacher, but later became a stenographer, which has since been her occupation. During this time the defendant visited her on two occasions. The first was at Christmas, 1895, when she gave him her watch, which she says he was to return when he came to claim her as his bride. The other occasion was during the defendant's vacation in June, 1896, an account of which appears in the testimony. With these exceptions the parties did not see each other from the time they were students at Westerville until they met 18 years later at the trial of this action in September, 1912.

Throughout this long period, except perhaps the last year or two, there was a more or less frequent correspondence between the parties. Most of the letters appear to have been destroyed, but some which happened to be preserved were produced at the trial and are printed in the record. It is unnecessary to comment upon the contents of these letters except in connection with certain assignments of error which will be presently considered. On the 29th of November, 1911, the defendant married one Mary Whipp, and on the 4th day of June, 1912, this action was commenced.

The defense based upon the statute of frauds is without merit and needs but a word of mention. If it be granted that the statute applies to a contract to marry, and that this contract by its terms was not to be performed within a year after it was made, we are of opinion that the subsequent letters of defendant, which in effect acknowledged and ratified the agreement, constituted a promise in writing within the meaning and intent of the statute.

[1] On the trial of the action the plaintiff was allowed, against the objection of defendant, to introduce and read to the jury a certified copy of the appraisement of his father's estate, which was filed in the clerk's office of Mineral county in October, 1910. To the list of personal property and real estate was appended a certificate of the appraisers to the effect that the list of items with the value thereof was correct, and a further certificate of the administrators, of whom the defendant was one, that the list embraced all the property belonging to the estate. This appraisement was offered in evidence for the purpose of showing the defendant's financial condition and was admitted solely for that purpose.

We perceive no error in this ruling of the trial court. Evidence of the defendant's means and consequent ability to respond in damages is clearly admissible in actions of this kind, and we see no reason to doubt that it was competent to prove this defendant's financial condition, *prima facie* at least, by the official valuation of his father's estate, in which he had a known and definite interest. It may be, as claimed by counsel, that the introduction of this appraisement, with its long list of items, of the nominal value in the aggregate of more than \$91,000, gave the jury an exaggerated impression of the amount of property which defendant inherited and which he then presumably possessed. But it was open to defendant to point out any items which were overvalued, or to show subsequent losses and depreciation, or to give independent proof of his actual financial condition. Having

failed to avail himself of the opportunity to rebut any inferences as to his present circumstances which might be drawn from the appraisal in question, he cannot now be heard to complain if the jury in fact based the amount of its verdict upon an excessive estimate of his pecuniary ability.

After the evidence was concluded, and before the arguments of counsel, the court gave to the jury certain instructions, five in number, which the plaintiff requested, and to each of which the defendant duly excepted. Without stating the various propositions submitted, or discussing the questions which they severally present, it is sufficient to say that in our judgment none of these instructions involves substantial error. Even if they be regarded as favoring the plaintiff's contention, we are not persuaded, in view of the pleadings and evidence, that they were incorrect or unwarranted.

[2] A different and more serious question arises from the refusal of the court to give the instruction requested by defendant, to which refusal exception was taken, and from the instruction afterwards given by the court of its own motion, with the consent of plaintiff, but over the objection of defendant; and, in order that this question may be determined on its merits, we pass by as unimportant the technical point that the instruction was not given in the order provided by the West Virginia statute. The instruction asked for and refused was this:

"The court instructs the jury that if they believe from the evidence that the defendant wrote to the plaintiff in June, 1907, breaking off their engagement, they must find for the defendant whether the plaintiff agreed thereto or not."

And the instruction in lieu thereof, given by the court of its own motion, was as follows:

"The court on behalf of the defendant instructs the jury that if they believe from the evidence that the defendant wrote to the plaintiff in June, 1907, breaking off their engagement, because of the statute of limitations and because this action was not instituted within one year thereafter, they must find for the defendant on the plea of statute of limitations filed in this cause; provided they do not find further from the evidence by circumstances and the relations of the parties that the engagement was in effect renewed."

It is conceded by plaintiff that, if the engagement to marry was terminated more than a year before this suit was commenced, the statute of limitations would bar recovery. The defendant testified that he broke off the engagement in a letter written to plaintiff in June, 1907, which was received shortly thereafter. Whether he did so or not was obviously the controlling fact in controversy. The letter itself was not produced, and its actual contents must be inferred from the testimony of the parties and their subsequent correspondence. The significant evidence in point is the answer of plaintiff on the 19th of July, the following month. There was an earlier acknowledgment, but in what terms does not appear. The later reply, on the date mentioned, is of considerable length, and discloses quite fully the state of mind and understanding of the plaintiff at that time. It is in part a plea for the continuance of friendship between them and further interchange of letters on that basis. Among other things, she says:

"How foolish it will be to deprive ourselves of this pleasure (meaning the pleasure of friendly correspondence) just because we cannot get married."

In another passage she repeats this idea, saying:

"Maybe we can get more pleasure out of a life devoted to correspondence than we could out of matrimony."

Again, she says:

"What I am interested in now is your friendship which I am only too glad to accept if that is all you have to give me—I will be satisfied with small favors."

This letter indicates not only that she no longer expected the defendant to marry her, but that she regarded his letter to her as intended to terminate their engagement. The fact that she urged his consent to further correspondence as friends seems otherwise not easy of explanation. In short, it is difficult to read the letter in question without believing that what the defendant had written to her was in substance and effect a refusal to keep his promise, that it was so understood by her, and that she then anticipated for the future no other than friendly relations.

Nor did anything afterwards take place, so far as this record discloses, which affords the slightest indication of a renewal of the engagement. Disregarding the point that no new promise is alleged, by way of replication or otherwise, and looking at the evidence in the light most favorable to the plaintiff, we are quite unable to discover any fact or circumstance which suggests that a broken promise had been renewed. Neither the testimony of plaintiff, the letters of defendant in 1909, the circumstances connected with the return of the watch, nor any other incident developed at the trial, permits an inference that the engagement formerly existing, if broken off by defendant in 1907, as he alleges, was again entered into by him, in effect or otherwise, at a subsequent date. The case was not tried on that theory, and there is nothing in the proofs to support the proposition.

We do not say that plaintiff was not entitled to go to the jury, under proper instructions, upon the issue here considered, namely, whether the engagement was broken at the time and in the manner asserted by defendant, for that question is not now presented. But we are of opinion, upon the pleadings and evidence before us, that the instruction asked for by defendant should have been given, and that the court's instruction in lieu thereof was also erroneous, for want of any basis in the proofs submitted, and because of its misleading import. The defendant contends that he canceled the engagement in June, 1907, nearly five years before this suit was commenced, and he relies upon the statute of limitations to defeat the plaintiff's action. The case on his part rests on this contention, and on her part, not on the renewal of a broken agreement, but on an agreement that remained unbroken until his marriage with another. It may be assumed, as plaintiff testifies, that she never released the defendant from his promise; but, if that promise was withdrawn or its fulfillment refused as and when the defendant alleges, the fact that she declined to release

him, or otherwise sought to hold him to his obligation, would not operate to prevent the running of the statute. The cause of action accrued when the breach of promise occurred, and unless suit were brought within a year thereafter the law invoked by defendant would bar recovery.

We are therefore persuaded that the instructions in question involved substantial error to the prejudice of defendant. The ruling asked for on his behalf was directly applicable to the case made by the pleadings and proofs, and correct in assuming that it was immaterial whether the plaintiff assented or not, if the jury found that the engagement was broken by defendant in his letter of June, 1907. The defendant was entitled to this instruction, and it ought not to have been refused.

The substituted instruction of the court appears to us clearly unwarranted. It is inconsistent with plaintiff's contention and without discoverable basis in the evidence. It was in effect a ruling that the jury, although believing that the promise sued on was broken five years before, might nevertheless find for the plaintiff upon the theory, which has no support but conjecture, of a later or renewed undertaking. That this was a misleading instruction, liable at least to improperly influence the verdict, seems hardly open to question. It certainly cannot be affirmed that it did not have that effect.

There is abundant authority for regarding such an instruction as reversible error. For example, in *Breitling v. United States*, 20 How. (61 U. S.) 252, 15 L. Ed. 900, Chief Justice Taney states the principle as follows:

"It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and, if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

Without multiplying citations, it is sufficient to refer to a comparatively recent case (*J. W. Bishop Co. v. Dodson*, 152 Fed. 128, 81 C. C. A. 346) in which this court sustained the refusal to give certain instructions, because they related "to matters not in issue in the case," and there was no basis for the contention. For the reasons above stated, we are constrained to hold that the errors under consideration require a reversal of the judgment.

[3] We are further of opinion that the plaintiff's letters of January 20 and 29, 1912, were improperly received in evidence. The declarations of a party in his own interest are not ordinarily admissible, and these letters seem to be essentially of that character. They cannot fairly be regarded as a part of the correspondence between the parties, for they are not in reply to anything defendant had written, nor were they answered by him. They were written nearly three months after the incident with which they are sought to be connected—the return of plaintiff's watch—and one of them certainly, the other apparently, after she had consulted with counsel and had in contempla-

tion a suit against defendant. The fact that he made no reply to these communications did not permit an inference of assent on his part to anything which plaintiff charged against him or claimed for herself, for the law is well settled that failure to answer a letter, under such circumstances as are here disclosed, cannot be regarded as an admission by the party to whom the letter is addressed. In our judgment, the letters in question are self-serving declarations which should have been excluded as irrelevant and incompetent.

The judgment should be reversed, and the case remanded.
Reversed.

CANADA ATLANTIC TRANSIT CO. et al. v. CITY OF CHICAGO.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)

No. 1,959.

1. COMMERCE (§ 10*)—NAVIGABLE WATERS (§ 2*)—REGULATION OF NAVIGATION THROUGH BRIDGES—POWERS OF MUNICIPALITY.

An ordinance of the city of Chicago, requiring all vessels when passing any bridge in the Chicago river to move at a rate of speed of not less than two miles an hour, and all vessels of 1,200 tons gross burden or more when moving through or between bridges in certain parts of the river to have the assistance of tugs, is not invalid as an interference with the rights of navigation or with interstate commerce, but is within the powers of the municipality in the absence of any legislation by Congress on the subject.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8; Dec. Dig. § 10; * Navigable Waters, Cent. Dig. §§ 2, 63; Dec. Dig. § 2.*]

2. MUNICIPAL CORPORATIONS (§ 63*)—ORDINANCES—REVIEW BY FEDERAL COURTS.

The power of the city to enact such an ordinance being clear, a federal court cannot adjudge it invalid as unreasonable merely because the court may believe from the evidence that it is unnecessary; the presumption being that local conditions render it reasonable and necessary.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1378, 1879; Dec. Dig. § 63.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; George A. Carpenter, Judge.

Suit in equity by the Canada Atlantic Transit Company, the Erie & Western Transportation Company, the Lehigh Valley Transportation Company, the Rutland Transit Company, the Erie Railroad Company, and the Western Transit Company against the City of Chicago. Decree for defendant, and complainants appeal. Affirmed.

This appeal is from a decree of the District Court, whereby appellants' bill for injunctive relief against the city of Chicago is dismissed for want of equity, on final hearing of the issues and testimony thereunder.

The appellants joining in the bill operate respectively various steam vessels navigating the Great Lakes between several ports thereof, inclusive of the port of Chicago and Chicago river—all engaged in interstate commerce. Their bill sets forth alleged injuries caused by the requirements of an ordinance adopted by the city of Chicago, in reference to navigation of the Chicago river, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

challenges the validity of such ordinance upon various grounds. The ordinance referred to was adopted December 13, 1900, as an amendment to the Revised Municipal Code, and reads as follows:

"Sec. 1014. Speed at Bridges—Forbidden Anchorage—Penalty: All vessels, steamboats, propellers, tugs or other craft navigating the harbor, when passing any bridge shall be moved past the same as expeditiously as is consistent with a proper movement in the harbor; but in no case shall any such craft while passing any bridge and obstructing the passage across such bridge, move at a rate of speed less than two miles per hour, and in no case shall any vessel, steamboat, propeller, tug or other craft, while passing any bridge and obstructing the same, remain or obstruct the passage across such bridge more than five minutes; and no vessel, craft or float shall be so anchored, laid, moored or fastened or brought to a stop, as to prevent any bridge from a free and speedy opening or closing, or any vessel from a free and direct passage, nor shall any line or fastening be so thrown, laid or made fast as to cross the track of any bridge or vessel, under a penalty of not less than twenty-five dollars for each offense, to be recovered from the master or other person having charge of such vessel, craft or float."

"Sec. 1016. Steam tugs for Vessels—Penalty: All vessels, craft or floats not propelled by steam, navigating the harbor, for which the opening of any bridge may be necessary, shall while approaching and passing such bridge be towed by a steam tug. Any steamboat, vessel, craft or float propelled by steam of twelve hundred (1,200) tons gross burden or more, while navigating the portion of the Chicago river bounded by the Rush street bridge on the east, the Twelfth street bridge on the south and the Chicago avenue bridge on the north, all inclusive, shall have the assistance of a tug or tugs. It shall be unlawful for any steamboat, vessel, craft or float of twelve hundred (1,200) tons gross burden or more to back through any bridge draw in the Chicago river or the Calumet river within the limits of the city of Chicago without the assistance of a tug or tugs.

"Any person owning or in charge, possession or control of any such vessel, craft or float, who shall navigate or cause to be navigated such vessel, craft or float in the harbor in violation of any of the provisions of this section, shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense."

Nicholas W. Hacker, of New York City, Edward T. Glennon, Robert J. Cary, Bertrand Walker, and Herbert D. Howe, all of Chicago, Ill., for appellants.

William H. Sexton, Corp. Counsel, and Charles M. Haft, Asst. Corp. Counsel, both of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The city of Chicago has adopted an amendment to the Revised Municipal Code, in reference to navigation in the harbor and river in Chicago, which prescribes (section 1014) that vessels passing any bridge shall move at a rate of speed not less than two miles per hour and shall not obstruct "passage across such bridge more than five minutes," and further requires (section 1016) that steam vessels of 1,200 tons gross burden or more, while navigating portions of the river defined in the amendment, "shall have the assistance of a tug or tugs"; and the issue upon this appeal is the validity of these provisions. Their validity is challenged by averments of the appellants' bill, filed for injunctive relief, upon two propositions in substance: First, that the requirements interfere with rights of navigation and interstate commerce, not within the authority of state or municipality, but subject alone

to federal control; and, second, that they are unreasonable, imposing unfair burdens on the appellants' steamers, if otherwise within the powers of the municipality. On final hearing of the issues, considerable testimony was introduced, as reported by Special Examiner—mainly directed for and against the proposition of unreasonableness—and all contentions for relief were overruled by the District Court and the bill dismissed for want of equity.

[1] 1. The primary contention of want of power in the municipality to prescribe and regulate the means and methods of navigation in the river as a highway of commerce is met and refuted, as we believe, in so far as the regulation conflicts with no rule established by Congress for such navigation, by decisions of the Supreme Court which are both numerous and uniform in the substance of their doctrine; for instance, in *Owners of Brig James Gray v. Owners of Ship John Fraser*, 62 U. S. (21 How.) 184, 187, 16 L. Ed. 106, and *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96, as the earlier cases, and in *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442, and *Cummings v. Chicago*, 188 U. S. 410, 23 Sup. Ct. 472, 47 L. Ed. 525, as later and directly pertinent rulings.

The doctrine thus settled is comprehensively stated and applied in *Escanaba Co. v. Chicago*, supra—in reference to the power of the city of Chicago to regulate navigation of the river, pursuant to an ordinance prescribing hours when bridges shall not be opened for the passage of vessels, and that during other hours named they shall not be opened for a longer period than ten minutes at any one time and shall then "be closed for fully ten minutes" for passage of teams and persons "waiting to pass over"—and may be epitomized as follows: The power of Congress is supreme over all navigable waters, to "exercise control to the extent necessary to protect, preserve and improve their free navigation"; but this federal power of control is usually exercised only in matters which "are national in their character and admit and require uniformity of regulation affecting all the states" and waterways. It is well recognized, therefore, that general regulations of navigation adopted by Congress cannot reasonably be made to answer various local requirements in ports and rivers within the states, and that the several states retain and "have full power to regulate within their limits matters of internal policy," which includes regulation of navigation in a waterway like the Chicago river, crowded with shipping and spanned by numerous bridges, in the midst of a great commercial metropolis. So, under the sanction of the state, the city of Chicago is authorized to regulate use of the bridges and river within the city, in accordance with local conditions and needs, "until Congress interferes and supersedes" such regulation. "If the power of the state and that of the federal government come in conflict, the latter must control and the former must yield;" but "until Congress acts upon the subject" municipal regulation for local purposes is within the authority of the state.

Again, in the recent case of *Cummings v. Chicago*, supra, the above ruling was reaffirmed and its doctrine applied, for denial of relief sought against the city to prevent enforcement of an ordinance which required permit from the city department of public works for con-

struction or reconstruction of docks within the city. The bill presented these facts: Complainant, as owner of property on the Calumet river (within the city), intended and was proceeding in disregard of such ordinance, to rebuild docks thereon, under written permit granted by the Secretary of War to that end, pursuant to prior acts of Congress providing for improvement of Calumet river. In conformity with the acts referred to, the War Department had made surveys and improvements, fixed dock lines, and granted permits under which docks had been built, including those in question for which like permit had been granted for reconstruction. As stated in the opinion, the issue was whether the acts of Congress referred to were intended "to supersede, for every purpose, the authority of Illinois over the erection of structures in navigable waters wholly within its limits," and it was decided (citing *Lake Shore & Mich. Ry. v. Ohio*, 165 U. S. 365, 17 Sup. Ct. 357, 41 L. Ed. 747) "that no such purpose was manifested by the acts in question;" that their effect, "reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a state, depend upon the concurrent or joint assent of the national government and the state government"—although not so mentioned in the act—so that both assents must be obtained to authorize the structure.

We are of opinion, therefore, that the regulations provided in the ordinance in controversy, for navigation in the Chicago river, are clearly within the nature and scope of powers vested in the city, as recognized and established by the above-mentioned line of authorities, and that all the contentions on behalf of the appellants in derogation of such power inherent in the state, must be overruled. It is unquestionable that the provisions by municipal ordinance upheld in the Escanaba Co. Case and in other precedents referred to constitute regulations of navigation in ports and rivers within the limits of the municipality, and are entirely analogous in their subject-matter to the provisions of this ordinance, and that the ordinance enforced in the Cummings Case reaches far beyond the scope of power involved herein, so that the force of their doctrine as precedents arises out of the facts involved therein and does not depend on reasons for the ruling stated in the opinions. Thus the contention, that the distinction between national control over waterways and navigation and the exercise of control over transportation by land, appears to have been overlooked "in discussing the subject of regulation of commerce by water," were it assumed to be tenable, is beside the issue and calls for no intimation of opinion. In reference to the provision that steamers of 1,200 tons burden "shall have the assistance of a tug" in navigation through and between bridges, we believe it to be plainly directed as a means for safety and celerity of movement in the crowded thoroughfare, and that it does not constitute "a pilotage regulation" in any recognized sense of the use of a pilot to supplant the master in navigation of the vessel. The objection raised for unreasonableness of the requirement relates alone to the exercise of the power and not to its existence, for which the test must be whether the city can require use of a tug in such navi-

gation under any conditions; and we have no doubt of its power to that end as both needful and inherent.

[2] 2. Their challenge of the ordinance for unreasonableness imposes upon the appellants the most difficult burden of proof established for any issue, in law or equity. Neither preponderance of evidence, nor proof which convinces the court of want of justifiable cause for the requirements, can serve to authorize judicial interference with legislative action upon a subject within the power of state or municipal legislation. In such case it must be presumed under our form of government that the regulations are enacted in conformity with public opinion in the locality based on familiarity with local conditions, as needful for reasonable speed and safety in navigation through and between bridges. This presumption is fortified by evidence in the present record of the existence of such public opinion; and neither the character nor the extent of testimony introduced by the appellants, tending to disprove such necessity for use of tugs in every movement of their steamers as required by the ordinance, and tending to show unreasonable delays and expense thereby imposed, can furnish sanction for annulment of the ordinance by judicial decree, as we believe, under the established rule of the federal jurisdiction. Sufficient citations for the rule referred to are these recent decisions: *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 30 Sup. Ct. 301, 54 L. Ed. 515; *Adams v. Milwaukee*, 228 U. S. 572, 33 Sup. Ct. 610, 57 L. Ed. 971 (decided May 12, 1913); and cases cited. As strongly stated by Mr. Justice Holmes, speaking for the court, in *Laurel Hill Cemetery v. San Francisco*, supra:

"If every member of this bench clearly agreed" that the theory and policy adopted in the ordinance were "wholly wrong, it would not dispose of the case. * * * Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief."

Plainly, therefore, any impressions we may have derived from the evidence that some requirements of the ordinance for use of a tug are in excess of any seeming need for public benefit and impose an unreasonable burden on the steamers would not authorize interference on the part of the court. If modification is found to be reasonable, it rests with the city, and not with the courts, to make the correction; and the only other remedy open to appellants is through the exercise of the plenary power of Congress to supersede or modify the requirements. *Olsen v. Smith*, 195 U. S. 332, 345, 25 Sup. Ct. 52, 49 L. Ed. 224; *Thompson v. Darden*, 198 U. S. 310, 317, 25 Sup. Ct. 660, 49 L. Ed. 1064.

The decree of the District Court is affirmed.

WARNER et al. v. GRAFTON WOODWORKING CO. et al.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1913.)

No. 1,161.

BANKRUPTCY (§ 140*) — PARTNERSHIP — TITLE OF TRUSTEE — PROPERTY OF ANOTHER PARTNERSHIP CONTRIBUTED BY PARTNERS.

Bankrupt, a partnership, was formed by three persons for the purpose of executing a certain contract. One of the partners contributed a substantial sum in cash to the capital, and the other two contributed machinery and material owned or purchased by another partnership in which they were the sole partners. The evidence did not show that the last-named partnership was at the time insolvent or that the transfer of the property was not made in good faith. On the filing of the petition such property came into the possession of bankrupt's receiver. *Held* that, under the established rule that in the absence of fraud a partnership may make a valid sale and transfer of its property as against general creditors, the property passed to the bankrupt and was subject to its debts as against the trustees in bankruptcy of the firm which formerly owned it and its members.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi, in Bankruptcy; Alston G. Dayton, Judge.

In the matter of the Charles A. Sims Company, a partnership, bankrupt. From an order denying their petition to recover certain property, George Warner, Elmer E. Herr, and Leon Rosenbaum, trustees in bankruptcy of Charles A. Sims and John Read Pettit, trading as Charles A. Sims & Co., interveners, appeal. Affirmed.

Arthur S. Dayton, of Philippi, W. Va., and William A. Carr, of Philadelphia, Pa. (W. Horace Hepburn and Sidney L. Krauss, on the brief), for appellants.

Hugh Warder and J. W. Robinson, both of Grafton, W. Va., for appellees.

Before PRITCHARD, Circuit Judge, and KELLER and CONNOR, District Judges.

CONNOR, District Judge. The facts apparent upon the record are: Chas. A. Sims and John Read Pettit, of Philadelphia, were, on and for many years prior to March 22, 1910, engaged in the business of railroad construction under the firm name and style of Chas. A. Sims & Co.; their place of business being Philadelphia, Pa. The firm had, for many years, conducted an extensive business, covering a large territory, including several states.

On March 22, 1910, said Chas. A. Sims, John Read Pettit, together with Charles E. Stewart and Roger B. Emmons, entered into a contract with the Baltimore & Ohio Railroad Company for the construction and completion of certain work at Grafton, W. Va.

On March 24, 1910, the said Chas. A. Sims, John Read Pettit, and Roger B. Emmons (said Stewart having retired from the contract)

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

entered into a written agreement, reciting that they had made a contract with the said railroad company and, for the purpose of performing the same, "become partners under the firm name and style of Chas. A. Sims Company, not incorporated, with the principal place of business at Grafton, West Virginia, and that a sign be erected on the work to the effect that the performance of this contract is being completed by said concern, and all letter heads, etc., bearing the name of said concern, and that the bank account be carried in the name of said concern." Provision was made respecting the amount of capital to be furnished by each of the parties; other provisions not material or relevant to the matters in controversy are found in the written agreement.

On January 4, 1911, the parties executed a second agreement, reciting the first, and further reciting that the said Sims and Pettit had failed to carry out their part of the obligations assumed by them, and that said Emmons had contributed the amount assumed by him, that, by reason of these and other matters set out, the said copartnership was dissolved and the contract with the Baltimore & Ohio Railroad Company assigned to said Emmons, and "that he should have and retain as his own property all the machinery, tools, implements, materials, lumber, now at Grafton, and that the said Sims and Pettit sold and transferred to said Emmons all of said property," etc.

On the 24th day of April, 1911, the Grafton Woodworking Company, Kane-Keyser Hardware Company, and the Bush Lumber Company, alleging that they were creditors of said firm of C. A. Sims Company, in amounts aggregating more than \$1,000, filed their petition in the District Court of the United States for the Eastern District of West Virginia, alleging that said firm of Chas. A. Sims Company and the individual members thereof were insolvent, and that, within four months prior thereto, they had committed acts of bankruptcy, the character of which is not material at this point, and prayed that said copartnership and the individual members thereof be adjudged bankrupts, that such proceedings be had in the premises as were provided by the act, etc.

On said 24th day of April, 1911, the petitioning creditors also filed a petition praying that a receiver be appointed to take into his possession the property of said copartnership. Pursuant to said petition, L. B. Brydon was appointed receiver and directed to take said property into his possession, and hold the same subject to the further orders of the court. The said Chas. A. Sims, John Read Pettit, and Roger B. Emmons filed separate answers to the petition.

On June 10, 1911, an order was passed by the court, referring certain questions, presented by the petition and answers, to O. E. Wycoff, Esq., referee and special master, who duly reported that said Emmons was a resident of Grafton, W. Va., on the date of the filing of the petition; that the Chas. A. Sims Company was a partnership with its principal office at Grafton, W. Va., formed between said Chas. A. Sims, John Read Pettit, and Roger B. Emmons, for the purpose of performing the contract entered into with the Baltimore & Ohio Railroad Company; that the partnership was dissolved and the property transferred to said Emmons, who, thereafter and within four months

of the filing of the petition, made certain transfers of the property, etc. This report was filed June 24, 1911.

On August 2, 1911, George Warner, Elmer E. Herr, and Leon Rosenbaum, trustees in bankruptcy of the said Chas. A. Sims and John Read Pettit, trading under the firm name and style of Chas. A. Sims & Co., of Philadelphia, were permitted, upon their application, to intervene in said bankruptcy proceeding and, pursuant thereto, filed their petition in which they alleged that, on January 25, 1911, the said Chas. A. Sims & Co., and the individual members thereof, were adjudged bankrupt by the District Court of the United States for the Eastern District of Pennsylvania, and that interveners were appointed their trustees. They alleged that the said Chas. A. Sims & Co. were the real parties to the contract with the Baltimore & Ohio Railroad Company for the performance of the work at Grafton, W. Va.; that Emmons was a secret partner, having no real interest therein; that, at the time of making said contract, Chas. A. Sims & Co. were wholly insolvent; that, while so insolvent, they transferred a large quantity of machinery belonging to said firm, consisting of one-third of their entire plant and assets at Philadelphia, to Grafton; that Sims and Pettit held themselves out to the public, and those with whom they dealt, in purchasing the plant and machinery for doing the work at Grafton under the said contract, as Chas. A. Sims & Co.; that said Emmons was not known to the public nor to those persons with whom the said Chas. A. Sims Company had dealings and of whom they made purchases, as a partner in performing said contract; that large purchases of material and machinery were made by said Chas. A. Sims & Co. for use in the completion of said work at Grafton. They allege that the name of Emmons was "illegally concealed from the public," etc. These, and allegations of similar import, are repeated with more definite specification. The interveners, for the reasons set forth, ask that the machinery and fixtures in the possession of the receiver at Grafton be delivered to them as trustees of Chas. A. Sims & Co.

The petitioning creditors, appellees herein, answered, denying the material allegations of said petition. They allege that they dealt with Sims, Pettit, and Emmons, doing business at Grafton, under the firm name and style of Chas. A. Sims Company, sold and furnished them goods, lumber, hardware, etc., which were sold for, and were used by, them in performing the work called for in the contract with the Baltimore & Ohio Railroad Company. Whereupon, the said C. E. Wycoff, Esq., as special master, by direction of the court, heard the testimony offered by the respective parties in support of their contentions, and on November 5, 1911, reported his conclusions of fact and law, together with the testimony taken by him. He found: That the Chas. A. Sims Company, at the time of filing the petition herein, was insolvent. That Chas. A. Sims and John Read Pettit, trading as Chas. A. Sims & Co., of Philadelphia, were individually and as copartners adjudged bankrupt by the District Court for the Eastern District of Pennsylvania, on January 25, 1911, and that interveners were duly elected their trustees. That said Sims, Pettit, and Emmons, and one Chas. E. Stewart, some months prior to the adjudication in bankruptcy of said Sims and Pettit,

under the firm name of Chas. A. Sims & Co., of Philadelphia, entered into a contract with the Baltimore & Ohio Railroad Company at Grafton, W. Va. That subsequent thereto said Stewart retired from the firm, and on the 24th day of March, 1910, and after the retirement of said Stewart, said Sims, Pettit, and Emmons entered into a written agreement, forming a partnership under the firm name of Chas. A. Sims Company, for the execution and performance of said contract. That, by the terms of said agreement, Sims and Pettit were to contribute in money and machinery the sum of \$100,000, and Emmons agreed to, and did, contribute \$25,000 to the capital of said firm. In pursuance of the agreement, said Sims and Pettit shipped from Philadelphia to Grafton machinery which was the property of Chas. A. Sims & Co. That an "uncertain but considerable part" of the amount contributed by Emmons was deposited in the bank at Grafton to the credit of Chas. A. Sims Company. He says:

"The evidence introduced by the intervening trustees for the purpose of showing insolvency on the part of Chas. A. Sims & Co. at the time of the contract of partnership between Sims, Pettit, and Emmons, I consider insufficient. The evidence shows the transfer of machinery by Sims and Pettit to have been bona fide. * * * I further find and report: That the firm of Chas. A. Sims Company, composed of Chas. A. Sims, John Read Pettit, and Roger B. Emmons, was, and is, not a secret partnership, and that its existence was not concealed. That the partnership of Chas. A. Sims Company is separate and independent of the firm of Chas. A. Sims & Co., of Philadelphia, and that the property heretofore sold by the receiver herein were assets of the firm of Chas. A. Sims Company, not incorporated."

The interveners filed a number of exceptions, all of which were overruled by the judge and the findings of the master sustained. The firm of Chas. A. Sims Company was adjudged bankrupt and an order of reference made. The petition of the interveners that the assets and property in the possession of the receiver be transferred to them was denied—the petition was retained until it was ascertained "whether any surplus, after the payments of the debts, will remain of the assets of the Chas. A. Sims Company due to Chas. A. Sims and to John Read Pettit, as members of said firm." To this decree the interveners made a number of assignments of error, and appealed.

The merits of the appeal depend, to a very large extent, upon the question whether the special master has found the facts correctly. The reasons, given by the learned judge below, for sustaining the master's conclusions, are very conclusive to our minds. Eliminating much of the testimony, not relevant to the determinative questions in controversy, there is but little contradiction. That a partnership was formed between Sims, Pettit, and Emmons, for the purpose of performing the work included in the contract with the Baltimore & Ohio Railroad Company at Grafton, under the firm name and style of the Chas. A. Sims Company, is shown by the written agreement executed by them, the validity of which is not controverted. That Emmons contributed the sum of \$25,000 to the capital stock is established by uncontradicted testimony. That Chas. A. Sims and John Read Pettit contributed a portion of the amount assumed by them in machinery, belonging to Chas. A. Sims & Co., of which firm they were the only members, and

that much of the material furnished by them was purchased by them as members of the firm of Chas. A. Sims & Co., and on the credit of that firm, could not operate to change the legal status of the firm of Chas. A. Sims Company, of Grafton, or to vest its title in the Philadelphia firm. The master finds that the firm of Chas. A. Sims & Co. furnished the machinery, etc., to the firm of Chas. A. Sims Company in good faith, and that the evidence does not show that the Philadelphia firm was insolvent at the time of doing so. As he very correctly says, the creditors of Chas. A. Sims & Co. had no lien on the partnership property, and there is no reason, either in law or equity, which forbids the sale of it to another partnership of which the individual members are also members. We avail ourselves of the industry of the master in his investigation of the authorities:

"There can be no doubt that members of a partnership have the power to convert the property of a firm into separate property of one or more of the individual partners; and that such conversion, unless fraudulent, will bind not only themselves, but all other persons, whether creditors or purchasers." 30 Cyc. 436.

In *Case v. Beauregard*, 99 U. S. 119, 25 L. Ed. 370, the right of creditors to have partnership property subjected to the payment of their debts, as a trust fund, is considered. Mr. Justice Strong says:

"If, before the interposition of the court is asked, the property has ceased to belong to the partnership, if by a bona fide transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is therefore always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced." *Francklyn v. Sprague*, 121 U. S. 215, 7 Sup. Ct. 951, 30 L. Ed. 936.

The case of *Thorpe v. Pennock Mercantile Co.*, 99 Minn. 22, 108 N. W. 940, 9 Am. & Eng. Ann. Cas. 229, is in point. Three persons, being partners, conducting a mercantile business, found that the firm was insolvent. They entered into an agreement with two other persons to form a corporation, the partners contributing the property of the partnership, the others contributing money, to complete the capital stock. The corporation became insolvent, and its property was placed in the hands of a trustee for settlement, etc. The creditors of the partnership claimed the right to share with the creditors of the corporation in the distribution of the corporate property. Mr. Justice Elliott said:

"The authorities establish the rule that, in the absence of fraud, a partnership may sell and transfer the property of the firm, and that the purchaser takes it free from any equities on the part of the simple contract creditors of the partnership. * * * That the transfer was made to a corporation which was organized by the partners for the purpose of carrying on the business is not in itself evidence of fraud." *Sayers v. Texas Land Co.*, 78 Tex. 244, 14 S. W. 578.

There is considerable evidence in the record that, during the existence of the firm of Chas. A. Sims Company, the name of Chas. A. Sims & Co. was used by the parties, and it is quite probable that some persons dealt with it under the impression that such was its correct name, that such persons sold goods to Chas. A. Sims & Co., which went

to and were used by Chas. A. Sims Company, that, as said by the learned judge below:

"With the absolute carelessness characteristic of wholesale dealers, having things to sell, the firms, supplying these supplies and machinery, took no precautions to ascertain under what terms and condition this Grafton contract was either taken, or being accomplished."

This, and other facts appearing in the record, tend to show that those dealing with Chas. A. Sims and John Read Pettit, trading as Chas. A. Sims & Co., honestly thought this firm was performing the railroad contract; but the special master finds, and the testimony amply sustains him, that in truth the work was being done by, and that the petitioning creditors dealt with, a separate entity, the Chas. A. Sims Company. While we should follow the well-settled rule that the finding of fact by the master, sustained by the judge, will not be disturbed, except for manifest error, or unless it appears that they are clearly wrong, we are of the opinion, from a careful examination of the record, that they are correct. Very much of the well-prepared brief, as much of the able and interesting argument before us, is dependent upon maintaining the proposition that there was a secret partnership between Sims, Pettit, and Emmons; that there was a fraud on their part. The master finds otherwise, and we concur with the learned judge below in sustaining his finding. Many of the authorities, cited in the brief, become therefore inapplicable. While no good purpose could be served by quoting the evidence at length, it is of interest to note the fact that Emmons invested in this partnership \$25,000; that the sign on the door of the office was "Chas. A. Sims Company"; that the bank account was kept in that name, although the correspondence on the part of the bank was with "Chas. A. Sims & Co." An examination of the bills and other exhibits indicate that the parties were not always observant of the distinction, but we think that the evidence shows that the dealing by the petitioning creditors were with Chas. A. Sims Company. The sole question presented upon this record is whether the property of Chas. A. Sims Company, in the possession of the receiver, or its proceeds, shall be delivered to the petitioning interveners, for the purpose of administering it in the proceedings in the District Court of the United States for the Eastern District of Pennsylvania, as the property of Chas. A. Sims & Co. For the reasons given by the learned district judge, in which we concur, this cannot be done, without disregarding the rights of the creditors of Chas. A. Sims Company.

Without pursuing the discussion further, we are of the opinion that the decree of the District Court should be affirmed. It will be so certified to the end that further proceedings may be had in this cause in accordance with said decree and this opinion.

Affirmed.

NELSON v. WOOD.

(Circuit Court of Appeals, Third Circuit. May 21, 1913. Rehearing Denied February 16, 1914.)

No. 1,702.

1. APPEAL AND ERROR (§ 70*)—REVIEW—INTERLOCUTORY ORDER.

An interlocutory order, denying an application to set aside a verdict for defendant, and for amendment of the record or minutes, and for leave to move for a new trial *nunc pro tunc* prior to the entry of final judgment, is insufficient to sustain a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 367-378, 386, 411; Dec. Dig. § 70.*]

2. TRIAL (§ 321*)—VERDICT—RECEPTION.

The reception of a verdict orally by the clerk, in the absence of the judge, the parties, and their counsel, and without the consent of the parties to such procedure, is erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 760-763; Dec. Dig. § 321.*]

3. NEW TRIAL (§ 119*)—GROUNDS—LACHES.

A verdict having been erroneously received by the clerk in the absence of the judge, the attorneys, and the parties, without any consent thereto, during an adjournment of the court, it appeared that counsel for plaintiff were in court shortly after the verdict was taken and before the recess had expired. They were informed that the jury had returned shortly after 1 o'clock, had rendered a verdict, and had dispersed, and they knew the judge was not then in the courtroom. It did not appear that they made any inquiry as to the circumstances attending the rendering of the verdict; each of the counsel alleging that he supposed the other was present and attended to the interest of their client. One of the counsel conversed afterward with several of the jurors, but testified that it was not until nearly a year thereafter that he was informed that the verdict was returned to the clerk in the absence of the judge. *Held* that, since the slightest inquiry would have disclosed all the facts at once, plaintiff was guilty of such laches in not sooner moving for a new trial on account of the irregularity as to constitute a waiver thereof.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 243; Dec. Dig. § 119.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Judge.

Action by Hilma Nelson against Richard G. Wood. An order was granted denying plaintiff's motion to amend the minutes and to permit plaintiff to move for a new trial, and she brings error. Dismissed.

Mark W. Collet and A. J. H. Frank, both of Philadelphia, Pa., for plaintiff in error.

Clement B. Wood and R. Stuart Smith, both of Philadelphia, Pa., for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and ORR, District Judge.

GRAY, Circuit Judge. This purports, by the statement in plaintiff in error's brief, to be a writ of error by Hilma Nelson, plaintiff in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the court below, to the decision or final order of the District Court for the Eastern District of Pennsylvania, entered May 7, 1912, refusing plaintiff's petition sur rule to set aside the verdict in the above entitled case, and for amendment of record or minutes, and for leave to move for a new trial, nunc pro tunc. The record before us is incomplete and peculiar in several respects. No final judgment in the case appears in the record, but what the counsel for plaintiff in error calls the final order of the court below, refusing plaintiff's petition to move for a new trial, etc., as above stated by the plaintiff's counsel, is set forth therein. The record contains a note of the exception to the order of the court above referred to, and several assignments of error founded thereon. From the statement of claim and the affidavits filed by plaintiff, constituting the ground upon which the motion refused was asked for, we gather the following statement of facts:

On September 22, 1910, plaintiff brought her action in the court below to recover damages for injuries which she claims to have suffered by the negligence of the defendant. The case was called for trial, April 26, 1911, and on April 27th, the jury found a verdict for the defendant. The court below having granted an order extending the time for filing a motion for a new trial, such motion, with the reasons therefor, was filed on the 5th of May, 1911, and was duly argued on the 7th of June. At the next term, to wit, on the 8th day of November, 1911, the court refused the motion for a new trial.

The plaintiff filed her petition on March 30, 1912, to set aside the verdict, and for amendment of the record, on the ground that the verdict was rendered during an adjournment of court, and the court granted a rule on defendant

"to show cause why said verdict should not be set aside, the record or minutes amended, and for leave to move for a new trial, nunc pro tunc, etc., and that the minute book of the United States court, of 1911, be amended so as to show more specifically the facts, to wit, by supplementing said minutes with the following entry: 'The clerk of said court announced the recess adjournment from 1 to 2 o'clock p. m., on the 27th day of April, 1911, during which interval the verdict, in the absence of the plaintiff and her counsel, was received and entered without plaintiff's assent.'"

On April 22, 1912, plaintiff moved to amend petition to set aside verdict, on the ground that she had, since filing the original petition, then ascertained lately and for the first time that when the verdict had been rendered during an adjournment of court from 1 to 2 o'clock, the clerk alone received the verdict, in the absence of the judge; also, to amend the first prayer of the original petition, by adding to the words, "that the verdict in this case be annulled, quashed, and set aside," the words, "all proceedings to stay meanwhile."

On May 7, 1912, the court below made the following order:

"Judge Holland, before whom this case was tried, authorizes me to say that he specially directed the clerk to receive the verdict that is now complained of as having been irregularly taken. The pending petition is therefore refused."

On the 6th of November, 1912, it appears that a writ of error allowed by the court was duly issued, at the suit of the plaintiff, in the

ordinary form, directed to the District Court for the Eastern District of Pennsylvania, beginning:

"Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Hilma Nelson, plaintiff, and Richard G. Wood, defendant, a manifest error hath happened, etc. * * * We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit," etc.

[1] As already pointed out, no final judgment by the court below is disclosed by the record, and counsel for plaintiff in error say in their brief that no judgment has yet been entered in the cause. It was unquestionably within the power of the plaintiff in error to have moved for judgment in the court below (if the defendant declined or neglected to do so), as a foundation for appellate proceedings, by a writ of error to a final judgment.

Notwithstanding this anomalous condition of the record, we feel it our duty to express an opinion on the facts disclosed by the affidavits in support of the petition of the plaintiff in the court below.

[2] No answer was filed to that petition, and there seems to be no doubt as to what happened in regard to the taking of the verdict in the case. The case was tried on the 26th and 27th of April, 1911. At about 1 o'clock p. m. on the latter day, the cause was given to the jury, who retired to deliberate. When the jury withdrew, the court ordered an adjournment or recess until 2 o'clock p. m. of that afternoon. Both attorneys for the plaintiff, the plaintiff herself and her witnesses left the courtroom, as did also the judge and the counsel for the defendant. None of them returned until after 1:30 p. m. In the interval, the jury returned with their verdict and rendered the same to the clerk, in the absence of the judge, of the plaintiff, of both of her attorneys, and of the attorney for the defendant, and was forthwith discharged by the clerk.

[3] There can be no doubt as to the irregularity of this proceeding. It is not necessary to quote from the long list of authorities cited in the brief of the plaintiff in error in support of this statement. The verdict, as rendered in this case, was not a sealed verdict. It was taken orally by the clerk, in the absence of the judge and of the parties and their counsel, and without any consent of the parties to such procedure. But, if the question were properly before us in this record, we should be compelled to the conclusion that the plaintiff was not entitled, by reason of her laches, to have the prayer of her petition granted. It appears from the affidavits of counsel for plaintiff, that they were both in the courtroom shortly after the verdict was taken by the clerk and before the period of recess had expired. They were informed of the fact that the jury had returned shortly after 1 o'clock, had rendered their verdict, and dispersed, and they knew that the judge was not then in the courtroom. It does not appear that they made any inquiry as to the circumstances attending the rendering of the verdict, each of the counsel alleging that he sup-

posed the other was present at the time and attended to the interests of their client. One of the counsel conversed afterwards with several of the jurors, but alleges that it was not until nearly one year thereafter that the information was given him by a juror, of the fact that the verdict was rendered to the clerk in the absence of the judge. The slightest inquiry by the counsel who came into the courtroom a few minutes after the rendering of the verdict, would have disclosed all the facts in regard to the same. Information obtained a year thereafter might easily have been obtained within a few days, at least, of the rendering of the verdict.

The case had been tried upon its merits, and submitted to the jury in a charge by the learned judge of the court below, to which no exception was taken. A motion for a new trial was made and argued a few days after the verdict, and after consideration by the court, was refused. After this trial upon the merits, and the proceedings in relation thereto, we do not feel that the plaintiffs, after this long delay, could with propriety invoke the judicial discretion of this court to review the order of the court below complained of, even if it were properly before us.

The writ of error is therefore dismissed.

McLEAN v. CITY STATE BANK OF MANGUM, OKL.

(Circuit Court of Appeals, Fourth Circuit. December 19, 1913.)

No. 1,201.

1. BANKS AND BANKING (§ 87*)—ACTS OF BANK—CHARACTER OF TRANSACTION—LOAN FOR PURCHASE OF COTTON.

Plaintiff bank having contracted to finance certain cotton purchases by G., a cotton broker, he purchased the cotton by buying bills of lading issued therefor. No bills were ever in G.'s possession, or under his control, he having transferred them to another bank as security for advances to pay for the cotton, which in turn transferred them to plaintiff's cashier and received from him plaintiff's draft for the value of the cotton, which draft was paid in due course. Prior thereto G. had contracted to sell the cotton to various purchasers, at an advance over the cost, whereupon sight drafts were drawn to the order of plaintiff bank on the several purchasers for the amounts payable by them, respectively, and bills of lading for the cotton attached thereto and forwarded through the usual channels to the buyers, and G.'s profits paid by placing the amount to his credit. *Held*, that such transaction did not constitute a purchase of the cotton by the bank in violation of the Oklahoma statute, providing that no bank shall employ its moneys directly or indirectly by buying or selling, goods, wares, or merchandise.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 219; Dec. Dig. § 87.*]

2. JOINT ADVENTURES (§ 1*)—PARTNERSHIP (§ 20*)—INTEREST OF PARTIES.

Plaintiff and the bank were neither partners nor joint adventurers in the transaction, and G. had no interest in the cotton which could be the subject of an attachment in a suit against him.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 1; Dec. Dig. § 1; Partnership, Cent. Dig. §§ 6, 7; Dec. Dig. § 20.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Red'r Indexes

In Error to the District Court of the United States for the Western District of North Carolina, at Greensboro; James E. Boyd, Judge.

Action by the City State Bank of Mangum, Okl., against John D. B. McLean. Judgment for plaintiff, and defendant brings error. Affirmed.

A. G. Mangum and A. C. Jones, both of Gastonia, N. C., and Tillett & Guthrie, of Charlotte, N. C., for plaintiff in error.

Mason & Mason, of Gastonia, N. C., and Cansler & Cansler, of Charlotte, N. C., for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

KNAPP, Circuit Judge. The defendant in error, hereinafter called the "plaintiff," is a banking corporation located at Mangum, Okl. The plaintiff in error, hereinafter called the "defendant," is the sheriff of Gaston county, N. C.

On or about May 13, 1911, one O. L. Gibbon, a cotton broker of Mangum and customer of the plaintiff bank, bought at Lone Wolf, Okl., 250 bales of cotton which were delivered on that day to the Wichita Falls & Northwestern Railway Company, at Wichita Falls, Tex., for transportation. The carrier thereupon issued three several bills of lading, one of which covered 50 bales of cotton, marked "F. I. T. S.," consigned to "shipper's order, notify Vivian Cotton Mills, Cherryvale, N. C."

It seems that the Bank of Lone Wolf, through its president, C. H. Griffith, had advanced the sum of \$14,921.20 to pay for this cotton, and had received the bills of lading issued therefor, presumably as security for its advances. In point of fact the bills were never in the possession of Gibbon or under his control. It was expected, however, that the plaintiff bank would finance the transaction, and an arrangement to that effect was carried out on the 15th of May, when Griffith went to Mangum, transferred the bills of lading to plaintiff's cashier, Percy Cornelius, and received from him plaintiff's draft for the amount above named, which draft was paid in due course by the St. Louis bank on which it was drawn. Prior to that date, though just when does not appear, Gibbon had contracted to sell the cotton to various purchasers for the aggregate sum of \$15,518.98, or \$597.78 more than the cost of the same. The 50 bales in question were sold to C. W. Cook & Co. of Spartanburg, S. C. Having satisfied Cornelius that these sales had actually been made and that the sums represented were to be paid in each case, Gibbon drew sight drafts to the order of plaintiff on the several purchasers for the amounts payable by them respectively, and delivered the same to Cornelius, who thereupon attached to each the corresponding bill of lading, which he had received from Griffith, and then forwarded the drafts for collection through the usual channels. At the same time Gibbon's profits were paid by placing the sum of \$597.78 to the credit of his account.

The draft on C. W. Cook & Co. was for \$3,076.66, the agreed purchase price of the 50 bales of cotton above described. The drawee having refused to pay this draft on presentation, it was duly protested

and returned to plaintiff, which has since retained possession of the same. It was not charged to Gibbon's account, and plaintiff has at all times been the owner and holder thereof. The reason for refusing payment was that in the meantime Cook & Co. had caused the cotton covered by this bill of lading to be attached by the defendant, as sheriff of Gaston county, in an action instituted by them against Gibbon on account of previous dealings with him, the nature of which is not shown by the record. Thereafter this suit was brought against the sheriff for a conversion of the cotton.

Upon the evidence submitted at the trial, of which the foregoing is a summary, the court directed the jury to find that the plaintiff was the owner of the cotton in question, and that the defendant had wrongfully converted the same, leaving to the jury only the question of damages, and a verdict was rendered accordingly.

[1] The first and principal contention of defendant is to the effect that plaintiff purchased this cotton outright by buying from Griffith the bills of lading issued therefor, that such a purchase is expressly forbidden by the Banking Laws of Oklahoma, and that consequently plaintiff acquired no title to the property. In our judgment this contention is clearly untenable. At best it takes a superficial view of what was done and ignores the substance and essential nature of the transaction. Gibbon had bought the cotton with the expectation that plaintiff would furnish the needed banking assistance. He bought it at Lone Wolf and got Griffith to advance the purchase money on the security of the bills of lading. Before the 15th of May, when plaintiff reimbursed Griffith, Gibbon had sold the cotton at a profit to parties presumably responsible, and was able to satisfy Cornelius that he had done so. Cornelius thereupon agreed to discount Gibbon's drafts on his customers and to pay back to Griffith the amount he had advanced, upon receiving from him a transfer of the bills of lading, which were then to be attached to the drafts and become security for their payment.

That this was the essence and legal effect of the arrangement, and that it was so understood and intended by the parties, seems to us not seriously doubtful. It is true that one element of the transaction was in form a sale of the bills of lading by Griffith to the plaintiff, and it appears that Griffith was in fact paid a few minutes, or an hour or two, before Cornelius received the drafts from Gibbon; but the entire plan for financing the operation had already been arranged and the order in which the different steps were taken became wholly unimportant. The circumstances under which the bills of lading were purchased, if their acquisition by plaintiff be regarded as a purchase, negative any intention on the part of plaintiff to purchase the cotton itself, for such purchase of the bills was merely incidental to the purpose which plaintiff had in view and the customary business in which it was engaged. In all that was done we see nothing suspicious or even unusual, certainly nothing which should be held to be in violation of the Oklahoma statute which provides that:

"No bank shall employ its moneys directly or indirectly in trade or commerce by buying or selling goods, chattels, wares or merchandise," etc.

The object of this provision is so apparent that it needs no explanation, and it is equally apparent, in our judgment, that the transaction under review is not within the spirit or letter of the prohibition.

[2] The claim that plaintiff and Gibbon were partners, or engaged in a joint speculation, is wholly unsupported by anything found in the record. The plaintiff was carrying on the business of banking, and Gibbon was a cotton broker. He had bought this 250 bales of cotton for a certain price and contracted to sell it at a moderate advance. The plaintiff financed the transaction by discounting the drafts of Gibbon on the purchasers of the cotton, and he got his profits in the sum credited to his account. For aught that appears it was an ordinary matter of business between the bank and its customer, and nothing was shown which suggests that they had any sort of partnership relations.

Holding, as we do, that plaintiff and Gibbon were not partners in this enterprise or engaged in a joint undertaking, it follows that Gibbon had no interest in the cotton in question and that it was not subject to attachment in the suit against him.

We have examined with care the authorities cited, but none of them sustains the defendant's contention. The case was properly disposed of in the court below, and the judgment is therefore affirmed

In re CASH-PAPWORTH, GROW-SIR.

In re FRANKLIN SUGAR REFINING CO.

(Circuit Court of Appeals Second Circuit. December 9, 1913.)

No. 15.

1. BANKRUPTCY (§ 114*)—RECEIVERS—EMPLOYMENT OF COUNSEL—FEES—DISCRETION.

Whether a receiver shall be appointed in bankruptcy proceedings, whether, if appointed, he shall continue the bankrupt's business, and whether he may retain counsel, and the amount that shall be allowed as compensation to the receiver and his counsel, are matters in the sound discretion of the district judge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164-166; Dec. Dig. § 114.*]

2. BANKRUPTCY (§ 446*)—REVISION—RECORD—CONTENTS—MATTERS OF DISCRETION.

On a petition to revise an order of the District Court, sitting in bankruptcy, making certain allowances of fees and compensation to the receiver and to his counsel, as a matter of discretion, the record must contain such a statement of facts as will show the amount and character of the services rendered by the receiver and his counsel, and the circumstances under which they were rendered, so as to show that the discretion of the district judge has been abused; it being insufficient to show merely the amount of receipts and disbursements, and that the aggregate allowed the receiver and his counsel was large in proportion to the fund on hand, and that nearly half the assets had been used for expenses of administration.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 446.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. BANKRUPTCY (§ 484*)—RECEIVERS—ALLOWANCES FOR FEES OF RECEIVER AND COUNSEL—NOTICE.

Where notice of hearing of an application for an allowance of additional compensation to a bankrupt's receiver and his counsel specified exactly the amount asked in dollars and cents, as required by Bankr. Act July 1, 1898, c. 541, § 48e, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3439), as amended by Act June 25, 1910, c. 412, § 9, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1502), it was not defective for failing to request an additional allowance.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 895, 896; Dec. Dig. § 484.*]

Petition to Revise Order of the District Court of the United States for the Northern District of New York.

This is a petition to revise an order of the District Court, Northern District of New York, making certain allowances of fees and compensation to the receiver herein and to the counsel for said receiver. No opinion was filed in the District Court.

J. P. Hennessey and Tracy, Chapman & Tracy, all of Syracuse, N. Y., for petitioners.

Costello, Burden, Cooney & Walters, of Syracuse, N. Y., for respondent.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. In this proceeding the receiver was ordered to continue the business for a certain period of time. No attempt to review that order was ever made; it was a matter within the sound discretion of the court, and there is nothing in this record to show that such a direction was not a proper exercise of discretion.

The Bankruptcy Act, § 48, subds. "d" and "e" (Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439]), as amended by Act June 25, 1910, c. 412, § 9, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1502), provides different rates of compensation for a receiver when he acts as a mere custodian and when he carries on the business. The rates are fixed as percentages on the amounts of money disbursed or turned over by the receiver, and the amounts allowed as compensation must not exceed the limits fixed by the section. In this case the allowance to receiver was on the basis that he carried on the business for a time. The petition for revision sets forth as one assignment of error that the sum allowed was not provided for by the provisions of the Bankruptcy Act. This would seem to imply that the amount awarded exceeded the limitations of the section. No such point has been argued, and it is to be inferred from the language of the brief that petitioner's complaint is, not that the limit was exceeded, but that the court ought not to have made allowance of the full amount which the section authorizes in cases where the receiver has conducted the business. The main question argued here is therefore one of fact, viz., that the amount of allowances to receiver and counsel were excessive in view of all the circumstances.

[1] Whether a receiver shall be appointed, whether, if appointed, he shall continue the business, whether he may retain counsel, are all mat-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ters within the discretion of the court. So, too, the fixation of allowances of fees and compensation to be made to receiver and counsel rests in the sound discretion of the district judge. What is really contended for here is that, in this case, the judge has abused that discretion.

[2] To support any such contention the record should contain such a statement of facts as would show the amount and character of the services rendered by receiver and counsel and the circumstances under which those services were rendered. Presumably the district judge, in whose court the proceedings had progressed, who appointed the receiver, directed his conduct, heard the various suggestions made from time to time by creditors and others, and was constantly advised as to the progress of events, has a fund of information which is most valuable when one has to form an opinion as to the extent and value of services rendered in connection with the case. The record here presented is absolutely barren of anything of the sort. All that appears is the amount of receipts and disbursements, which shows that the aggregate allowed to receiver and his counsel is large in proportion to the fund in hand; the argument being that because about one-half of the assets has been used for expenses of administration the amount of such allowances should be reduced to some sum, which the record supplies no means of determining. The discretion of the district judge does not come here for review, except where such discretion has been plainly abused and the record sufficiently indicates upon what state of facts it was that the discretion was exercised.

[3] A question of law is also raised by the petition to revise, it being contended that the notice of hearing for fixing the allowances "did not request an additional allowance as provided in section 48c of the act." That section provides that the notice shall specify the amount asked. The notice in this case did, as to each allowance, specify exactly the amount asked, giving it in dollars and cents. It seems to be in exact conformity to the section.

The order is affirmed.

CROWN CORK & SEAL CO. OF BALTIMORE CITY v. STERLING CORK & SEAL CO.

(District Court, N. D. Ohio, W. D. January 14, 1913.)

No. 2,247.

1. PATENTS (§ 328*)—INFRINGEMENT—BOTTLE SEALING MACHINE.

The Painter patent, No. 638,354, for a machine for automatically sealing bottles, the essential feature of which is a pressure limiting mechanism to prevent the breaking of the bottles by excess pressure, *held* not infringed by a device in which the mechanism of the prior Penfield patent, No. 426,315, for a brick-pressing machine, was adapted to use in the bottle-sealing art, which required no more than ordinary mechanical skill.

2. PATENTS (§ 328*)—INFRINGEMENT—FEEDING MECHANISM FOR BOTTLE SEALING MACHINES.

The Painter & Hawkins patent, No. 643,973, for an apparatus for feeding crowns or closures to bottle-sealing machines, claim 2, in view of the of rejections and requirements of the Patent Office, acquiesced in by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

patentees, is limited to the apparatus substantially described in the specification which is a combination structure. As so limited *held* not infringed.

3. PATENTS (§ 246*)—INFRINGEMENT—PATENT FOR COMBINATION.

A patent for a combination is not infringed if any element claimed in the combination is omitted.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 387; Dec. Dig. § 246.*]

In Equity. Suit by the Crown Cork & Seal Company of Baltimore City against the Sterling Cork & Seal Company. On final hearing. Decree for defendant.

R. H. Parkinson, of Chicago, Ill., James Q. Rice, of New York City, and E. G. Baetjer, of Baltimore, Md., for plaintiff.

Bakewell & Byrnes, of Pittsburg, Pa., for defendant.

KILLITS, District Judge. With the usual allegations necessary to raise the issue complainant sues on two patents, one granted to Painter, its assignor, in 1899, No. 638,354, on a machine for automatically sealing bottles, and one granted in 1890, to Painter & Hawkins, No. 643,973, on an apparatus for feeding crowns or closures to bottle-sealing machines. It is admitted that the inventions embodied in these patents are capable of and are in joint use in the art of sealing bottles with the well-known Crown device, a tin cap with a cork lining.

The defendant owns patents for caps or crowns, for method of sealing, and for sealing heads to be used on bottle capping machines, and has attempted to adapt to the use of its patented devices and methods alleged old constructions for limiting sealing pressures, to prevent breakage of bottles by excess pressure, and for feeding caps in right position to the sealing head.

In the issue before us is involved neither a basic patent for sealing by crowns nor the idea of transferring yielding plungers to release pressures to a new art. Painter's expired patent of 1892 opened the art of sealing bottles by stoppers of the sort in question, and his patent of 1898, No. 609,209, introduced into the art a pressure-limiting device, transferring thereto an old hydraulic mechanism. But for the patents sued on the field is open to the world, except as limited by the hydraulic patent of 1898, as to which no question is raised.

It is agreed that complainant rests its charges of infringement upon its rights under claims 4, 5, and 6 of patent No. 638,354, and claim 2 of patent No. 643,973. These claims, as applied to the first patent, read:

"4. In a machine for applying closures to bottles, a pressure-limiting mechanism comprising a support for the bottle, a spring held under an original predetermined compression, a tripping mechanism and means for automatically operating the same when said predetermined pressure is reached, substantially as described.

"5. In a pressure-limiting mechanism for bottle-sealing machines, a support for the bottle, a compound cylinder, a spring between the two members thereof, said spring being given an original predetermined compression and means substantially as described for releasing said compression when said predetermined

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

limit has been reached, by allowing one member of said compound cylinder to slide within the other to shorten the same as a whole, substantially as described.

"6. In a pressure-limiting mechanism for bottle-sealing machines, a bottle-support, a compound cylinder, a spring between the two members thereof held under a predetermined compression, a tripping device for automatically releasing said predetermined compression consisting of a pair of tripping-dogs pivoted to one member of said compound cylinder, and means carried by the other members of said compound cylinder for actuating the dogs, whereby said compound cylinder will become automatically shortened as a whole when the predetermined pressure applied to the bottle resting thereon be automatically released, substantially as described."

Claim 2 of the second patent alleged to be infringed herein reads:

"2. In an automatic feeding apparatus for bottle-sealing machines, a hopper for the indiscriminate reception of the crowns or closures, a chamber external to said hopper, an inclined bottom to said hopper adapted to lead the closures to said external chamber and a receptacle or cage rotating within said external chamber, having one side closed and a central opening in the side adjoining said hopper, adapted to receive the crowns or closures indiscriminately from the hopper, and containing in its periphery suitably-formed passages such that the crowns or closures can pass therethrough in one position only; whereby, by the tumbling action of said cage, the crowns or closures are changed in position therein until they present themselves in proper position to pass through said passages into a surrounding channel-way, substantially as described."

Although the answer pleads invalidity of the patents in suit, the case is presented almost wholly upon the question whether, under a proper construction of these claims and in view of the prior art applied to limit them, defendant's several constructions under attack do infringe. For the purpose of the court at this time it is sufficient to consider the question of infringement only.

[1] Confessedly, yielding pitmen or plungers are very old devices employed in many arts. Patents have been granted for specific forms to be used in pressing glass, molding brick, making coal briquettes, for mower and reaper cutter bars, and to accomplish many other results. So important a place in mechanical arts does such an appliance occupy that the Patent Office is said to have made a separate classification for inventions thereof. In this opinion it would be unprofitable to discuss the many variations and many patented forms pleaded, as counsel on both sides in briefs and oral argument treat the Penfield device, expired patent No. 426,315, for molding brick as defendant's substantial reliance to avoid charge of infringement of the first patent in suit. If it may be seen that defendant's construction for releasing pressure before the damaging point is reached substantially and lawfully adapts to the art of bottle sealing the Penfield release, this feature of the controversy before us is over in defendant's favor, for we are content to rest upon the assurance of counsel for complainant that the Penfield device does not "show any mechanism or any combinations corresponding to the patent in suit or any analogous combination."

In the margin we show the tripping devices patented by Painter and Penfield and that employed in defendant's machine,¹ with the notations and description used in complainant's brief. The similarity

¹ See note at end of case.

between the defendant's tripping mechanism and that of Penfield is superficially striking when we ignore the fact that one is to be delicately constructed for rapid use in a process dealing with fragile subjects and the other is coarse and heavy in its application to slow processes and crass material. Complainant's counsel, indeed, says:

"This machine (Penfield's) presents some superficial resemblance to the spring mechanism of defendant's construction."

Apparent differences are: (1) Penfield's plunger operates downward, while defendant's plunger works upward. (2) Penfield uses no resetting spring, while in defendant's construction such a device is necessarily employed to put the face of the plunger in position to be acted upon by the machine's full power. (3) Where Penfield employs two lateral controlling springs defendant has four smaller ones employed in the same apparent office. These differences are not radical. Complainant's hydraulic patent, employed a downward acting plunger, and in one of that sort gravity operates to reset the device; doubling the number of pressure-controlling springs is merely a convenient noninventive division of labor. No issue can be raised upon any of these features of difference. It is well to note that neither of the claims of Painter's patent, No. 638,354, alleged to be infringed by defendant, provides for a resetting spring.

It is first urged by counsel for complainant, in criticising the reliance upon the Penfield device, that the uses are not analogous. In this, it seems to the court, counsel are failing to distinguish between the machines of which the respective devices are parts and the functions which those devices perform in their respective machines. There is little, if any, analogy between molding brick and capping bottles, just as there is little, if any, analogy between coating pills and lifting and delivering paper to a printing press. *Stearns & Co. v. Russell*, 85 Fed. 218, 29 C. C. A. 121. There seems to the court to be a close analogy between the function of a yielding plunger in a brick machine and that of a similar device employed in a bottle capper, just as it appeared to the court in the case cited to be a close analogy in the use of suction by the exhaustion of air to lift pills for dipping and the similar employment of a partial vacuum in delivering sheets of paper in printing. It is seen that in molding brick, as in affixing these crown seals to the bottle, it is desirable that a release of the pressure in advance of an undue increment thereof be provided for; hence the function of these devices in the two widely divergent arts is precisely the same, namely, the securing of release before the point of attaining disaster. The question is not affected, in our judgment, whether the result is to prevent breakage of the machine or crushing of the subject worked upon; the ultimate function of the yielding plunger is to save the machine's efficiency. The question then is: Would one ordinarily skilled in mechanics applicable to the art in question, having under observation the Penfield machine, readily apprehend, in respect to its provision for tripping the pressure, the latter's adaptability to the results he desires to obtain in the other art? *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275. We are constrained to answer this question in the affirmative.

But it is argued that in the Penfield machine:

"The releasing pressure is not determined by a spring or springs under original predetermined compression but is determined largely by the action of a variable force, with the result that the machine will not release at any given or predetermined pressure."

This seems to us to be hardly valid. Rather, it impresses us that, after a pressure is applied sufficient to overcome "static friction," the lateral springs in Penfield's machine will allow an increase up to the limit of their power of resistance, precisely as in either complainant's or defendant's devices. And while we will not dispute, but do doubt, that the Penfield machine "does not require an accurate release at an exact and predetermined pressure, it being enough to satisfy the requirements if the machine releases somewhere within a ton or so of the desired pressure," it seems clear that the pressure which will trip the mechanism, while probably not predetermined, is easily determinable and is fixed within approximately narrow limits by the tension of the springs themselves, and we also think we see in this construction the opportunity to set the machine to a predetermined pressure through adjustment of the nuts and washers holding the springs in place, precisely as in defendant's device the same result is obtained. This is so obvious as to involve little mechanical skill and no inventive genius in its comprehension.

Again, it is urged that in the Penfield machine as the pressure increases it is exercised increasingly by the blocks *E* (which with their controlling arms *H* correspond to the dogs *3* of defendant's machine) upon their pivots, that "the friction between the blocks and pivots increases with pressure," and we are told that this friction, known as "static friction," which is defined as "the friction developed between two parts under a pressure applied in a single direction, the parts being relatively stationary at the time the friction is developed," is a distinctive accompaniment of the operation of the Penfield device. In this we cannot agree with counsel. Applying this definition of static friction to the operation of the constructions of both complainant and defendant, it seems to us that such friction, different in degree doubtless but not in quality and in fact, occurs in both. Each of these devices has pivots on which swing arms or dogs which bind increasingly upon their pivots and turn with more friction, therefore, with the increase in a single direction of the pressure of operation. Defendant's device has friction rollers, but that construction does not change the fact of the presence of this so-called static friction. They affect but the degree thereof. The use of friction rollers is so old and their application at this point so obvious that the fact affects the situation in no degree.

It is further argued that the Penfield device is "semiself-locking" because pivots *F* are located close to the shoulders *D* of the inner telescoping member, wherefore a certain amount of pressure is carried before the springs are called upon. This is manifest from an inspection of the device; but it seems to us, again, that something of a self-locking character is present in both complainant's and defendant's devices. Without the springs in complainant's machine a

certain amount of pressure could be exerted through the pivoted locking dogs *I-2*. Doubtless in a vertical position they would not be able to carry the weight of the superstructure. Horizontally, however, pressure up to the effect of friction of the parts would be sustainable through them, and the same may be said of the arrangement of defendant's device. The difference, again, is one merely of degree, due to a shifting of leverages readily discerned as an expedient to one of ordinary mechanical skill seeking to adapt a familiar mechanical contrivance to an art in which he is interested.

The answers of complainant's expert to certain crucial questions put to him in rebuttal cross-examination (pages 101, 102, Complainant's Record) were somewhat enigmatical. They were sufficiently plain, however, to suggest that his mind ran parallel with the court's to the point that the difference in functions of a tripping device or yielding plunger, whether the purpose be to protect the machine or the subject of the operation, is apparent rather than real, and that one of ordinary mechanical skill would readily see in the Penfield mechanism adaptability for use in tripping pressures in bottle-capping machines, and, with no substantial draft on his inventive faculty, would be moved to a refinement of their parts and their adjustment to adapt the complete mechanism for substitution for either complainant's or defendant's devices. If these conclusions are correct, and the language of the witness's replies, skillfully avoiding the categorical, seem to the court to be reluctant admissions, the question of infringement respecting the first patent demands a negative answer.

The principles which govern the questions immediately before us are so well settled and so clearly stated in sections 37, 38, and 39, Walker on Patents, that to cite case authority seems unnecessary. As was said in *Herman v. Youngstown Car Mfg. Co.*, 191 Fed. 579-582, 112 C. C. A. 185, 188:

"The application of these rules to specific facts depends upon the force which those facts carry to those who determine the issue."

Granting that the art of pressing brick is clearly without analogy to that of capping and sealing bottles, yet the special purpose for which a yielding pitman is used in these two nonanalogous arts may be and is, as we have said, closely analogous. This is the crux of the case so far as issues are involved in the first patent and in defendant's reliance upon the Penfield mechanism are concerned. To go into a remote art for a tripping device is open to defendant because of complainant's use of the hydraulic release. If we are warranted in holding the analogy necessary to a defense to the broad function which a yielding pitman is to perform, rather than to involve in it, as complainant would have us, but the result in the particular operation which the exercise of that function effects, then Penfield's device is a safe foundation for defendant's structure. The proximate office of the yielding pitman in the two arts is to save the particular operation from the effect of too great pressure, and to render the machine efficient in the accomplishment of its purpose against inadvertent or casual stress. The analogy which must be seen to make a case of double use should be one which appeals to a person of ordinary mechanical skill. Courts

and text-writers have not improved upon Justice Brown's definition in *Potts v. Creager*, 155 U. S. 579, 608, 15 Sup. Ct. 194, 39 L. Ed. 275. The adaptability of the Penfield device to effect the purpose of a tripping pitman when the pressure became dangerous in a bottle-capping machine, we think, would readily occur to such a person when his interest in the latter art became engaged.

The distinction, therefore, which the court so clearly makes in *Herman v. Youngstown Car Manufacturing Company*, *supra*, between the alleged analogous uses of hydraulic cylinders and that involved in the invention under consideration by that court, does not, it seems to us, exist here. But one function is to be performed by the yielding pitman in Penfield's and in defendant's machine, namely, a tripping to prevent dangerous pressure. In either case the result occurs at a precise point, to wit, the overcoming of the resistance of the lateral springs. This point in each device may be produced and regulated by substantially the same means, and the operation of the springs is initiated by substantially the same means. The respective parts seem to us to be so clearly mechanical equivalents as that, if such an issue were made, we would be obliged to say that as to this construction Penfield anticipated defendant. Assuming that the issue was upon defendant's claim for novelty in its tripping mechanism, we are satisfied that a reference to Penfield's patent would be sufficient for rejection. Again, it seems clear that the court which invalidated the Martin patent in *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856, would hold defendant to infringe Penfield, could such an issue be raised for its determination. Defendant's device seems at least as nearly equivalent to Penfield's as to Painter's. If that be so, there can be no infringement of Painter by defendant respecting the yielding plunger.

The difference, as we view it, between Penfield's and defendant's construction, is one of refinement of parts to adapt them to an office involving delicacy of operation and not found in the art of molding brick. It is obvious that some special adaptation of parts or arrangement to fit an old device to a new use accompanies the attempt to transfer, and we are of the opinion that it is only when such adaptation or refinement is so radical and original as to transcend ordinary mechanical skill alert for a device for a special purpose that invention follows. This situation does not obtain here. The changes from Penfield to the structure of defendant are those which seem to us would be obvious to one of ordinary mechanical ability engaged in scanning a remote art for a yielding pitman to be used in a bottle-capping machine.

We have no disposition to ignore the force of such decisions of our own Circuit Court of Appeals as those of *National Tube Co. v. Aiken*, 163 Fed. 254, 91 C. C. A. 114, and *Herman v. Youngstown Car Mfg. Co.*, *supra*; but we assume that these cases are to be considered and weighed in their relation to other opinions of the same court, such as *Stearns v. Russell*, *supra*, affirmed, 171 U. S. 689, 19 Sup. Ct. 886, 43 L. Ed. 1179, *Schreiber v. Grimm*, 72 Fed. 671, 19 C. C. A. 67, and *Bullock v. General Electric Company*, 149 Fed. 409, 79 C. C. A. 229.

This Circuit Court of Appeals shows no disposition to depart in any substantial degree from its position in *Stearns v. Russell*, for in the *Aiken Case*, 163 Fed. 254, 259, 91 C. C. A. 114, 119, the court approves the principle of that case in this language:

"Nevertheless, the general rule undoubtedly is that it is not invention to apply an old device to a new use which involves no change in mode of application, as in *Stearns & Co. v. Russell*, 85 Fed. 218, 29 C. C. A. 121; but in that case the function of the pill dipping device in picking up and holding pills by suction was precisely the same as where it was employed in picking up and holding pieces of iron, cloth, or paper, and no structural change was needed to adapt it to doing with pills what it had done before with other materials."

In the *Herman* and *Aiken Cases* the patentees were pioneers in entering a remote art for a device which, with proper modification, would serve a purpose in the art in hand. Invention, in each case, inhered as much in the originality abiding in the thought that such remote art might contribute as in the adaptation of the contribution. No one before *Herman* had thought to seek among hydraulic devices for an escapement in making blueprints, nor had any predecessor of *Aiken* seen the possibility of adapting conveyors of such inert and rigid bodies as sawed lumber to the conveyance and support of red-hot and consequently flexible sheets of metal in a manner to cool them uniformly and without warping them as they approached the trimming shears. But when *Painter* patented the mechanism alleged to be infringed in this case, the art of bottle sealing by crowns had already invaded the art of yielding pitman, of which the known forms were many, and had made an appropriation therefrom. This was the result of the grant to him of patent 609,209, noted above. Whatever may be the merits of his invention, we find nothing in his grant which shuts the door of opportunity in some other inventor to go to the yielding plunger art for an old device of this character. This is not a case where the words of Justice Brown in *Potts v. Creager*, *supra*, apply, namely:

"Indeed, it often requires as acute a perception of the relation between cause and effect, and as much of the peculiar intuitive genius which is a characteristic of great inventors, to grasp the idea that a device used in one art may be made available in another, as would be necessary to create the device *de novo*."

For, when the patent now considered was issued, "acute perception" and "intuitive genius" of this character had been exhausted in the grant of patent 609,209. Nor is there here a fair opening for the application of the principle laid down in *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, that:

"It is not sufficient," in order "to constitute an anticipation" of a patented invention, "that the device relied upon might, by modification, be made to accomplish the function performed by the patent, * * * if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions."

Four patents are offered in evidence by the defendant, notably those to *Creager* (413,929) and *Hall* (448,231), both of which are expired, the first primarily for a yielding pitman and the second for a device of that character specially adapted for brick machines. In each of these

grants the specifications call attention to the adaptability of the invention "for analogous purposes in other mechanism"; the invention (Creager's) not being "limited to any particular use." In Creager's device weighted levers are employed to control pressure, which is tripped when the tension with which they hold certain compound levers is overcome. Not only does Creager call attention to the fact that lateral springs may be employed instead of these weighted levers, in which case springs would take the appearance and perform the function of those in the Penfield contrivance and defendant's, but he also provides for adjusting the tension (which, of course, involves an opportunity to predetermine it) by shifting the weights on the levers, surely an equivalent, mechanically, to the adjustment provided by defendant and possible in the Penfield trip through a shifting of the retaining nuts and washers on the outer ends of the springs. Hall also employs a lateral flat spring the tension of which is "regulated by a setscrew 1 taking through one of the links." These conditions of the yielding pitman art dispose, we think, of two points deemed by complainant's counsel important. It is urged that a "spring between two members," as in claims 5 and 6, means simply "that the spring shall be operatively between the two members," and that consequently defendant's lateral springs are within the claim. It would seem, likewise, that Hall's and Creager's springs were "operatively between" the members controlled by them; hence, at least, defendant, in this respect, is not using any novelty introduced by Painter. Again, it is urged that Penfield's machine does not suggest provision for adjusting tension. However that may be, this idea is offered by both Hall and Creager. As we consider their devices, there appears in them almost if not quite sufficient defense to defendant in the essentials of its tripping device independent of the Penfield reference.

We feel the problem involved in adapting either the Penfield, Hall, or Creager pitman to the use of defendant does not reach the complexity of that before Herman in modifying hydraulic resistance devices already known to work out his escapement, in the solution of which the court (191 Fed. 579, 582, 112 C. C. A. 185) found invention. Rather we consider the task before defendant's mechanic (who had at least constructive knowledge of the state of the yielding pitman art, *Mast-Foos & Co. v. Stover*, 177 U. S. 485, 493, 20 Sup. Ct. 708, 44 L. Ed. 856) to be more nearly comparable to that engaging Russell when he adapted from a remote art a device for lifting pills (*Stearns v. Russell*, *supra*). It is no new use of a yielding plunger which either complainant or defendant makes in their respective bottle-sealing machines. The use is identical and to the same end attending the employment of such devices elsewhere, wherefore this case is distinguished also from *Western Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294.

The effect of the current of authority is well stated by the court in *Webster v. Dunham*, 181 Fed. (C. C. A. 8th Cir.) 836, 839, 104 C. C. A. 346, 349, in this language:

"It is only when the new use is so recondite and remote from that to which the old device and combination has been applied, or for which it was conceived, that its application would not occur to the mind of the ordinary me-

chanic skilled in the art, seeking to devise means to perform the desired function, with the old machine or combination before him, that its conception may rise to the dignity of invention."

[2] As we have suggested, Painter & Hawkins entered an old art when they applied for patent which appears in this case as No. 643,-973, and it appears that their application was attended with many difficulties and much modification in its passage through the Patent Office. Repeatedly their claims were rejected and as often did they acquiesce in the rejections and attempt to meet the reasons therefor by modifications and limitations.

Claim 2 in controversy must be, therefore, considered as to its scope with reference to this history. *Campbell v. American Shipbuilding Company*, 179 Fed. 498, 103 C. C. A. 122. In the case at bar, as in the case cited, the rejections and the requirements which the examiner made of applicants which they attempted to meet were based on references to specified patents which, in the judgment of the examiner, were sufficient to warrant his action, and here, as in the case cited, to use the language of the court:

"It is not necessary to examine those patents with any purpose either of defining the prior art or of otherwise justifying the action of the Patent Office. It is sufficient that Campbell (the applicants, in the case at bar) acquiesced in the rulings, instead of taking the prescribed course of appeal."

The court in the case cited quotes with approval the language of Judge Severens in *American Stove Co. v. Cleveland Foundry Co.*, 158 Fed. 978, 86 C. C. A. 182, to the effect that the applicant under circumstances such as these "must be deemed to have surrendered and disclaimed what he conceded, and to have imposed such definitions upon the language of the patent as he attributed to it in order to secure the grant"; wherefore, to use again the language of the court in the *Shipbuilding Company Case*:

"It inevitably follows that the language into which the grant of the present patent was ultimately resolved must be interpreted with constant reference to the limitations and restrictions imposed and with respect to matters distinctly excluded through rejections and amendment."

Now, for the history of this claim 2 alleged to be infringed: Its elements are seen to be a hopper for the indiscriminate reception of crowns or closures, the inclined bottom thereto adapted to lead the contents to an external chamber, a receptacle or cage rotating within said external chamber, having one side closed (the side opposite to the entrance to the external chamber), and a central opening in the side adjoining said hopper, said rotating cage having in its periphery suitably formed passages for the passage of the crowns or caps in one position only, substantially as described.

The application, in the first instance, contained 11 claims. They were all rejected by the examiner for reasons given. In these claims the so-called external chamber was described as an "auxiliary chamber adapted to receive the crowns from the hopper." The rejection was acquiesced in and an amended set of four claims was offered, in which the auxiliary chamber was described as one "exterior to the hopper." These claims were rejected. Attempting to meet this situation, solicitor for applicants said:

"Replying to the examiner's last action, I beg to call attention to the fact that neither of the references show the chamber exterior to the hopper with the selecting cage rotating in vertical plane therewith."

To which the examiner replied:

"On reconsideration of this case at request of the applicant, it is repeated that Bennett discloses the *exterior auxiliary chamber*, while Gillette shows the very common employment of a vertical selecting cage and chute therefrom."

Thereupon applicant's solicitor requested the erasure of his four claims and permission to amend with two claims describing a vertically arranged hopper, a chamber external thereto, a selecting cage in said external chamber, and other details not necessary now to be discussed. Again a rejection occurred with the suggestion by the examiner that appeal be had, to which applicant's solicitor replied:

"After consultation with the applicants they came to the conclusion that the examiner's rejection of the former claims 1 to 4 was warranted, but it was thought that applicants were entitled to *more limited claims to the structure*, and so the claims 1 and 2 were proposed, to take the place of former claims 1 to 4."

Thereupon the case was reopened and the two claims then in question again rejected "as involving nothing whatever over Bennett taken with Gillette." To which the applicants respond:

"*The applicants believe themselves to be entitled to claims for their structure and are perfectly willing to define their structure to distinguish from the references and supposed that the first and second claims did this.* The attorney begs for a reconsideration of the claims in the comparison which he asks the examiner to make, and, if any further limitation seems to be necessary to avoid the references, it is asked that the examiner suggest this."

Replying, the examiner said:

"In response to applicants' request for an explanation of the references cited, it is stated that Bennett discloses a hopper, a chamber external to the hopper, an inclined bottom to the hopper for feeding to the external chamber, and a selecting cage in the external chamber, the exterior portion C of the cage forming part of the front wall of the chamber," etc.

Whereupon the solicitor for the applicants asked for further consideration in view of certain facts suggested of which one is the allegation that "Bennett does not disclose a selecting cage in the external chamber," and, further, that "the claims now presented have also the elements of a *rotating selecting cage having one side closed and the other open.*" Accompanying this application are three amended claims, of which No. 2 is identical with the claim in question in this controversy. Upon this record these claims were allowed and patent granted.

We are unable to consider this history without reaching the conclusion that the complainant here has a patent only for the structure substantially such as is described in the specifications of the patent. In view of the reference to Bennett and the acquiescence of the applicants therein, independent of other patents pleaded and brought to our attention in evidence, complainants have no issue with the defendant merely because the claim in question involves the use of an external chamber, for the record forces the patentees to admit that the use of such an intermediate container between the main hopper

and the selecting cage is not new; yet a great deal of this controversy and a large part of the argument depend upon the insistence of complainant that that portion of defendant's device which consists of a narrow neck or vertical passage from the main body of the hopper to the selecting cage is a chamber external to the hopper and, consequently, a "regulating chamber" because at the beginning of the constriction, which complainant assumes to be the bottom of the hopper, defendant has placed an agitating device (2-6-4-5) which serves, at least when stationary, to restrict the passage of the crowns from the upper portion of the hopper into this lower portion or neck, which leads through an opening in its side to the selecting cage. Assuming that this restricted portion below the agitator is substantially an auxiliary or external chamber, its relation to the main part of the hopper and the manner in which it is related to the selecting cage are so different from the arrangement of parts in complainant's device that the similarity is very obscure, and, if we may justly limit complainant's claims to the structural descriptions in the specifications, there can be no conflict. This dissimilarity increases when we pass to a consideration of the claim for a selecting cage rotating within the external chamber, a feature of the claim which was urged upon the examiner as especially distinguishing the applicant's invention from Bennett's, because Bennett did "not disclose a selecting cage in the external chamber," and because "the claims now presented have also the elements of a rotating selecting cage having one side closed and the other open." Applicants' claims were distinguished from the anticipations alleged by the examiner in rejection, but very clearly defendant does not employ a selecting cage rotating in anything that may be said fairly to be an auxiliary chamber or one external to the hopper. It does not rotate within that portion of defendant's device which complainant insists is substantially an external chamber. Its action is wholly without any portion of the neck or restricted portion of the hopper, which complainant insists is practically an external chamber.

[3] In view both of its history and its language, this claim 2 must be held to be a combination claim for structure. It cannot be infringed when one important element is absent.

"A combination is an entirety. If one of its elements is omitted, the thing claimed disappears. Every part of the combination claimed is conclusively presumed to be material to the combination, and no evidence to the contrary is admissible in any case of alleged infringement. The patentee makes all the parts of a combination material, when he claims them in combination and not separately." Walker on Patents, § 349.

Nor has defendant's selecting cage one side open and one side closed. Both sides are open in fact, although intermittently and casually, as the circumstances require through the infrequent clogging of crowns, a part (7) which ordinarily is stationary, closing the outer side of defendant's selecting cage, partially rotates to free an offending crown. This device performs, in an unlike way, the function of a pendulum mechanism used by complainant (not shown in cut).

Again, the opening from the passage from the hopper into defendant's selecting cage is the full measure of that side of the defend-

ant's cage except as it is closed by a transverse bar or block (not shown in cut) having projections designed to lift or agitate the crowns in the chamber beyond; whereas complainant's selecting cage has a central opening as described with lifting projections on the periphery of the rotating cage. The arrangement of all these parts is very dissimilar. Devices of unlike characters are used to accomplish the several results desired. The defendant's construction seems to the court to be simpler, as it has less parts. In the margin we show the selecting construction of the parties hereto, taking the cut out of complainant's brief, and using the notation and description employed by it.²

In short, again, if the claim in question is to be limited to structure as described in the specifications, the divergencies are so marked between defendant's and complainant's structures as to leave no room for claim of infringement. In fact, as we have said, the greater portion of the argument submitted, orally and in brief, is upon the claim that defendant uses an external chamber, in the fact that the restricted vertical neck of the hopper, formed in one casting, is partially separated from the bowl of the hopper by the agitating device referred to, but this claim must be construed to be for structure only, and it must be considered as a whole. So considered, the device covered by it in the relation of its parts one to the other is not that employed by defendant. The two constructions may, of course, and do perform the same functions and the same intermediate results may be had to reach the final result; but that fact involves no infringement if the structures are substantially different.

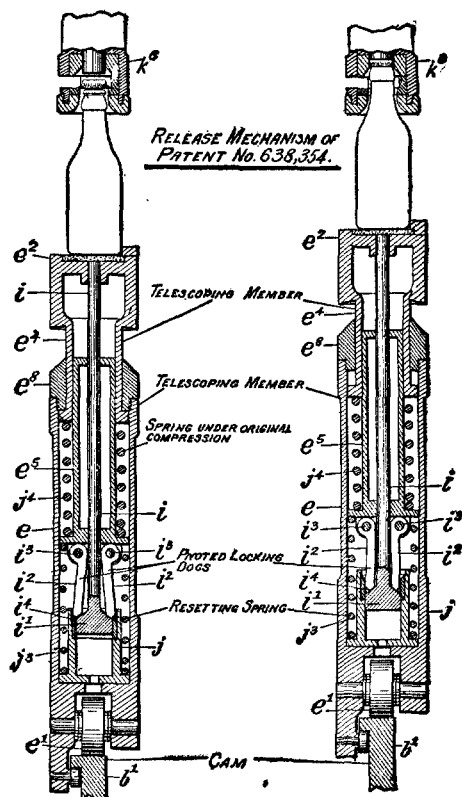
It is unnecessary to discuss other patents pleaded as occupying the selector field. It is quite plain that, as to other features not by us here considered, both parties to this action are using elements or their equivalents found in the Muslar (531,001), Gillette (592,584), Campbell (577,643), and Dimock (278,320) patents, among others. In fact, working models of the Campbell and Dimock selectors have been exhibited to the court. With the addition of such an agitator as defendant uses, each of these appears to be fairly competent to perform the service rendered by either complainant's or defendant's selector. Nowhere in argument has there been any criticism advanced of the use by defendant of the parts 2, 6, 4, 5 to even the flow of crowns by agitating against bridging. It is only because, in complainant's opinion, these parts combine to separate the hopper's integral casting into two chambers, that the construction is objected to; but we are not invited to consider this result in any other way except broadly that an external chamber is formed. No similarity of structure other than is involved in the production of two chambers is urged; but for the employment of two chambers complainant cannot claim originality in view of the history of the application of Painter & Hawkins in the Patent Office.

Our conclusion is that, whatever may be the standing of either of the patents sued on, complainant has no cause of action under either against defendant for infringement, and that the bill should be dismissed.

² See note at end of case.

NOTE.—The following are the devices patented, with descriptions from the briefs:

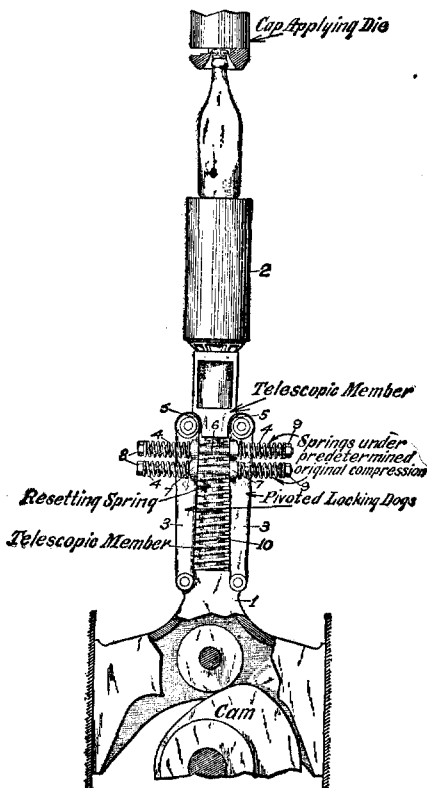
COMPLAINANT'S RELIEF MECHANISM.



In the operation of the machine, as the anti-friction roll e^1 moves up the cam, the compound cylinder e , e^4 , the parts of which cannot telescope because the dogs i^2 are engaging the beveled ring i^4 , is pushed up, carrying the bottle with it, the bottle in its upward movement picking up the crown and forcing it into the metal die k^6 . As the bottle and crown strikes the die, the die begins to force the crown down upon the bottle in order to seat it before the die bends the flange of the crown inward to lock it. The die, therefore, offers a resistance to the further upward movement of the bottle and crown. At this time, the roll e^1 is rolling up the cam and is pushing the cylinder e upward. The upward movement of the cylinder e causes an upward thrust of the rings j and i^4 , which are located in the bottom of the cylinder, and the force of this thrust is transmitted to the dogs i^2 . These dogs, through the flange to which they are pivoted, transmit this force to the spring j^4 . This spring, however, being under original predetermined compression, will not yield until the predetermined force is exercised upon it, and until this force is reached the spring transmits the force to the part e^4 against the bottom of which the spring bears. The parts of the device, therefore, move upward in the same way that they would if the compound cylinder was an integral structure instead of being a telescoping one. When the force of the upward movement reaches the 700-pound pressure limit which is required to cap the bottle, which will be at the time the crown is thoroughly seated and its flange bent in, the spring j^4 begins to compress. In other words, the resistance now offered by the die to the further movement of the bottle is greater than the original compression of the

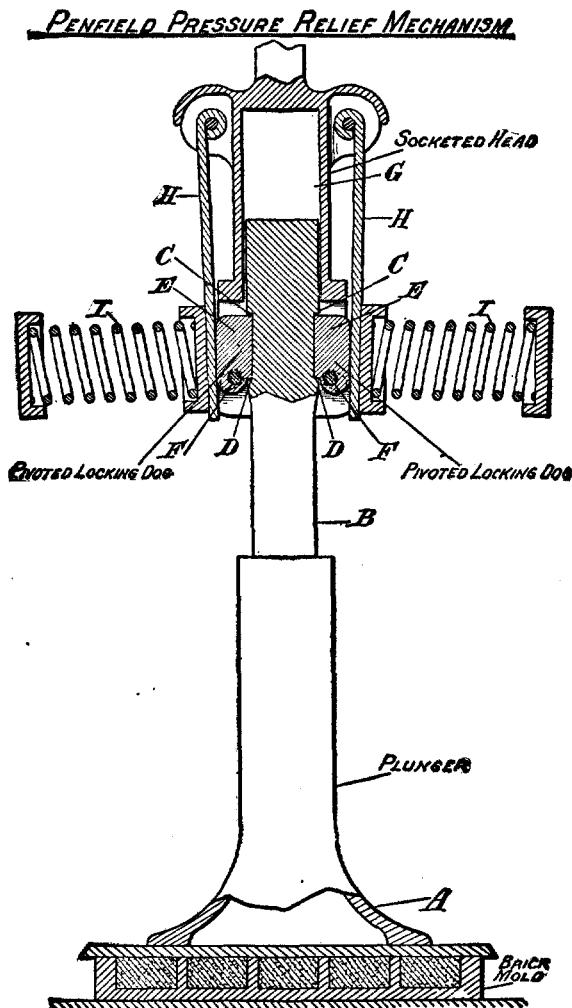
spring, so that the spring yields. The part e^4 therefore ceases to move upward, being held against movement by the bottle and die, but the part e continues its upward movement, because the roll is still moving up the cam. This causes the ring i^4 to move upward with respect to the locking button i^1 , which remains stationary because it is connected to the part e^4 . This upward movement of the ring carries the bottoms of the dogs above the top of the button and they then slip off the top of the ring and into the position shown in Fig. 2 of the drawings. As soon as this occurs no further resistance is opposed to the upward movement of the part e , except that offered by the comparatively light resetting spring j^3 , and it therefore continues its upward movement until the roll reaches the top of the cam without exercising any further substantial pressure on the bottle, and, consequently, without further increasing the movement of the bottle with respect to the die or the pressure upon it.

Diagram Defendants Machine.



The defendant's mechanism includes two telescoping members, viz., a cam-operated member 1 and a bottle-supporting member 2. The member 1 has a socket at its top in which the contracted circular stem of the member 2 may slide, the parts being thus capacitated to telescope and shorten and thereby preventing excessive pressure on the bottles in the same way in which the parts of the patented construction telescope. The reduced part of the member 2 has beveled shoulders 5, which are engaged by anti-friction rolls on tripping dogs 3. These tripping dogs holds the parts 1, 2, from telescoping until the required pressure has been exerted by the capping die upon the bottle. In order that the antifriction rolls on the dogs may engage the shoulders sufficiently strongly to prevent the telescoping operation, the dogs are forced inward by

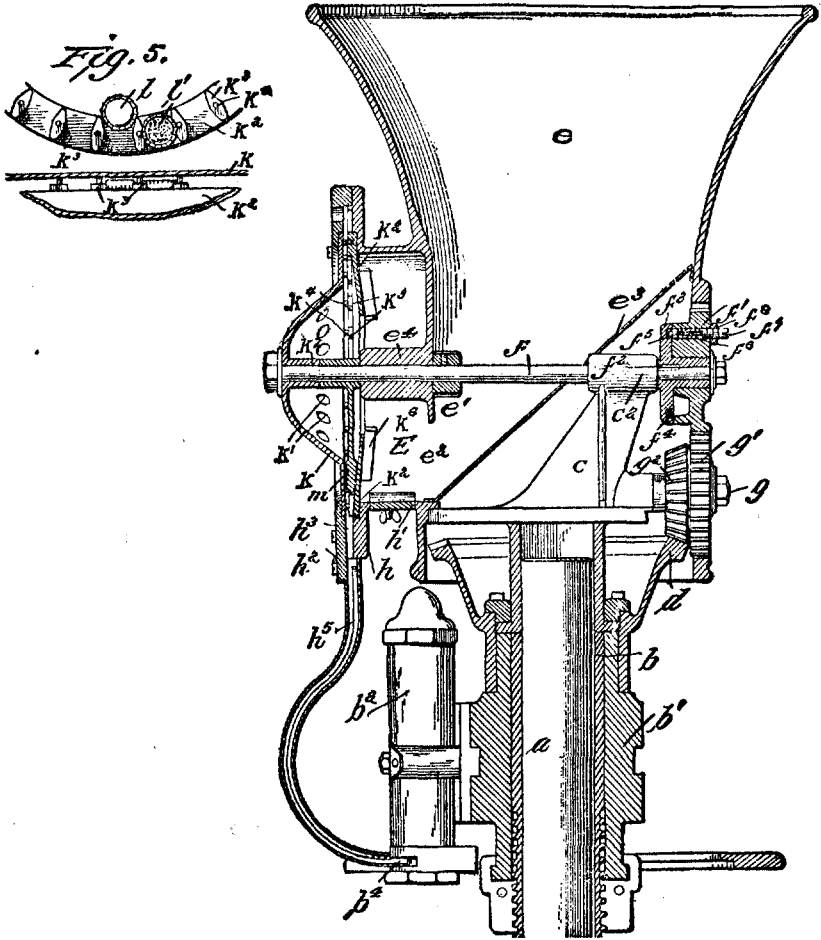
springs 4, which are under original predetermined compression, these springs being mounted on rods 6, supported in ears 7 on the dogs. The springs under original predetermined compression bear, therefore, against the ears 7 on the dogs, their compression being determined and held by nuts 8, 9, on the ends of the rods. When a bottle is placed on the top of the part 2, the support is pushed upward by the cam which operates on the bottom of the member 1, this movement operating to push the bottle with the cap thereon into the die. (From description in complainant's brief.)



The stem B has two square side recesses C, the bottoms of these recesses forming shoulders D. These recesses are engaged by blocks E of generally rectangular outline pivoted on pivots F secured in the socketed head G into which the plunger extends. Plates H which are pivoted to the head extend down behind the blocks E and these plates are backed up by springs I. When the plunger A meets an obstruction such as a stone in the mold, and, therefore,

develops a destructive pressure which would, if not relieved, break the machine, the shoulders *D* are forced so strongly against the blocks *E* as to cause them to rock on their pivots *F* and release the plunger, thus allowing it to telescope into the socket *G*.

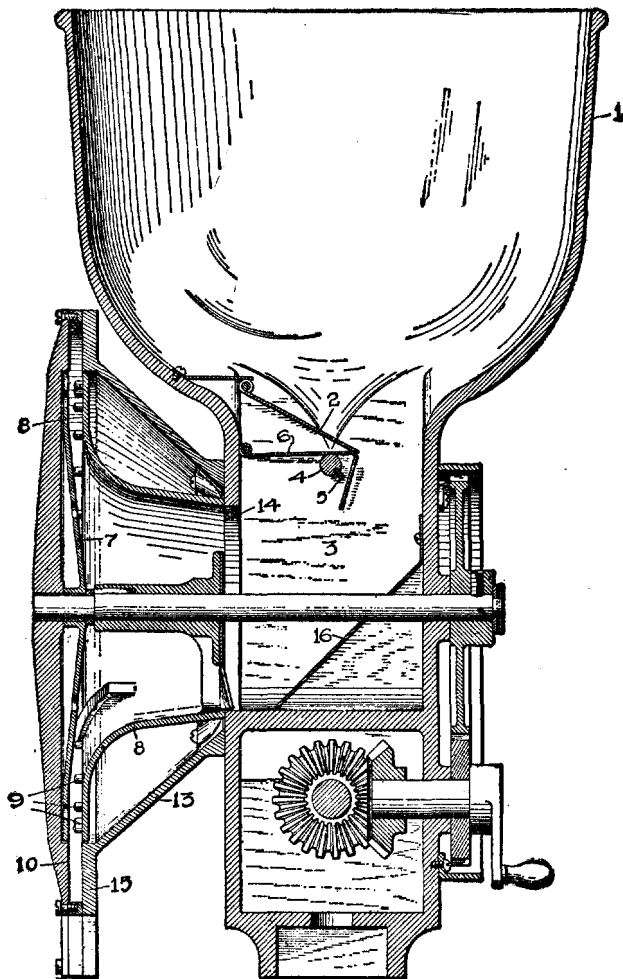
COMPLAINANT'S SELECTOR AND FEEDER.



The accompanying cut is a reproduction of Figs. 1 and 5 of the patent. The crowns are placed in a large storage hopper *e* of the accompanying cut of complainant's hopper. The bottom of this hopper is formed by an inclined plate *e3* down which the crowns are fed through an opening *e2* into a chamber *E*. This chamber *E* is referred to in the patent as an "external chamber"; that is, it is external to the hopper. It is, however, intermediate the hopper and the tumbling drum or cage *k*. This drum or cage is mounted to rotate on a shaft *f* and has its outer side closed and provided with eight openings *k1*. It also has a central opening *k2* through which the crowns are transferred from the chamber *E* to the tumbling chamber or cage by means of rotating lifters *k3*. This cage *k* is generally frustoconical in shape and has a flat annular portion at its base which faces a ring *k2*. This ring has secured to it, by pins *k4*, a series of blocks *k3* which extend toward the annular portion of the cage.

The openings formed by these blocks are of such shape that the crowns can pass through only when their cork disks face the annular portion of the tumbling cage. Such crowns as pass between the blocks fall into a channel h^3 surrounding the cage and run down a chute h^5 which delivers them to the capping head b^2 , this being the head which contains the steel capping die before referred to. With this construction, a large supply of crowns in an indiscriminate mass can be thrown into the hopper e , a certain number of these crowns, of course, descending at once into the external or intermediate chamber E . Only a limited number of these crowns, however, can pass from the external or intermediate chamber E through the central opening e^2 into the tumbling drum or cage, the quantity being determined by the form and size of the opening e^2 .

DEFENDANT'S SELECTOR AND FEEDER.



Referring to this drawing, 1 indicates the hopper into which the large mass of crowns is indiscriminately dumped. This hopper has an inclined bottom formed by a plate 2. A second plate 6 is located below the plate 2, and has

its end bent downward so as to form a sort of throat. The plates 2 and 6 form the top wall of a regulating chamber, which is marked 3, this chamber being inclosed by a wall formed in one piece with the hopper casting 1. The regulating chamber communicates through an opening 14 with a tumbling receptacle or cage formed by a bell-shaped ring 8 and a front plate 7. This cage is mounted on a rotating shaft, as clearly shown in the drawings, but not lettered. Pins 9 are located in the space between the flat annular portion of the cage 8 and the outer edge of the plate 7, these pins being so arranged that the crowns can only pass through them when in the proper position. Such crowns as pass through fall into a surrounding channel 10 and are fed from it down a chute 15 to the capping head. To prevent the crowns from choking in the somewhat narrow opening beyond the edge of the plate 2 and formed by it and the plate 6, the plates are pivoted and are agitated by a tappet 5 mounted on a rotating shaft 4. As the shaft rotates, this tappet moves the plates up and down and tends to facilitate the feeding of the crowns through the narrow opening. The crowns are delivered from the regulating chamber 3 to the tumbling cage through an opening 14, the quantity of crowns thus delivered being determined, of course, by the size and form of the opening as in the patented construction. (Language that of complainant's brief.)

BONBRIGHT et al. v. GEARY et al., Corporation Commission of Arizona et al.

KELLEY v. SAME.

(District Court, D. Arizona. November 19, 1913.)

Nos. E-9 and E-10

1. GAS (§ 14*)—GAS COMPANIES—STATE REGULATION OF RATES—CONFISCATORY RATES.

A state commission having power to fix rates to be charged by a public service corporation, as a gas or electric company, must make the rates sufficiently high to yield a fair return on the reasonable value of the property at the time it is being used for the public.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10-11; Dec. Dig. § 14.*]

2. GAS (§ 14*)—GAS COMPANIES—REGULATION OF RATES—VALUATION OF PROPERTY.

If the valuation of any one of the necessary elements of a public service plant is fixed by the rate-making authorities at a sum unjustly and unreasonably low in a substantial amount, or if the value of an element of substantial value used or useful in maintaining or operating such a plant is entirely omitted by the rate-fixing authority and rates are based on the valuation so made, such unreasonable and unjust valuation or omission of valuation is the taking of private property for a public use without just compensation.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10-11; Dec. Dig. § 14.*]

3. GAS (§ 14*)—GAS COMPANIES—RATES FIXED BY PUBLIC AUTHORITY—VALUATION OF PROPERTY.

Evidence considered, and held to make a sufficient showing to entitle the stockholders and bondholders of a gas and electric company to a preliminary injunction to restrain the enforcement of rates fixed by the Corporation Commission of Arizona to be charged by the company on the ground that in making a valuation of its property as a basis for such rates the commission omitted certain elements of substantial value which the company was entitled to have included in the valuation, and that the valuation as a whole appeared to be unreasonably low, being less than the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

amount complainants paid in the open market for the company's stock less than a year before, on a valuation by competent experts, although the property was subject to a mortgage of \$700,000.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10-11; Dec. Dig. § 14.*]

4. GAS (§ 14*)—GAS COMPANIES—REGULATION OF RATES—"OVERHEAD CHARGES."

"Overhead charges" is a term which, as applied to a public service corporation, includes the expense that would necessarily be incurred in the reproduction of the property; the legal expenses of organization and expenses for office, engineering, inspection, supervision, and management during construction; fire and casualty insurance, taxes and interest during the period, contractors' profits, and other minor expenses of like character.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10-11; Dec. Dig. § 14.*]

In Equity. Suits by William P. Bonbright, Irving W. Bonbright, Frederic C. Walcott, Orlando B. Willcox, Starling W. Childs, Frederick W. Stehr, George Rex Buckman, William P. Fisher, Lord Fairfax, and George C. Cassels, doing business as copartners under the firm name of William P. Bonbright & Co., against W. P. Geary, Amos W. Cole, and Frank A. Jones, members of the Corporation Commission of the State of Arizona, George P. Bullard, Attorney General of the State of Arizona, Frank H. Lyman, County Attorney of Maricopa County, Ariz., George C. Adams, Charles H. Akers, Henry L. George, Ernest W. Lewis, and the Pacific Gas & Electric Company, defendants, and by Augustus W. Kelley, as trustee, against the same defendants, to restrain the enforcement of certain gas and electric light rates prescribed by the Corporation Commission of Arizona. On motions for interlocutory injunctions. Motions granted.

Louis H. Chalmers and Edward Kent, both of Phoenix, Ariz., and H. Alexander Smith, Daniel W. Knowlton, and George B. Hatch, all of Colorado Springs, Colo., for complainants.

G. P. Bullard, of Phoenix, Ariz., for defendants.

Before MORROW, Circuit Judge, and VAN FLEET and SAWTELLE, District Judges, convened under the provisions of section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]).

MORROW, Circuit Judge (orally). In disposing of these cases this morning we will state our conclusions in a general way. We have not had time to prepare a written opinion, and perhaps our general conclusions will be sufficient for the present purpose.

The first-entitled suit is by the stockholders of the Pacific Gas & Electric Company, a public service corporation organized to supply gas and electricity to the inhabitants of the city of Phoenix in the state of Arizona.

The second suit is by the bondholders of the same corporation. The defendants in these two cases are members of the Corporation Commission of the state of Arizona, the Attorney General of the state of Arizona, the district attorney of Maricopa county (the county in which the plant of the Pacific Gas & Electric Company is situated), certain

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

customers of the Pacific Gas & Electric Company, and the corporation itself. The suits are brought to restrain the Corporation Commission of the state of Arizona from compelling the Pacific Gas & Electric Company to adopt and put in operation a certain schedule of rates promulgated by the Corporation Commission; that is to say, a schedule of rates to be charged for gas and electricity supplied to its customers by the Pacific Gas & Electric Company. The suits are brought by the stockholders and bondholders of the Pacific Gas & Electric Company against the named defendants for the reason, among others, that under the law of the state of Arizona the penalties which would attach for noncompliance with the order of the Corporation Commission are so excessive and extreme that the officers of the company have refused to take the risk of disregarding them, and the responsibility of testing the validity of the rates fixed by the Corporation Commission is left to the action of the stockholders and bondholders of the company. The allegations of the two bills of complaint are substantially the same, and the two cases will be treated and referred to as one case.

The jurisdiction of the federal court is invoked on the grounds of diversity of citizenship arising out of the fact that all the stockholders in the first case and all the bondholders in the second case are citizens and residents of states other than that of Arizona, and the defendants are all citizens and residents of the state of Arizona. Second, the jurisdiction of the federal court is also invoked upon the constitutional grounds that the statute of Arizona in question denies to complainants the equal protection of the laws and threatens to deprive them of their property without due process of law. This claim of jurisdiction is based upon the allegations of the complaint setting forth in substance that in no other way can the rights of the complainant be adjudicated and determined in a court of law; that the pains and penalties of the Arizona statute are so severe and cumulative in effect that neither the complainants nor the company can under the provisions of the statute test the validity of the order of the Corporation Commission here involved without the danger of being subject to irreparable damage and absolute ruin. These allegations of the complaint and the provisions of the Arizona statute to which reference is made appear to bring this case within the decision of the Supreme Court of the United States in *Ex parte Young*, 209 U. S. 123-144, 148, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; but, as the jurisdiction of this court is otherwise complete, we will not stop to discuss that feature of the case. We will come at once to the merits of the controversy.

In approaching this subject we wish to say that we recognize fully the authority and the wisdom of the views of the Supreme Court of the United States in *Knoxville v. Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371, and in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, wherein it was held that a case should be a clear one before the court ought to be asked to interfere with state legislation upon the subject of rates in advance of an actual experience of the practical results of such rates; and, if this were a similar case to either of these cases, we should un-

hesitatingly remand these complainants to an actual experience of the practical results of the prescribed rates; but we do not consider that the facts in the present case bring it within that rule. There are several reasons why we are of that opinion, but there is one statement of the court in the Knoxville Case which sufficiently distinguishes that case from the present case. The statement will be found in 212 U. S. 18, 29 Sup. Ct. 154, 53 L. Ed. 371. The court says:

"City authorities (of Knoxville) acted in good faith, and they tried, without success, to obtain from the company a statement of its property, capitalization, and earnings."

No such fact appears in this case. The gas and electric company appears to have acted with good faith in furnishing the Corporation Commission with full and detailed information as to its property, its capitalization, and its earnings. It is not charged that the company has withheld any information desired by the Corporation Commission, or that the company has in any way prevented a free and full examination into all of its affairs; in other words, the Corporation Commission has had the benefit of the company's experience with existing rates, and it does not appear to be a difficult matter to estimate the practical result that would follow the rates ordered by the Corporation Commission. In fact, the estimate of the difference of the operation of the two rates is set forth in the record and is not a matter of substantial dispute.

In the Willcox Case the controversy was mainly with respect to the value of certain franchises granted by the city without cost and held by certain gas lighting companies in the city of New York as a gratuity. These corporations had been merged under a statute of the state into the Consolidated Gas Company. The suit was to enjoin the enforcement of certain legislative acts of the state and an order made by the Gas Commission, which subsequently became the Public Service Commission, relative to rates for gas in New York City. The ground for the relief asked for in the bill of complaint was the alleged unconstitutionality of the act and the order because the rates fixed were so low as to be confiscatory in effect. The consolidation of the stock of the various companies into the stock of the Consolidated Gas Company took place in 1884, at which time the tangible property of the several companies forming the Consolidated Company was appraised at \$30,000,000 and the several franchises transferred to the Consolidated Company at \$7,781,000. The stock of the Consolidated Company included this valuation of the franchises. The question was: What was the valuation to be placed upon the property of the Consolidated Company in 1895 upon which it was entitled to a return equivalent to that obtained on investments of that degree of safety in the city of New York? The lower court found that the value of the tangible property of the corporation in 1884 was, as before stated, \$30,000,000; that in 1895 its tangible property had increased in value to \$47,000,000; that the value of the franchises had increased in like proportion and was of the value of \$12,000,000, making a total valuation of \$59,000,000, in round numbers. The valuation of the tangible property had been made by experts; the estimated increase in the value of the franchises

had been made and found by the trial court. It was upon this finding that the court decreed the enactment to be unconstitutional with respect to the rates fixed. With respect to this increased valuation of the franchises the Supreme Court said:

"We are not prepared to hold with the court below as to the increased value which it attributes to the franchises. It is not only too much a matter of pure speculation, but we think it is also opposed to the principle upon which such valuation should be made. This corporation is one of that class which is subject to regulation by the Legislature in the matter of rates, provided they are not made so low as to be confiscatory. The franchises granted the various companies and held by complainant consisted in the right to open the streets of the city and lay down mains and use them to supply gas, subject to the legislative right to so regulate the price for the gas as to permit not more than a fair return (regard being had to the risk of the business) upon the reasonable value of the property at the time it is being used for the public."

After referring to the business of the company during the period from 1884 to 1895, the court was of the opinion that the increased valuation of the franchises to \$12,000,000 should not be allowed. The opinion of the Supreme Court is by Mr. Justice Peckham. In the margin of the report of the opinion is an announcement made by Mr. Justice Peckham which contains the following statement:

"The estimated increase in the value of these franchises as made by the trial court at the time of the commencement of this suit is only an estimate and is not based upon evidence sufficient to warrant the finding of any increase whatever over the amount agreed upon at the consolidation."

In the present case there is no question concerning the valuation of a franchise. The corporation makes no claim for the value of its franchise, and no valuation is placed upon it in these proceedings. Upon this question alone the case is to be widely distinguished from the Willcox Case. Furthermore, in that case, as in the Knoxville Case, no question as to a temporary injunction was involved. That stage of the proceedings had been passed in both cases, and the question was as to the validity of rates determined upon final decree. The application here is for a temporary injunction pending inquiry into the facts of the case in accordance with a method of procedure fair both to the public and to the public service corporation.

[1] We come now to the question of valuation, and we commence the inquiry with this rule for our guide:

"There must be a fair return upon the reasonable value of the property at the time it is being used for the public." *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757, 19 Sup. Ct. 804, 811 (43 L. Ed. 1154); *Same v. Jasper*, 189 U. S. 439-442, 23 Sup. Ct. 571, 47 L. Ed. 892; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19-21, 29 Sup. Ct. 148, 53 L. Ed. 371.

[2] The inquiry will also be aided by another rule, that if the valuation of any one of the necessary elements of the public service plant is fixed by the rate-making authorities at an amount unjustly and unreasonably low in a substantial amount, or if the value of an element of substantial value used and useful in maintaining or operating such a plant is entirely omitted by the rate-fixing authority, such unreasonable and unjust valuation or omission of valuation is the taking of private property for a public use without just compensation.

[3] We will now proceed to consider the evidence before us on this motion. It appears that the complainant, in the month of August, 1912, acquired the property of the Pacific Gas & Electric Company by purchase for \$557,500, in cash; such purchase being all of the outstanding stock of the company. That said company was then and now is subject to a lien of a certain trust securing outstanding bonds of the company amounting to \$670,000. The total purchase price of the stock and the outstanding bonds, in August, 1912, amounted therefore to the sum of \$1,227,500. This amount the complainant contends was the market value of the property at that time; it having purchased in the open market after diligent inquiry as to its value. It is alleged in the complaint, and there is evidence in the record sustaining the allegation, that the books of the company show that the company and its predecessor have laid out and expended in actual cash for construction and material used in the construction of the plant the sum of \$937,563. This sum is claimed to be the actual cost of the plant. There has also been a valuation made by certain engineer experts for the company showing that the value of the property as of June 30, 1912, was \$1,180,000; this valuation is designated as the cost of reproduction. The Corporation Commission of Arizona has also made a valuation of the property based upon expert evidence and has fixed the value of the plant at \$511,234.69; and upon this latter valuation the Corporation Commission has fixed the schedule of rates which is the subject of complaint in this action. The complaint is that the valuation placed upon the property of the corporation by the Corporation Commission is unlawful, unjust, unreasonable, and confiscatory, and does not represent the true present value or the true, just, and fair valuation of the property of the corporation for the purpose of rate making or for any purpose whatever.

The plant of the Pacific Gas & Electric Company consists of two service systems, one an electricity producing and delivery plant, and the other a gas producing and delivery plant. The expert engineers on the part of complainant value the electric plant at the sum of \$788,000 and the gas plant at \$392,000, making a total of \$1,180,000. The Corporation Commission has valued the electric plant at \$318,902.73 and the gas plant at \$192,331.96, making a total valuation as above stated of \$511,234.69. This value of the property of the company by the Corporation Commission is \$46,265.33 less than the amount paid by the complainant for the stock of the corporation alone; it is \$158,765.33 less than the outstanding bonds of the corporation alone, and is \$716,265.13 less than both stock and bonds combined; it is \$426,328.33 less than the actual cash expended for the construction and for the material used in the plant as shown by the books of the company, and is \$668,765.53 less than the estimated cost of reproduction as shown by complainants' experts. The Corporation Commission has fixed the rate of return which the plant should be allowed to earn upon the valuation of \$511,234.69 at 8 per cent. per annum, and upon this valuation and return the Corporation Commission has fixed the rates that are to be charged to the customers of the company. There is complaint that the return of 8 per cent. per annum is too low in com-

parison with the returns realized on capital similarly invested in that locality. The claim is that the company should be allowed a return of 10 per cent. per annum upon the actual value of its plant. The substantial complaint at this time, and for the purpose of this motion, is that the valuation made by the Corporation Commission of the property of the company used and useful in the operation of its plant is unjustly and unreasonably low and does not allow a return upon the investment. That is the question to which we will now direct our attention.

The question at issue upon this motion turns therefore upon the present value of the plant. Should the valuation be \$1,227,500, the amount of the outstanding bonds and the purchase cost of the stock of the corporation, that is to say, the market value, as claimed by the complainants; or should it be the appraised value of \$1,180,000 made by the expert engineers on behalf of the complainant, which is claimed to be the reproduction value of the plant; or should it be the actual cost of the plant as shown by the books of the corporation, namely, \$937,563; or should it be the value placed upon the plant by the Corporation Commission, namely, \$511,234.69? There is here a wide difference in the valuations; so wide, indeed, that a satisfactory adjustment of the entire question is impossible at this time, and we will not attempt it. All that we can do now is to examine the differences on broad lines and ascertain in a general way whether the valuation placed upon the plant by the Corporation Commission is reasonable and just. For that purpose we will take the valuation made by the expert engineer Francis S. Viele as a basis for comparison. In this way we will develop the main differences between the two valuations. Mr. Viele states his qualifications as expert engineer very fully, as follows:

"I am a graduate of the Massachusetts Institute of Technology in the department of electrical engineering. I have had twenty years' experience in the construction and operation of electric properties of all kinds, and have of my own knowledge accurate information on costs. I was for ten years the head superintendent of construction for the Standard Underground Cable Company of Pittsburgh, and handled personally construction work in excess of \$15,000,000. As assistant to the president of the General Electric Company for three years, I had charge of the investigation of electric properties, with reference to the cost, earning power, and proper price at which to value such property, and in this capacity investigated properties in every part of the United States, and on my advice many properties were financed. Since 1906, I have been president of the Electric Operating Construction Company of New York, and had active charge of the business of that company particularly with reference to the financing of the enterprises constructed and operated by the company."

He explains his valuation of \$1,180,000 as follows:

"Said valuation of \$1,180,000 is arrived at by me as follows:

"Careful examination of all vouchers of this company for the last seven years was made by Lee & Plunkett, public accountants, employed by the commission at the hearing referred to in the bill of complaint herein, and a tabulation of the unit price of all material purchased during that time was made by them. From these figures are determined the average prices of all material for a period of five years past; these prices applied to the quantities of material in use by the company on June 30, 1912, thus showing the actual cost to reproduce the physical property, based on average prices for the last five years.

"The reproduction cost (new) of the physical property was depreciated to secure the present value of the physical property; the amount of depreciation being determined by actual inspection of all such apparatus as could be inspected at the present time. To such apparatus as could not be inspected, the ordinary accepted theoretical annual depreciation was applied.

"The results obtained are summarized as follows:

Present value of physical property in use June 30, 1912.....	\$ 563,034 00
Overhead charges (actual).....	112,607 00
Working capital.....	50,000 00
Proportionate value of power contract with United States government due to 7 years' unexpired term, which contract has yet to run.....	110,000 00
Accrued deficits based on a reasonable return on money invested since organization of company.....	282,000 00
Discount on bonds.....	63,000 00
Less, for round figures.....	641 00
	<hr/>
	\$1,180,000 00"

Let us examine this valuation somewhat in detail as to units and compare it with the same units in the valuations made by the Corporation Commission. Mr. Viele fixes the present value of the physical property in use June 30, 1912, at \$563,034. The Corporation Commission values the unit at \$437,459.63; the difference being \$125,570.37. Mr. Viele values the overhead charges at \$127,607. The Corporation Commission values it at \$50,276.06; the difference being \$62,330.94. Mr. Viele values the working capital at \$50,000. The Corporation Commission values this unit at \$23,500. For the proportionate value of the power contract with the United States government, due to seven years' unexpired term, Mr. Viele places the value at \$110,000. No valuation whatever is made by the Corporation Commission for this unit. For the item designated in the appraisalment as accrued deficits based on a reasonable return on the money invested since organization of the company, Mr. Viele places the value at \$282,000. This item is explained as the value of the company as a going concern. No valuation of this item is made by the Corporation Commission. For discount of \$63,000 on the bonds no allowance is made by the Corporation Commission. There is another item not mentioned in Mr. Viele's appraisalment which should be considered, and that is a reserve fund of \$64,292.97 on hand in the treasury of the company, having been acquired as a reserve fund for the purpose of keeping the plant in repair. This item is not allowed by the Corporation Commission.

Returning now to the difference in the present physical valuation of the plant, we find it is made up chiefly of the amount estimated for depreciation. An estimate for depreciation is, of course, correct. The question is as to the amount which should be allowed for depreciation. The Corporation Commission estimated the value of the various physical units, and then estimated that the plant had depreciated at the rate of 7 per cent. per annum, which for an average of, say, seven years, would be 49 per cent. for the total depreciation upon the whole plant, leaving the present value of the plant only 51 per cent. of its original value. The experts for the complainant made an examination of the various units of the physical properties and as far as possible made an

actual valuation of each unit, and when that was not possible then an estimated depreciation was made.

Turning now to the affidavit of R. S. Masson, an expert engineer, and one of the experts who valued the plant for the company, we find the following uncontradicted statement concerning the plant:

"Condition of Property. The gas and electric plants of Pacific Gas & Electric Company are in good and efficient condition. All parts of the electric generating plant are modern, up-to-date installations, including turbo-generators, water tube boilers, condensers, oil and lamp black burning apparatus, etc. There is an ample water supply obtained from wells. The new gas generating plant is a modern, up-to-date reversible Lowe water gas apparatus. Both plants are housed in brick buildings with steel truss roofs covered with fire-proof material. Neither plant could be improved upon anywhere. The electric distributing system is the most modern type for distribution in cities of this character, and all the lines, transformers, and service equipment are of the latest, most improved type. The gas distributing system includes ample mains well laid, the greater portion of which have been installed during the last three years. This distributing system is in the best possible condition and of the most up-to-date qualifications. The utility equipment of the company is also of the latest design, including automobile trucks and the latest office labor-saving devices."

It would seem that, if the plant is in the condition set forth in this statement, a deduction of 49 per cent. from its original value for depreciation, or approximately that percentage, is excessive; but to what extent it is excessive we do not now determine. We call attention to the statement for the purpose of referring to the fact that the plant appears to have been kept in repair and is now in good condition. In the Knoxville Case the Supreme Court commended this method of preserving the integrity of a public service plant. The court said:

"Before coming to the question of profit at all, the company is entitled to earn a sufficient sum annually to provide not only for current repairs but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning. It is not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation at least, its plain duty to the public."

This brings us to a peculiar feature of this case. There was on hand in the treasury of the company at the time of the valuation of the plant the sum of \$64,292.67, accumulated for the purpose of meeting the expense of current repairs and for replacing such parts of the property as had been worn-out and the life of the part ended. The fund had been withheld from the stockholders that it might be used in preserving the plant in good condition and in proper efficiency. This was good business judgment on the part of the officers of the corporation and must be approved. Public service corporations are to be encouraged in maintaining their plants in a proper state of efficiency. We are of the opinion that the Corporation Commission was in error in its estimate of depreciation of this plant, and particularly was in error in omitting this reserve fund from its valuation of the plant.

There is another feature of the case which appeals to us for con-

sideration, and that is the valuation of the contract with the federal government for power. The company values the remaining term of this contract at \$110,000; the Corporation Commission omitted it altogether. It appears that the Reclamation Service, proceeding under the provisions of the Act of Congress of June 17, 1902, c. 1093, 32 Stat. 388 (U. S. Comp. St. Supp. 1911, p. 662), formed a project for impounding the waters of Salt river at a point about 75 miles from Phoenix with a structure called the Roosevelt Dam. The project contemplated the distribution of water for irrigation of about 200,000 acres of land near Phoenix and for supplying electric light and power to the inhabitants of the same territory. The Reclamation Service found the predecessor of the present company in possession of certain water rights and a plant with which it was supplying electricity to the inhabitants of Phoenix. The plant cost originally \$189,000, and in these proceedings it is designated as the Desert Plant. When the government came to establish its project on Salt river, it was deemed necessary to acquire this Desert Plant, together with the water rights of the complainant's predecessor, and negotiations were accordingly opened with the company with that object in view. The negotiations resulted in a contract under which the Desert Plant, together with the water rights, were secured, and in consideration thereof the Reclamation Service agreed to deliver to the company electricity at the rate of $1\frac{1}{2}$ cents per kilowatt for the term of ten years. This contract was submitted to the Secretary of the Interior and the Attorney General of the United States, at Washington, and was approved by them and agreed to by all parties in interest. The acting Attorney General in his letter of approval has this to say about this contract:

"As recited in the contract itself, and as shown by the records of this department, the Pacific Gas & Electric Company was the owner of certain water rights in canals within the physical limits of the reclamation project, and, pursuant to the policy of merging all irrigating canals in Salt River Valley in the government reclamation project, so that when completed and paid for the water users would control all irrigation works therein, it was deemed necessary to acquire the rights of the electric company. Such an adjustment was reached through the contract in question wherein the electric company surrendered and conveyed to the United States all of its rights, and in lieu thereof the United States agreed to furnish to the company in the city of Phoenix, Ariz., a specified amount of electrical energy generated at works of the United States of the Roosevelt Reservoir. For this energy the company obligates itself to pay $1\frac{1}{2}$ cents per kilowatt hour for all power furnished and consumed, the receipts therefor being credited to the Salt river project, thereby operating to reduce the charges payable by the landowners and irrigators therein. The contract was for a term not exceeding 10 years."

Under this contract the present corporation is receiving electricity from the Reclamation Service which it supplies to its customers; it takes the place of a plant which cost \$189,000. The contract went into effect in 1909 or 1910 and has six or seven years to run. The value of the remaining term is estimated by the complainant at the sum of \$110,000. We are of opinion that this contract has a substantial value for the company, but what that value is we do not now determine. We think the Corporation Commission should have given this contract a reasonable valuation in view of all the circumstances of the case, and

that the omission to make such valuation was a substantial error in the proceedings.

We come next to the valuation of what is termed the working capital. The experts for the complainant value this item at \$50,000. The Corporation Commission valued it at \$23,500. We think the latter sum is too small for the current business of the corporation. The corporation must carry a certain amount of supplies and should pay its bills for repairs and supplies at the end of the week or month as they come due and should not be obliged to await the collection of its revenues from the rates collected by the company from its customers. There is always more or less delay in collecting rates. The company should therefore have constantly on hand what might be termed a revolving fund to pay its own current obligations and keep its credit good and enable it to transact its business promptly and satisfactorily to everybody concerned. We think that a working capital of \$50,000 is a reasonable capital for the corporation in this case and should be allowed as a valuation in its plant.

[4] There is also a question as to the item of overhead charges. This item is not very clearly defined, but appears to include the expenses that would necessarily be incurred in the reproduction of the property. It includes the legal expenses of organization and the expenses for office, engineering, inspection, supervision, and management during the period of construction; it would also include fire and casualty insurance, taxes, and interest during the period, contractors' profits, and other minor expenses of like character. The complainant's experts estimated this valuation at 20 per cent. on the physical valuation of the material and cost of construction entering into the plant; the Corporation Commission has estimated it at 12 per cent. of the physical valuation of the materials and cost of construction as they have estimated these elements. Complainant's criticism of this estimate is that it is too low and does not include all the expenses that necessarily enter into the reproduction of such plant. We think this estimate needs further consideration and probable revision in a final valuation of this item.

With respect to the item of accrued deficits based upon a reasonable return on the money invested since the organization of the company, estimated by the experts at \$280,000, and for which no allowance was made by the Corporation Commission, we have not had time to examine the evidence with respect to this item. As has been stated, this is the valuation of a going concern as distinguished from the bare bones of the corporation. The courts recognize a difference between the value of a plant of this character, without customers or business, and a plant that has been fully established and connected up with a municipal lighting system and with the houses, business places, and factories of regular customers. The present corporation was in August of last year a going concern; it was connected up with the municipal lighting system, the houses, business places, factories, and other institutions of a prosperous community, and there was nothing more to do except to deliver the service, for which the corporation was fully and efficiently equipped. We think this element of valuation should be

considered in connection with the other elements of valuation with the view of determining the actual present value of the whole plant.

We think, for the reasons stated, we are justified in awarding an interlocutory injunction. The differences to which we have referred between the valuation of the plant of this corporation as made by the Corporation Commission and the experts for the company are so great that we think the subject is one for judicial investigation. In the meantime the status quo should be maintained. In making this order, however, we must take into consideration the possibility that upon a careful consideration of all the facts in the case the court may reach the conclusion that the findings and orders of the Corporation Commission are substantially correct, and for that contingency we must require security that will fully protect the customers of the company in their rates. This is an embarrassing and a difficult problem to deal with. Both my Brother VAN FLEET and myself have had trouble in other cases in dealing with the fund arising out of the difference between the lower and the higher rates in these controversies. We have come to the conclusion, however, that the order we will make in this case will dispose of that question effectively and secure substantial justice to all concerned. It appears from the evidence that the difference between the amount received by the company from its present rates and the amount that would probably be received under the rates fixed by the Corporation Commission would be about \$3,000 per month, or \$36,000 per year. A final decree may not be reached in this case inside of a year. I am sure the case will not be delayed by the court in Arizona, but delays are unavoidable from various causes, and we should provide for a safe margin. We are of the opinion therefore that a temporary injunction should issue upon complainants giving a bond in the sum of \$50,000. We are of the opinion further that this order should provide that the company shall file with the clerk of the court, conveniently after the first day of each month, a statement of the amount collected from each of its customers, together with a statement of the amount that would have been collected had the rates of the Corporation Commission been in force, and that when a final decree is entered, if it shall be determined that the rates of the Corporation Commission should have been adopted by the company, then and in that event the difference between these rates and the rates collected shall be paid to an officer of the court—a special master—and be distributed by the special master to the various persons entitled to receive the same. We will provide further that the amounts paid to the master by virtue of the final decree shall carry interest at the rate of 6 per cent. per annum for the term during which the company had the use of the money. It is not the order that the company shall pay any money into court until the final decree is entered, and then only if the final decree adjudges that the rates prescribed by the Corporation Commission are valid rates; in that event the company will pay the excess collected to the special master, together with interest at the rate of 6 per cent. per annum from the day the excess was collected. These amounts are to be paid within a time

to be fixed by the decree. The bond herein provided for may be given within 15 days from date.

Mr. Bullard: There is one matter that I would like to have understood: The question to be determined is not whether the rate is a proper rate as fixed by the Corporation Commission, but whether it is a confiscatory rate.

Judge MORROW: Oh yes, that is the question: Is the rate confiscatory in the sense in which that term is defined by law?

Judge SAWTELLE: And the bond must be satisfactory in form to the defendants' counsel.

Judge MORROW: Yes.

Mr. Kent: May I make just one suggestion, your honor? Is the bond to be given by the stockholders, that the company will carry out these matters?

Judge MORROW: The bond will only be required to be given in one case; the company can give it, or the stockholders can give it.

Mr. Bullard: Cannot an order be made by his honor Judge SAWTELLE consolidating these cases for all purposes? I do not see any reason why they should not be consolidated.

Judge VAN FLEET: I think they should be consolidated and treated as one case.

Judge SAWTELLE: Make an order to that effect, Mr. Clerk, consolidating the two cases.

Mr. Kent: Would it be within your honors' purview that if the Attorney General and myself and Judge SAWTELLE agree upon it, that the bond be given by the company instead of by the stockholders, if that turns out to be the most feasible plan?

Judge MORROW: That will be satisfactory to us. You can insert the conditions of the bond in such a way as will be entirely satisfactory to you all.

Mr. Bullard: There is one thing I want to be clear about, your honor, as it will be of importance for the Corporation Commission to understand it clearly. In speaking of this question of going value, did you intend to approve of the theory of going value to the amount specified by the experts for the complainant?

Judge MORROW: No. What we hold is that some amount should be allowed. On that element I have frequently been confronted with the question of the value of a going concern, and I have never yet been able to determine such valuation upon the evidence submitted, and we are not able to make it now in this case. We simply say it appears to have a value and the subject should be considered by the court.

Judge VAN FLEET. All that we are agreed upon here is that upon principle there should be a greater value attachable to a going concern than one which is merely in its initiative and not enjoying the benefit of patronage.

PENSACOLA STATE BANK v. MELTON et al.

(District Court, W. D. Kentucky, at Owensboro. December 19, 1913.)

1. ALTERATION OF INSTRUMENTS (§ 6*)—NOTES—DATE OF MATURITY—MATERIAL ALTERATION.

Under Kentucky Negotiable Instruments Law (Ky. St. § 3720b) § 125, providing that any alteration which changes the time of payment is a material alteration, an instruction that a change of the date of maturity of the note sued on from May 15, 1907, to May 15, 1908, without the authorization or consent of defendants, was a material alteration which released them from liability was proper.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 30-33; Dec. Dig. § 6.*]

2. NEW TRIAL (§ 41*)—PREJUDICE—INSTRUCTIONS.

Where a material alteration was pleaded as a defense to a note, plaintiff was not prejudiced by an instruction submitting to the jury whether the alteration was made before or after maturity, limiting the availability of the defense to a finding that it was made after maturity.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 67-71; Dec. Dig. § 41.*]

3. BILLS AND NOTES (§ 348*)—TRANSFER—"HOLDER IN DUE COURSE"—INDORSEE AFTER MATURITY.

Kentucky Negotiable Instruments Law (Ky. St. § 3720b) § 52, provides that a "holder in due course" is one who takes an instrument complete and regular on its face; becomes a holder before it is overdue, and without notice that it has previously been dishonored, if such is the fact; takes it in good faith and for value, and at the time it is negotiated to him has no notice of any infirmity therein, or defect in the title of the person negotiating it. *Held*, that where a note sued on when transferred to plaintiff showed on its face that the date of maturity had been altered from May 15, 1907, to May 15, 1908, and the transfer was made November 2, 1907, plaintiff was charged with notice by the instrument itself that it was overdue, and it was not a holder in due course, and hence the note was subject in its hands to the defense that it was given without consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 870-877½; Dec. Dig. § 348.*]

For other definitions, see Words and Phrases, vol. 4, p. 3380.]

4. BILLS AND NOTES (§ 497*)—INDORSEMENT AFTER MATURITY—INQUIRY—BURDEN OF PROOF.

Where plaintiff took a note by indorsement after maturity and made inquiry concerning the existence of defenses, the burden was on it to allege and prove it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1448, 1675-1681, 1683-1687; Dec. Dig. § 497.*]

5. BILLS AND NOTES (§ 538*)—INDORSEE—DEFENSES—WANT OF CONSIDERATION.

Where plaintiff was not a holder in due course of the note sued on, which it acquired after maturity, with notice that the date thereof had been altered without defendants' consent, an instruction that, though it was presumed that the note was given for a consideration, such presumption might be overcome by testimony was expressly authorized by Kentucky Negotiable Instruments Law (Ky. St. § 3720b) § 28, giving a right to defend on that ground.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1895-1898, 1900-1910; Dec. Dig. § 538.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. **BILLS AND NOTES (§ 351*)—INDORSEMENT—NEGOTIABLE INSTRUMENTS LAW—CONSTRUCTION.**

Kentucky Negotiable Instruments Law (Ky. St. § 3720b) § 124, provides that, when a negotiable instrument is altered without the consent of all the parties liable thereon, it is avoided except as against the party who has made, authorized, or assented to the alteration, and subsequent indorsers, or when an instrument has been materially altered, and is in the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to its original tenor. *Held*, that the last clause of such section did not apply to a case where the note had been materially altered after it was overdue, though it was thereafter indorsed and delivered to plaintiff, which was not a party to the alteration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 878-881, 882½-885; Dec. Dig. § 351.*]

7. **BILLS AND NOTES (§ 538*)—TRANSFER—ACTION BY INDORSEE—INSTRUCTIONS.**

Ky. St. § 474 provides that all bonds, bills, or notes for money shall be assignable so as to vest the right of action in the assignee, but, except in cases of bills of exchange, shall not impair the right to any defense, discount, or set-off that defendant might have used against the original obligee, or any immediate assignor before notice of the assignment. Florida Gen. St. 1906, § 1465, provides that the assignment or indorsement of a note shall vest in the indorsee the same rights, powers, and capacities as might have been possessed by the assignor or indorser; that he may bring suit thereon, and that it shall not be necessary for plaintiff to allege the consideration on which the note was given, or to prove such consideration, or the execution of the instrument, unless it shall be impeached by defendant under oath. *Held*, that in a suit in the federal court sitting in Kentucky, on a note transferred to plaintiff in Florida, after maturity, an instruction that the indorsement and delivery of the note to plaintiff passed the legal title, and authorized plaintiff to sue thereon in his own name, was proper.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1895-1898, 1900-1910; Dec. Dig. § 538.*]

8. **JUDGMENT (§ 617*)—DEFENSES CONCLUDED—ACTION ON NOTE.**

Where a note sued on was transferred to plaintiff after maturity, a decree in an equity suit confirming plaintiff's title to the note did not affect the right of defendant to take advantage of any defense thereto which would have been available as against the payee.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062, 1130, 1134; Dec. Dig. § 617.*]

9. **NEW TRIAL (§ 35*)—GROUNDS—RULINGS ON EVIDENCE.**

Alleged error in the admission of testimony on an issue presented by defendants, which the court charged was not maintainable, is not available to plaintiff as a ground for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 51-55; Dec. Dig. § 35.*]

10. **STIPULATIONS (§ 14*)—CONSTRUCTION—WITNESSES.**

Where a written stipulation provided that it should be read as testimony, subject to exceptions for incompetency and irrelevancy only, it constituted an express waiver by plaintiff of all objections to the competency, as witnesses, of the parties to the transaction, leaving for determination only whether the testimony was competent or relevant.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.*]

11. **WITNESSES (§ 159*)—COMPETENCY—TRANSACTION WITH INSANE PERSON.**

Where, in an action on a note, the date of maturity of which had been altered, there was no direct proof that S. made the alteration, nor, if he did so, that the alteration was a transaction between him and any one of

defendants, or that he made any statement to them concerning it, testimony of defendants that they did not authorize or consent to the alteration was not objectionable as a statement of, or relating to, a transaction with S., who was insane, within Ky. Civ. Code Prac. § 606, providing that parties to a suit may testify except as to any verbal transaction with, or statement of, any person who is of unsound mind, and was therefore admissible on the issue of material alteration.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 629, 664, 666-669, 671-682; Dec. Dig. § 159.*]

Action by the Pensacola State Bank against R. E. Melton and others. On motion for new trial. Denied.

John B. Baskin, of Louisville, Ky., for plaintiff.

W. T. Ellis, and Jas. J. Sweeney, both of Owensboro, Ky., for defendants.

EVANS, District Judge. The plaintiff against which the verdict of the jury went has moved for a new trial, and has specified nine grounds upon which it seeks that relief. The ninth of these grounds is subdivided into eight other grounds. Laying aside for the present the first eight of the grounds urged, and which relate to questions of testimony, we will first dispose of the ninth ground and its subdivisions, all of which relate to the charge to the jury.

[1] 1. The plaintiff in its petition shows, and the fact is nowhere disputed, that the makers of the note sued on, on its face, made it payable on May 15, 1907. The plaintiff also shows, and it is also undisputed, that the figures "1907" were changed to "1908," and avers that this was done "*without the knowledge or consent of plaintiff or defendants.*" Besides, there was no testimony to show that either of the defendants authorized or consented to the alteration, and in fact they testified that they had done nothing of the kind, and had no knowledge of the alteration until the note was sued on. This being the situation, the court charged the jury that if the alteration was made after May 15, 1907, without the authorization or consent of the defendants, the alteration was a material one and discharged the six defendants from liability thereon. The jury returned a verdict as follows: "We, the jury, after deciding that this note was changed after May 15, 1907, find for the defendant. T. W. Anderson, Foreman."

It is objected that the charge in respect to this matter was erroneous, but it would seem to be obviously correct. Section 125 of the Negotiable Instruments Act (section 3720b, Ky. St.) provides that:

"Any alteration which changes * * * (3) the time * * * of payment * * * is a material alteration."

This, like most of the provisions of the act, is but a declaration of the common law, and abundantly supports the charge. Besides many Kentucky cases which support this elementary proposition, we may quote from what the Supreme Court said in *Mersman v. Werges*, 112 U. S., at page 141, 5 Sup. Ct. 65, 28 L. Ed. 641, as follows:

"A material alteration of a written contract by a party to it discharges a party who does not authorize or consent to the alteration, because it destroys the identity of the contract, and substitutes a different agreement for that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

into which he entered. In the application of this rule, it is not only well settled that a material alteration of a promissory note by the payee or holder discharges the maker, even as against a subsequent innocent indorsee for value; but it has been adjudged by this court that a material alteration of a note, before its delivery to the payee, by one of two joint makers, without the consent of the other, makes it void as to him."

[2] 2. Objection is also made that the court left it to the jury to say whether the alteration was made before, or was made after, May 15, 1907, but if there was any question in the case, that was it. While we doubted whether the alteration of the date of payment was not a material one, even if made *before* maturity, we gave plaintiff the benefit of the doubt, and held the defense of material alteration good only in the event it was made *after* the note was overdue, viz., after May 15, 1907, and so charged the jury. We can see no error in this, as the charge left it to the jury to find for the plaintiff if the alteration was made before the maturity of the note, but for defendants if made afterwards.

[3] 3. We are quite sure that what we have said makes it clear that the defendants were entitled to a verdict upon the sole ground of material alteration, if that was made after May 15, 1907. But there was also a defense that there was no consideration for the note. Considerations very similar to those respecting the material alteration apply to this defense also. That is to say, if the note was indorsed and delivered to the plaintiff after May 15, 1907, when it became due, then the indorsee acquired no rights superior to those of Scudamore, and if the want of consideration could have been pleaded as against him, so it can be pleaded against a holder who did not get the note in "due course." In such circumstances the new holder acquired no right superior to Scudamore's.

Section 52 of the Negotiable Instruments Act provides that:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"First. That the instrument is complete and regular on its face.

"Second. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

"Third. That he took it in good faith and for value.

"Fourth. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Here it is quite apparent that when plaintiff took the note it was neither complete nor regular on its face, because the alteration plainly appeared thereon. It is certain that when plaintiff took the note it was long "overdue," and it is equally clear that plaintiff had notice of the alteration. It could be seen, and as that was a fact which should have put the plaintiff upon inquiry, it was equivalent to notice of whatever fact the inquiry would have developed. It is obvious that if plaintiff had inquired of the makers before taking the note, the fact of alteration would have been made clear. So we conclude that the plaintiff did not become a holder "in due course" when it took the note by indorsement from Scudamore, the payee, on November 2, 1907. The following illustrative cases may be noted: *Wilkins v. Usher*, 123 Ky. 696, 97 S. W. 37; *First National Bank v. Shue*, 119 Mich. 560, 78 N.

W. 647; *Pierson v. Huntington*, 82 Vt. 482, 74 Atl. 88, 29 L. R. A. (N. S.) 695, 137 Am. St. Rep. 1029; *Limerick National Bank v. Adams*, 70 Vt. 132, 40 Atl. 166. Under these circumstances the court told the jury that plaintiff was put upon inquiry, and in this we think we were amply supported by what the Supreme Court said in *United States v. Linn*, 1 How. 104, 11 L. Ed. 64, and in *Smith v. United States*, 2 Wall. 232, 17 L. Ed. 788.

[4] If the plaintiff made inquiry, as this rule requires, it was its duty to allege and prove it. It did not devolve on the defendants to show that plaintiff did not do what the rule exacted of it.

[5] 4. In its charge to the jury the court told them that the note on its face stated that it was given for value received, and that presumptively this was true, though it was a presumption that might be overcome by testimony. The plaintiff insists that this last proposition is not correct. There has always been room for a plea of no consideration when suit was brought upon a note which, per se, carried a presumption that it was based upon a valid consideration, and section 28 of the Negotiable Instruments Act expressly gives the right to defend on that ground. It is too clear to require citation of authority that the charge was perfectly correct in this connection, qualified as it was with the condition that the alteration of the note must first be found to have been made after it became due on May 15, 1907. The jury found the essential fact, and it followed that the plaintiff which took the note on November 2, 1907, took it after the alteration and after it was past due. Plaintiff, therefore, held it subject to the defense of no consideration precisely as Scudamore would have held it if no transfer had been made by him. We are not quite sure what plaintiff's counsel means when stating that there is no evidence in the record of want of consideration. The uncontradicted testimony of each of the defendants in the clearest manner shows that there was no consideration for the note.

[6] 5. As we have seen, the plaintiff alleged in its petition that the note was altered from "1907" to "1908" "without the knowledge or consent of plaintiff or defendants." While the absence of knowledge or consent on plaintiff's part was probably alleged to meet the terms of section 124 of the Negotiable Instruments Act, the court charged the jury that it was immaterial whether the alteration was made without plaintiff's knowledge or consent if it was made after May 15, 1907. Section 124 is in this language:

"Where a negotiable instrument is materially altered without the assent of all the parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

We have seen how section 53 has defined the phrase "holder in due course," and we cannot doubt that the last clause of section 124 does not embrace a case where the note has been materially altered after it was overdue, even though it has thereafter been indorsed and delivered to another holder without his having been a "party to the alteration." That clause of the section must necessarily be restricted to notes

the integrity of which has not been interfered with by unauthorized and material alterations made after maturity. This view is particularly applicable where, as here, the note when indorsed to plaintiff on its face plainly showed the change. We think it is wholly inadmissible to construe section 124 as putting such a note upon a footing as favorable as that of one which had not been tampered with. It would not do, we think, to hold that the payee of a note may, after its maturity, alter it as he might please, and by thereafter indorsing it bind the makers on a new writing, of which they had never heard and to which they had never assented, precisely as if they had actually made the new contract. Especially must this view be emphasized when the indorsee ignores the alteration made manifest on the face of the paper he receives. The makers have rights which cannot be defeated by having a new contract made for them without their consent or knowledge. The last clause of section 124 goes to the verge of legislative power in enforcing a new contract where the alteration was made before maturity, but except within the precise language of that clause a material alteration discharges the makers of a note. Here it follows that the indorsee cannot have the same rights as would one who received the note in due course before maturity.

[7] 6. The plaintiff also contends that the court erred in telling the jury that the indorsement and delivery of the note to the plaintiff in Florida passed the legal title to it, and authorized it to sue thereon in its own name. How this charge can in any way prejudice the plaintiff we have not been informed, and cannot conceive, especially as section 51 of the Negotiable Instruments Act gives plaintiff the right to sue in its own name.

The plaintiff alleges title in the note, and no one disputes it. It has sued thereon in its own name, and nobody has objected. What more it wants in this connection is not clear. The note was executed and delivered to Scudamore in Kentucky, the forum of this suit. Even though he passed it to the plaintiff as collateral security, the legal title passed by the indorsement and delivery to plaintiff. Section 474, Kentucky Statutes, is as follows:

"All bonds, bills, or notes for money or property shall be assignable so as to vest the right of action in the assignee; but except in cases of bills of exchange, not to impair the right to any defense, discount or off set that the defendant has or might have used against the original obligee, or any intermediate assignor, before notice of assignment."

The assignee becomes the absolute owner, subject to defenses. This statute was construed in *Prather v. Weissiger*, 10 Bush, 117, and in *Garrott v. Jaffray*, 10 Bush, 413. See, also, *Levy v. Rudolph*, 56 S. W. 988, 22 Ky. Law Rep. 258, 260, where the note was taken as collateral only. We think it probable that as the note sued on here was dishonored and overdue, and especially as it had been discharged by a material alteration when taken by plaintiff, it was no longer a "negotiable instrument," even under section 47 of the act, but was subject to the statute just copied and the decisions to which we have just referred.

Besides, the indorsement and delivery to plaintiff were made in

Florida. The law of the place of that contract is found in section 1465, Florida General Statutes (Ed. 1906), which is as follows:

"All bonds, notes, covenants, deeds, bills of exchange, and other instruments of writing not under seal, shall have the same force and effect (so far as the rules of pleading and evidence are concerned) as bonds and instruments under seal.

"The assignment or indorsement of any such instruments of writing shall vest the assignee or indorsee with the same rights, powers and capacities as might have been possessed by the assignor or indorser. And he may bring suit thereon, and it shall not be necessary for the plaintiff in any suit upon an instrument assignable by law to set forth in the declaration the consideration upon which the instrument was given, or upon which such assignment or indorsement was made, nor to prove such consideration or the execution of such instrument, unless the same shall be impeached by the defendant under oath. An executor or administrator, however, may deny the execution or consideration aforesaid by plea not under oath."

7. Though section 51 of the Negotiable Instruments Act expressly provides that the holder of a negotiable instrument may sue thereon in his own name, the plaintiff seems to prefer to claim title to the note and the right to sue thereon under a decree rendered by the United States Circuit Court for the Eastern District of Illinois in a cause in equity therein pending, wherein the plaintiff in this action was complainant and G. C. Scudamore and the defendants in this action were defendants. A complete transcript of the record in that suit, and which we shall call the Illinois case, was made part of the record in this suit by an amended petition filed herein on the 28th day of April, 1913. It is not impossible that more importance has been given the Illinois case than it deserved. It seems to us that we gave it its full effect on this case when, in the charge, we assumed that the decree therein confirmed the plaintiff's title to the note sued on, but that it could not in any way be held to deprive the defendants of the right to plead herein the defenses set up in their answers. The accuracy of this conclusion seems to admit of no discussion, but it may be well to state our idea somewhat more fully.

The Illinois suit was brought under section 8 of the Judiciary Act of March 3, 1875, c. 137, 18 Stat. 472, compiled as section 629 of the Revised Statutes (U. S. Comp. St. 1901, p. 513), and later made section 57 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1102 [U. S. Comp. St. Supp. 1911, p. 152]), though the latter was not in force when the Illinois suit was brought.

Section 8 is as follows:

"That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks;

and in such case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein; within such district, and when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state: Provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

The equity suit under the statute was necessarily a very special proceeding. The defendants lived elsewhere, and were to be proceeded against by substituted or constructive service of process, and the jurisdiction of the court in such cases is very specifically limited, and cannot be maintained unless the statute is strictly complied with, nor unless the facts upon which jurisdiction is based are clearly shown. No presumptions favorable to jurisdiction are to be indulged. *Ex parte Smith*, 94 U. S. 455, 456, 24 L. Ed. 165. When we compare the averments of the bill with the provisions of the statute we find how far short of the latter the former come, and when we examine the testimony heard in the equity suit we see how this situation is emphasized. We need not go into the details, as we have already done so in an opinion delivered March 10, 1913, in which the matters pertaining to the Illinois suit were fully discussed. For present purposes we shall content ourselves with saying: First, that that bill does not allege that the note was "within the district" where the suit was brought; second, that the testimony in that case unmistakably shows that the note was not then "within" that district, but was in the state of Florida, where it was then in the possession of plaintiff's predecessor, who alleges itself to be and was in fact the holder thereof; third, that its situs was therefore in Florida, and not in Illinois; and, fourth, that the note never was in the state of Illinois until it was voluntarily sent there as an exhibit in the deposition of one of the plaintiff's witnesses in the case long after the suit in equity was filed on January 4, 1911. The defendants were at most the mere makers of the note, although they claim to have a defense to it. They never claimed any interest in or title to the note, either equitably or otherwise, nor are they alleged in the bill to have done so. Nevertheless the court in which the equity suit was pending decreed, not only the relief prayed for in the bill, but greatly more.

[8] It is not necessary for us definitely to determine what, if any, effect the decree in the equity suit had on the rights of the plaintiff as between it and Scudamore, but we shall assume that its effect was to confirm plaintiff's *title* to the note as against any claim that Scudamore

had. But that result, while it possibly may make clearer plaintiff's right to sue in its own name, cannot affect nor interfere with the right of the defendants to make any available defense to the note. So that, as between the plaintiff and the defendants now before the court, the equity suit was altogether inefficacious and futile, except as it confirmed plaintiff's title as against Scudamore's.

[9] 8. This brings us to the consideration of the first ground urged for a new trial, which has relation to the testimony of J. B. Ramsey. It is rather remarkable that this ground, in the main, complains of the admission of testimony bearing upon the change of the *place of payment* of this note, as to which defense the court explicitly charged the jury that it was not maintainable. How the admission of such testimony prejudiced the plaintiff, naturally enough, is not explained. The defendants might have lost the verdict, in which event *their* bill of exceptions might have brought up the question. Other parts of the testimony of J. B. Ramsey related to the defenses of material alteration and want of consideration, and will be treated of further along in connection with the testimony of the defendants on those two subjects. .

These remarks more or less apply to the second ground for a new trial, which covers the testimony of R. E. Melton, the third ground, which has reference to that of J. E. Thornberry, the fifth, which has reference to that of J. R. Ramsey, and the sixth, which has reference to that of E. J. Ramsey, the addition of whose name to the note we held did not invalidate it. As to the fourth ground, which relates to the testimony of H. C. McDaniel, and the seventh, which relates to that of C. H. Wettreau, there need be no further reference than to say that, whatever weight may have been attached to this part of the testimony, it was obviously competent and relevant to the issues involved, or, so far as not so, was perfectly harmless to plaintiff.

9. The eighth ground for a new trial has relation to the action of the court in passing on the tenth of plaintiff's exceptions to the agreed testimony. We need only repeat here what we said on the subject in the opinion handed down on the first instant as follows:

"The tenth of plaintiff's exceptions is involved and objectionable in form, but, these matters apart, we will dispose of this exception also. It has reference to certain parts of the contents of a stipulation in writing filed on October 27, 1913, which stipulation is to be read as testimony subject to exceptions thereto for 'incompetency and irrelevancy only.' No objection has been made, or could, under the stipulation, have been made to the competency as witnesses of J. B. Ramsey, R. E. Melton, J. E. Thornberry, T. J. Pike, J. R. Ramsey, or E. J. Ramsey, and exception No. 10 is expressly based upon and limited to the ground that the 'statements' of said persons as specifically set forth in the stipulation are 'incompetent and irrelevant.' We are of opinion that what we must call the subclauses of exception No. 10, to wit, subclauses 1 and 7 and those parts of subclauses 2 and 5 which refer to the blank originally left in the note sued on, those parts thereof which refer to the filling of that blank with Scudamore's name, and those parts thereof which refer to the change made in the note whereby the words 'First National Bank of Seabee' were substituted for the words 'Bank of Seabee,' related to matters which are 'incompetent and irrelevant,' and to the extent indicated plaintiff's exception No. 10 will be sustained. But exception No. 10, so far as it relates to other matters covered by and contained in said stipulation, is overruled.

We think this disposition of the question was entirely proper.

[10] 10. The agreement of the parties just referred to was in writing, and we think must be lived up to. Accordingly nothing remains but to determine whether the testimony of the various parties to the note sued on is "incompetent and irrelevant" within the language of the agreement so far as it bears: First, upon the question of the material alteration of the note; and, second, upon the defense of no consideration for the note. Section 606 of the Kentucky Civil Code of Practice regulates the competency of witnesses. It authorizes parties to the suit to testify, but excepts from the general rule their testimony as to any verbal statement of or transaction with a person who is of unsound mind. We have reached the conclusion that the only fair interpretation of the agreement is that it is an express waiver by the plaintiff of all objection to the competency *as witnesses* of the parties to the transaction with Scudamore, thus leaving to be determined only the question of whether the testimony of the parties to the note is competent and relevant to either one of the defenses to which we have just referred.

[11] As to the defenses of material alteration of the note, it will be observed that the testimony does not have reference to a "statement of" or to a "transaction with" Scudamore. We regard it, therefore, as perfectly clear that the testimony of the defendants to the effect that they did not authorize or consent to a change of the date of maturity of the note was not a matter which related to a "statement of" or to a "transaction with" Scudamore, who is insane. There was indeed no direct proof that Scudamore himself altered the note, and certainly none that, if he did so, it was a transaction between him and any one of the defendants, or that he made any statement to them about it. So that we are perfectly clear that as to this part of the testimony it was competent and relevant upon the issue of material alteration. Besides it is important to remember in this connection that the plaintiff's petition alleges that this alteration was made without the consent or knowledge of any of the defendants. In the face of this allegation by the plaintiff, this phase of the matter becomes of little or no importance.

We think, furthermore, that the testimony of the defendants was competent to the effect that there was no consideration for the note, that being one of the issues made by the pleadings and their side of which was open to support by defendants' testimony. The agreement as to this issue was also an express waiver by the plaintiff of all objection to the competency of the defendants *as witnesses* as distinguished from the competency and relevancy of their testimony. Carrying into effect the agreement that objection to this testimony should be for "*incompetency and irrelevancy only*," we entertain no doubt of the accuracy of our ruling that it was neither.

We have very carefully examined the questions involved on the motion for a new trial; and, having no doubt that the verdict of the jury was right, whether viewed from the standpoint of either one or both of the defenses, the motion should be and is overruled.

BENNER LINE v. PENDLETON et al.
(District Court, S. D. New York. November 14, 1913.)

No. 486.

1. SHIPPING (§ 204*)—LOSS OF CARGO—LIABILITY OF PART OWNER OF VESSEL.

A suit may be maintained against a part owner of a vessel for loss of cargo for which the vessel would be liable, but his liability is limited by Act June 26, 1884, c. 121, § 18, 23 Stat. 57 (U. S. Comp. St. 1901, p. 2945), to the proportion of the loss that his individual share of the vessel bears to the whole.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 639, 640; Dec. Dig. § 204.*]

2. SHIPPING (§ 132*)—SUIT FOR LOSS OF CARGO—PARTIES.

Libelant advertised to transport merchandise from New York to Porto Rico, and when sufficient contracts for shipments had been obtained chartered a vessel and notified the shippers to deliver their merchandise to the vessel, and bills of lading were issued direct to them. A vessel so chartered was lost, and the insurance companies paid the loss to cargo owners. *Held*, that libelant had the right as bailee of the owners of the cargo to maintain a suit for such loss against the owners of the vessel, and, having such right, it could maintain the suit in behalf of the insurers as successors to the rights of the insured by subrogation.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471-487; Dec. Dig. § 132.*]

3. SHIPPING (§ 132*)—LOSS OF CARGO—SEAWORTHINESS OF VESSEL.

Where a ship three days after starting on a voyage, in weather which, although heavy, was not extraordinary, sprang a leak of so serious a character that she was afterward abandoned and became a total loss with her cargo, and where three of her four pumps when put in use almost immediately broke down and became useless without any adequate reason shown, the inference is warranted that she was unseaworthy when she commenced the voyage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471-487; Dec. Dig. § 132.*]

4. SHIPPING (§ 121*)—LIABILITY FOR LOSS OF CARGO—SEAWORTHINESS.

The obligation on the owners of a ship according to the maritime law is that she must be in fact seaworthy at the commencement of the voyage, and it is immaterial that the owners believe her to be seaworthy or have used every reasonable effort to make her so.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 449-451, 466; Dec. Dig. § 121.*]

5. SHIPPING (§ 137*)—LIABILITY FOR LOSS OF CARGO—HARTER ACT.

Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946), which provides that if the owner of a vessel shall exercise due diligence to make her in all respects seaworthy, etc., he shall not be liable for damage or loss to cargo resulting from faults or errors in navigation or in the management of the vessel, does not exempt him from liability for loss resulting from her unseaworthiness.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. § 137.*]

6. SHIPPING (§ 205*)—LOSS OF CARGO—LIMITATION OF LIABILITY.

A charter of a particular vessel by the owner binds the vessel and is not the personal contract of the owner in such sense as to preclude him from limitation of his liability for loss of cargo.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 641, 642; Dec. Dig. § 205.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Suit by the Benner Line against Fields S. Pendleton and Edwin S. Pendleton, copartners under the firm name of Pendleton Bros., and Fields S. Pendleton individually. Decree for libelant against Fields S. Pendleton.

Harrington, Bigham & Englar, of New York City (D. Roger Englar, of New York City, of counsel), for libelant.

Henry W. Goodrich, of New York City, and William H. Gulliver, of Portland, Me., for respondents.

HOLT, District Judge. This action is brought to recover damages for the loss of a portion of the cargo of the schooner Edith Olcott, which was lost at sea on August 7, 1910. The libelant, the Benner Line, is a corporation engaged in the business of transporting merchandise between New York and Porto Rico and other southern ports. The respondents Fields S. Pendleton and Edwin S. Pendleton were copartners, doing business under the name of Pendleton Bros. Fields S. Pendleton owned nine-sixteenths of the Edith Olcott. Edwin S. Pendleton owned no interest in the ship. The firm of Pendleton Bros. acted as agents for the owners, and as such signed a charter party, chartering the Edith Olcott to the libelant for a round voyage from New York to Porto Rico and return, for the lump sum of \$3,500. The charter provided that "the said vessel shall be tight, staunch, strong and in every way fitted" for the voyage in question. The schooner, on Sunday, July 31st, left New York for Porto Rico. All went well until the following Wednesday, when it was discovered that there was about four feet of water in the hold. The amount of water continued to gradually increase until Saturday of that week, when the amount of water in the hold was about 13 feet, and the ship was obviously in danger of sinking. A signal of distress was put up. The steamer King Edgar came to their relief, took the Olcott in tow, and attempted to tow her to New York, but, after some hours of towing, the cable broke, and thereupon the crew was taken off and brought to New York and the Olcott abandoned. She thus, with her cargo, became a total loss.

[1] The respondent Edwin S. Pendleton owned no interest in the schooner, and appears to have been sued simply because he was a member of the firm which as agents for the owners signed the charter party. I do not see any ground therefore upon which a suit can be maintained against him, and the libelant's counsel concedes in the brief filed that the libel as to him should be dismissed. I think that this suit may be maintained against the respondent Fields S. Pendleton, who was the owner of nine-sixteenths of the Edith Olcott, but that his individual liability under the act of 1884 amending the limited liability statutes is limited to the proportion of the claims sued on that his individual share of the vessel bears to the whole; that is, he is liable for nine-sixteenths of the libelant's claims provided the libelant's right to recover generally is established and the defenses interposed are not maintained.

[2] The respondent claims that the libelant cannot maintain this action on the ground that, bills of lading having been issued directly

to the shippers, the charterer cannot maintain the action. The method of doing business by the Benner Line was this: The Benner Line advertised to transport merchandise to Porto Rico, and made contracts with shippers to that effect. When a sufficient amount of cargo had been contracted for, the Benner Line chartered a vessel, and directed the shippers to deliver their merchandise to the vessel. The shippers thereupon sent their merchandise to the vessel, and received shipping receipts, which were subsequently exchanged for bills of lading. These bills of lading undoubtedly bound the ship. But the essential nature of the arrangement was that the shippers contracted with the Benner Line in the first instance. They did not select the vessel on which their goods were to be shipped. They sent their merchandise to whatever vessel the Benner Line directed them to send it. The vessel having been lost, the various insurance companies paid the various claims of cargo owners, and this suit is brought by the Benner Line nominally as bailee of the shippers, but actually in behalf of the insurance companies. Under the well-settled practice in admiralty, the carrier could have sued as bailee for the shippers. *The Beaconsfield*, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. Ed. 993; *The New York* (D. C.) 93 Fed. 495. If the carrier could sue as representing the shippers, I think it could sue as representing the insurance companies, which, by virtue of their payment of the claims of the shippers, were subrogated to the rights of the shippers.

[3] The respondent also claims that the schooner was seaworthy when she sailed, and that therefore he is not liable for her loss. The charter party contained an express warranty of seaworthiness, which, indeed, would have been implied if no such warranty had been contained in the charter party. The evidence shows that when the *Edith Olcott* was about four days out from New York she sprang a leak so serious that between the previous evening, when the usual soundings showed no water in her, and the succeeding morning about 8 o'clock, four feet of water had entered the hold. This amount steadily increased during the following three or four days, although one large and one small steam pump were constantly at work, until there was about thirteen feet of water in the hold, and the vessel had to be abandoned in a sinking condition. The only explanation suggested as the cause of this leak is either that the vessel struck some submerged object or that the weather was so heavy as to cause the ship to leak. Wright, one of the officers, when examined nearly three years after the accident, testified, in substance, that about midnight of the night before the leak was discovered he felt a slight shock, and that he spoke of it to the mate, but did not really think at the time that anything had happened. No one else on the ship felt anything. No reference is made to this alleged shock in the protest which was made immediately after the crew reached New York. No reference is contained in the answer to any such occurrence, but the answer alleges that the schooner "encountered perils of the sea, among other things, a very heavy wind and heavy sea, so that said vessel labored heavily, and such conditions continued until the morning of the 5th day of said August, during which time said schooner became greatly strained, causing her to

leak." Indeed, there is no evidence that any claim was made by anybody that the leak was caused by striking a submerged object until Wright testified in May, 1913.

That a vessel at sea may be struck by some submerged object, causing a sudden leak, is of course possible, but not very probable. That a sufficiently serious blow to have caused such a leak should have occurred in such a manner as to have attracted the attention of one person on the ship without attracting the attention of any other seems to me also improbable. The fact that apparently no one upon the ship except Wright heard of such an occurrence at the time is very suggestive. Here was a ship with a crew of nine men, suddenly springing a dangerous leak. For several days, during which the lives of the crew were in imminent danger, every effort was made to overcome it, without success. The ship was finally abandoned in a sinking condition, and the crew brought to New York. Every detail and circumstance of such an event would naturally have been talked over by every one on board, and would have been remembered when the story was told at New York. The facts that only one man claims to have felt this alleged shock, that at the time he did not think it amounted to anything, and that there was no reference made to it in the protest or in the answer or in any account given of the occurrence at the time, makes it, in my opinion, impossible for the court to give any weight to the claim that this leak was caused in that way. All that can be said is that it was possible; but in such a case the burden is upon the shipowner to show by satisfactory proof how such a leak occurred. The only other explanation of the leak is that given in the answer, that the schooner was subjected to such heavy weather that the straining of the ship caused the leak. But admittedly the weather was not heavy until the night before the leak, and, although from that time until the ship was abandoned there was heavy weather, there was nothing so extraordinary about it that a ship in a proper condition to make an ocean voyage should not have been in condition to undergo the strain. The respondent has given elaborate evidence to the effect that the ship was kept in very good condition; that she had been carefully inspected, overhauled, and put in order before the voyage; and that she had a rating with the insurance companies as high as is ever given any vessel of her age. I have no doubt that her owners believed her to be seaworthy. But facts in such a case speak louder than words, and the facts that she sprang so bad a leak on the first night of heavy weather that occurred upon her voyage, and that there is no adequate explanation given of it, is, in my opinion, not consistent with her being seaworthy at the beginning of the voyage.

But a more serious claim of unseaworthiness is based on the action of her pumps. The schooner had on board five pumps, a steam pump called the "wrecking pump," another steam pump called the "messenger pump," a small steam pump called the "circulating pump," all forward, and two hand pumps aft, one on the port side and one on the starboard side. These pumps, according to the evidence of the respondent, had been actually used on the previous voyage and were carefully tried immediately before sailing, and all worked satisfactorily

and efficiently. As soon as this leak began, the wrecking pump was started, and almost immediately broke down. This pump was run by a cogwheel, and almost as soon as it was started several of the cogs broke, so that it is claimed that the wheel would not engage the corresponding cogs, and that therefore the pump would not operate. No explanation is given why these cogs broke, or what was the appearance of the broken part. No attempt was made apparently to repair the broken part, or to substitute some other method of operating the pump. At all events, the use of that pump was thereupon abandoned and never resumed. The messenger pump and the small circulating pump were then started, and apparently worked well during the entire period between the discovery of the leak and the abandonment of the ship, but did not discharge a sufficient amount to keep the water in the hold from steadily increasing. Immediately after the wrecking pump failed, the men started to use the hand pumps aft, both of which the evidence shows were in perfect order and pumped satisfactorily immediately before the voyage began. They began to work with the port hand pump, which very soon after they commenced pumping failed to operate. No explanation is given why it failed to operate. The captain says that perhaps the packing was too tight, but if that was the explanation there is no evidence of any effort to remedy the packing. At all events, the use of the port pump was thereupon abandoned, and it was not used or tried afterwards. They then tried to pump with the starboard hand pump, and after a short time that ceased to act. The captain says that he suspected that there was some obstruction at the bottom of the pipe, and gave orders to have the pipe taken out. A tackle was rigged over it, and the pipe was pulled out up through the deck. This appears to have been a work of considerable difficulty. They were several hours in accomplishing it. The captain testified that the pipe was dented and bent in the operation of pulling it out, so that it could not be put back, and it thereupon was lashed on deck and remained lashed and unused thereafter. There is no explanation why it was so difficult to pull it out, or why it should have become jammed and bent and made useless by the operation of pulling it out. Especially there is no evidence that anything was found after it was pulled out that caused the obstruction which led to its being pulled out. No attempt seems to have been made to restore it to its original condition and to resume its use.

It is suggested that the hold was so deep that these hand pumps worked hard. But the evidence is that they worked well before this voyage, and as the water in the hold continually increased the distance through which the water had to be raised continually decreased. In view of all the circumstances in the case, if a single accident to a single pump had occurred, it might be reasonable to attribute it to a mischance; but here were three powerful pumps proved to have been in perfect order before the vessel sailed, each one of which broke down immediately as soon as an attempt was made to use it, and no adequate explanation is given why they immediately broke down. I give no weight to the evidence of those members of the crew who testified that the pipe which was taken out was rusted and full of holes. The mem-

bers of the crew who refused to sign the protest and who have testified against the ship were obviously a venal and dishonest lot. They were constantly offering their testimony for sale to the respondents, and I have no doubt that if their price had been paid they would have signed the protest and afterwards testified in the respondents' favor. I reject their evidence entirely. But the fact remains, in passing upon the question of the seaworthiness of this vessel, that three different pumps which it had provided to meet just such an occasion as arose in this case broke down immediately one after the other, and that there is no adequate explanation given why they broke down. The evidence tends to show that if either of these pumps which failed had worked to its full capacity the water could have been kept down and the vessel probably saved. In my opinion, under these circumstances, the inference is irresistible that the pumps which failed were not fit to use when the ship started, and that therefore the ship was not seaworthy at the beginning of the voyage. I have no doubt that the owners believed her to be seaworthy, and that Capt. Fletcher, a very competent man, to whom the owners had intrusted the duty of putting the ship in order, believed her to be seaworthy.

[4] But the obligation upon the owners of a ship, according to the maritime law, is that a ship must be in fact seaworthy at the commencement of the voyage, and it is entirely immaterial whether the owners believe her to be seaworthy or have used every reasonable effort to make her seaworthy. If she was not in fact seaworthy when the voyage began, the owners are liable under the general rules of the maritime law unless such liability is limited by the statutes limiting the liability of shipowners.

[5] I think that the Harter Act has no application to this case. That act provides, in substance, that if a shipowner shall exercise due diligence to make the vessel seaworthy, he shall not be held responsible for damage or loss arising from faults in the navigation of the vessel or from dangers of the sea. But there is nothing in the evidence to indicate that the Edith Olcott foundered because of any fault in navigation or from dangers of the sea, within the meaning of that expression in maritime law. She foundered, in my opinion, because she was not seaworthy. But the Harter Act does not undertake to impose any new liability on vessel owners for sending an unseaworthy ship to sea. That liability, as I understand the act, is left to be governed by the general rules of the maritime law.

[6] The respondent alleges as a defense to this suit that he is exempted from liability, except to the extent of the value of the ship and the pending freight, by the statutes limiting the liability of shipowners. The libellant claims that the respondent cannot avail himself of that statute because of the authorities which hold that the statutes exempting a shipowner from liability are not a defense to a claim based upon the personal contracts of the shipowner. The charter party in this case was signed by Pendleton Bros., and the libellants' counsel claims that therefore the charter party was the personal contract of the defendant Fields S. Pendleton and his partner. But the cases holding that a shipowner is not entitled, by virtue of the statutes limiting his

liability, to exemption from liability on his personal contracts, apply, as I understand it, to contracts which are strictly personal, and do not in terms bind the ship. For instance, in the case of *The Loyal* (D. C.) 198 Fed. 591, affirmed 204 Fed. 930, 123 C. C. A. 252, relied on by the libellant, the Jarvis Company, the owner of the *Loyal*, entered into a contract with the Apollinaris Company to lighter in and about the harbor of New York consignments of mineral waters to be received at New York by the Apollinaris Company. The contract did not specify any particular vessel by which the lightering was to be done. It would be complied with if the Jarvis Company provided any vessel to do the lightering, and it was immaterial to the Apollinaris Company what vessel was provided. It was therefore the strictly personal contract of the Jarvis Company, which imposed no obligation upon any particular vessel, and for liability under which the Jarvis Company could not exempt itself from responsibility by the surrender of any particular vessel. So in the case of *the Great Lakes Towing Co. v. Mill Transp. Co.*, 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A. (N. S.) 769, there was a general contract for towing entered into by the Great Lakes Towing Company. It was not a contract providing for towing by any particular vessel. In the other cases cited in which vessel owners have been denied the right to obtain exemption from liability upon contracts under statutes limiting the liability of shipowners, the contracts have been strictly personal contracts by which the personal credit of the shipowners was pledged. *Rudolf v. Brown* (D. C.) 137 Fed. 106; *Gokey v. Fort* (D. C.) 44 Fed. 364.

But in the case at bar the charter party signed by Pendleton Bros. was a charter party of the particular schooner *Edith Olcott*. Pendleton Bros., in signing that charter party, acted as the agents of the owners. The agreement was the owners' agreement chartering the schooner, and was an agreement made in the conduct of the business of the schooner. Under such circumstances, in my opinion, the charter party cannot be regarded as the mere personal contract of Pendleton Bros. It was the ordinary case of a charter party binding the vessel. In my opinion, the schooner was not seaworthy at the beginning of the voyage, but such unseaworthiness was without the privity or knowledge of the owner. The respondent therefore in my opinion is entitled to exemption from liability. The ship was a total loss. The evidence is not clear whether there is any pending freight to be surrendered. The evidence shows that most of the freight due from the shippers to the charterer was prepaid, but there were several consignments on which the freight was not prepaid. It does not appear whether the lump sum of \$3,500 has been paid by the charterer to the owners.

My conclusion therefore is that the libellant is entitled to recover the amount of its damages, so far as any pending freight is applicable to pay such damages, as provided for by the statutes limiting the liability of shipowners, but that the respondent is not liable to any greater extent. I regret to be obliged to reach such a conclusion, which I think unjust, but that, in my opinion, is not infrequently the result of the operation of the statutes limiting the liability of shipowners when the ship itself is a total loss.

A reference should be ordered, unless counsel can agree on the facts, to take testimony and report whether there is any freight pending to be surrendered, within the meaning of the statutes exempting ship-owners from liability, and if so, how much, and whether the libelant is entitled to a judgment for the whole of said amount or for only nine-sixteenths of said amount, with authority in his discretion to take testimony, and report on any other question which may appear to be necessary to a proper determination of the amount to be recovered in the suit.

UNITED STATES v. DWIGHT MFG. CO.

(District Court, D. Massachusetts. November 19, 1913.)

No. 254.

1. ALIENS (§ 58*)—IMPORTATION—"CONTRACT LABORER"—"OFFER OF EMPLOYMENT"—ACTION FOR PENALTY.

Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 900 (U. S. Comp. St. Supp. 1911, p. 503), provides that certain classes of aliens shall be excluded, one class being "contract laborers," who are defined to be persons who have been induced or solicited to migrate to the United States by offers or promise of employment or in consequence of agreements to perform labor in the United States of any kind, skilled or unskilled. *Held*, that where a declaration to recover penalties for importation of "contract laborers" alleged that defendant made to the alien named, in a foreign country specified, a certain "offer of employment," and that if the alien would migrate defendant would employ and pay him to perform for defendant certain manual labor, it sufficiently alleged an "offer of employment" so as to bring the laborer within the excluded class of "contract laborers," though the offer was indefinite as to terms and conditions of the employment, the amount of his wages, etc.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113, 114; Dec. Dig. § 58.*]

2. ALIENS (§ 58*)—IMPORTATION—CONTRACT LABORERS—ACTION FOR PENALTY—DECLARATION.

Where a declaration by the United States to recover penalties imposed by Immigration Act Feb. 20, 1907, c. 1134, §§ 4, 5, 34 Stat. 900 (U. S. Comp. St. Supp. 1911, p. 503), for importing contract laborers, was filed against defendant corporation and alleged that it made the offers of employment to the aliens and prepaid their transportation, the fact that it did not specify whether the offers were made by an officer of the corporation or by some other person, and did not allege whether they had authority, whether the offers were oral or in writing, or their terms, did not render it demurrable.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113, 114; Dec. Dig. § 58.*]

3. ALIENS (§ 58*)—IMPORTATION—CONTRACT LABORERS—EXEMPTED CLASS.

Where a declaration by the United States to recover penalties for importing contract laborers in violation of Immigration Act Feb. 20, 1907, c. 1134, §§ 4, 5, 34 Stat. 900 (U. S. Comp. St. Supp. 1911, p. 503), alleged generally as to each alien that he was not within the exempted class, but was a contract laborer, it was not demurrable for failure to allege facts showing that the particular aliens were not within the exempted class specified by section 2.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113, 114; Dec. Dig. § 58.*]

4. ALIENS (§ 58*)—CONTRACT LABORERS—IMPORTATION—PENALTIES—DECLARATION.

Where a declaration by the United States to recover penalties for the importation of contract laborers alleged that the aliens assisted as charged migrated to the United States, it was not demurrable for want of further allegations that they migrated or arrived at those places within the United States referred to in the various alleged offers of employment.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113, 114; Dec. Dig. § 58.*]

Action by the United States against the Dwight Manufacturing Company to recover penalties under Immigration Act Feb. 20, 1907, c. 1134, §§ 4, 5, 34 Stat. 900 (U. S. Comp. St. Supp. 1911, p. 503). On demurrer to declaration. Overruled.

See, also, 210 Fed. 79, 81.

Asa P. French, U. S. Atty., of Boston, Mass.

Charles F. Choate, of Boston, Mass., for defendant.

DODGE, Circuit Judge. For the reasons and upon the terms stated in the opinion herein dated March 31, 1913, 210 Fed. 85, the government was allowed to amend for the second time, after a demurrer to its declaration as first amended had been heard but not decided. To its present amended declaration the defendant again demurred on April 10, 1913, and upon this demurrer there has now been a hearing.

This declaration as filed contains 122 counts, alike in form, and differing only in the names of persons, countries, or places. The questions raised by the demurrer are the same under each count.

As stated in the opinion dated March 31, 1913, the suit is to recover penalties under sections 4 and 5 of the Immigration Act of Feb. 20, 1907, c. 1134, 34 Stat. 900 (U. S. Comp. St. Supp. 1911, p. 503). The question upon each count is whether or not such a violation, by the defendant, of section 4, as incurs the penalty imposed by section 5, is sufficiently alleged.

The violation charged in each count is that the defendant knowingly and unlawfully assisted a certain alien to migrate from a foreign country, specified in the count, to the United States, by knowingly and unlawfully prepaying his transportation to a place specified, within the United States. Each count further alleges that the alien named was an alien contract laborer within the true intent and meaning of the Immigration Act, was an unskilled laborer, and was not a contract laborer exempted under the terms of the last two provisos in section 2 thereof.

Section 2 provides that certain classes of aliens shall be excluded from admission into the United States. One class is to consist of "contract laborers." Contract laborers are then defined, for the purposes of the act, to be persons "who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country, of any kind, skilled or unskilled."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The last two provisos of section 2 are:

"(1) That skilled labor may be imported if labor of like kind unemployed cannot be found in this country.

"(2) That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants."

The declaration does more than allege that the aliens whose immigration was assisted as above were "contract laborers" within the meaning of the statute. Each count is more specific upon this point. Each count begins by alleging that the defendant made to the alien named, and in the foreign country specified, "a certain offer of employment." Each count then describes the alleged offer as follows:

"That if said alien would migrate from said * * * to (here naming a place in the United States), said defendant would employ and pay said alien to perform for said defendant at said (place within the United States) certain manual labor, that is to say, to operate and assist in operating divers machines used by the defendant in its mill at said (place within the United States) in the manufacture of cotton fabrics."

Having thus described the alleged offer or promise of employment made to the alien named, each count next alleges that the defendant unlawfully assisted him to migrate by prepaying his passage to a place within the United States; follows this by allegations that, induced by the offer and assisted by the prepayment, he did migrate to the United States; and concludes with allegations that he was not at the time an alien entitled to enter the country, that the defendant well knew the fact to be so, and that it owes the prescribed penalty.

The defendant objects that the aliens named in the counts are not sufficiently alleged to have been contract laborers within the definition given in the act.

[1] The defendant urges, in the first place, that no offer of employment sufficient to make the alien a "contract laborer," even if he was induced or solicited by it to migrate to this country, has been set forth. It will be noticed that the declaration nowhere says that any "promise" of employment was made. The offer described as above in the declaration is claimed to be insufficient for the purpose, because it does not appear therefrom: (a) When or under what terms and conditions the defendant would employ the alien named; nor (b) the sums, if any, the defendant would pay him; nor (c) what the character of the labor referred to was; (d) what the terms of payment were or were to be. It is contended that an "offer" not specific on these points cannot be sufficiently definite and certain to constitute an inducement to migrate, and therefore an "offer of employment" within the meaning of the act.

We are not dealing here with the sufficiency of a published advertisement as a "promise" of employment, within the meaning of section 3 of the Act of March 3, 1891, c. 551, 26 Stat. 1084, U. S. Comp. St. 1901, p. 1295 (section 6 of the present act), as was the case in *U. S. v. Baltic Mills* (D. C.) 117 Fed. 959, reversed on appeal 124 Fed. 38, 59 C. C. A. 558. There the defendant was accused of assisting or encouraging an alien's migration by publishing an advertisement in Man-

chester, England, which held out to first-class weavers on fine, combed work the prospect of wages ranging in amount between specified limits, to be earned by working for the defendant at Baltic, Conn. It was not there necessary, as it is here, merely to allege facts bringing the alien within the class of "contract laborers" as defined by the act of 1907 in the words above quoted from section 2 thereof. The question was whether or not the advertisement could be called a "promise of employment" such as the defendant was forbidden by law to advertise abroad. The District Court held that it could not; the Court of Appeals, one judge dissenting, held that it could. According to the opinion, "promise" was not to be taken in its strict legal meaning, but in the sense in which advertisements commonly promise employment. It was said:

"We are of opinion that any assurance of proper employment, definite as to the kind, the place, and the rate of wages, is a promise of employment within the meaning of the statute."

According to the dissenting opinion, this made "promise" synonymous with "expectation" or "hope" and was too broad a construction.

The defendant urges that if an advertised "promise" must, at least, be definite as to the kind of employment, the place, and the rate of wages, to be within the act of 1891, no less is essential to make an "offer" sufficient for the purpose of constituting the alien to whom it is made a "contract laborer" under the definition of section 2 of the present act.

An opinion is quoted rendered to the President in 1909 by the then Attorney General (27 Op. A. G. 479) in which it is pointed out that the provisions of the act of 1907 were passed because the courts had so construed previous acts as to require, in order to prove an alien a "contract laborer," proof that he came in pursuance of a completed contract previously entered into with him, and that Congress, regarding this as a defect, evidently intended to remedy it. It was said:

"The meaning of the words added in the act of 1907 does not require that their effect be given greater force than to cure the defect in the previous law, which it was the manifest purpose of the amendment to remedy; and the statute as thus amended could very properly be construed to prohibit only an offer or promise of employment which is of such definite character that an acceptance thereof would constitute a contract."

But the facts upon which this opinion was rendered did not present a case in which there was or was to be any offer or promise of employment to any of the aliens concerned, and their immigration was to be induced only by representations of the resources of Hawaii and the industrial conditions there existing.

No court appears as yet either to have adopted or disapproved the construction suggested by the above opinion.

The former acts did not make an alien a "contract laborer," and thereby put him into the excluded class, unless he was under or came to this country under a contract. The present act makes him a "contract laborer" or not, according to the moving cause of his coming. Not only an agreement with him to perform labor in this country, but also an offer or promise of employment to perform such labor, are to

make him a "contract laborer," if by such offer or promise he has been induced to migrate, or solicited to migrate; as well as if, in consequence of such agreement, he has been induced or solicited to migrate. A penal statute like this is indeed to be strictly construed, yet the language actually used by Congress must be interpreted according to its fair and obvious meaning. If, as this declaration alleges, the aliens named were in fact induced to migrate by offers no more specific as to terms and conditions, amounts to be paid, the character of the labor, or the terms of payment, than the offers described as above, I do not think the court could properly say that they were not "contract laborers" within the act; nor do I see how the court can properly say that offers made in the terms alleged could not have induced any of them to migrate. This will be a question for the jury, as will also the further question whether or not, if they were so induced, and were therefore "contract laborers," the defendant knowingly assisted their migration as charged after they had thus become "contract laborers." I am unable to hold that the declaration has not sufficiently alleged them to have been contract laborers.

The remaining grounds of demurrer may be more briefly dealt with.

[2] The defendant being a corporation, the allegations that it made the offers to the aliens, or prepaid their transportation, can only mean that these things were done by some person having the defendant's authority. The declaration does not specify whether the offers were made by an officer, by some other person, or by one or more persons, nor that whoever made the offers had authority from the defendant. The same is true regarding the alleged prepayments, and there is no statement of the amounts prepaid.

The declaration does not set forth whether the offers were made orally, or in writing, or what their terms were. It is, however, made sufficiently clear that the penalty claimed is for violating sections 4 and 5 and not for the distinct offense of violating section 6.

If the offers, having been made as alleged, induced the alleged migrations, and if the defendant, chargeable with knowledge of these facts, assisted the migration by prepaying transportation to any amount, or causing it to be prepaid, I am unable to say that the declaration fails to allege an offense under sections 4 and 5 by reason of the above omissions. It may be that the defendant will have the right to require further specifications upon some of the above points before the trial. None of the omissions, however, seem to me of a character to warrant the ruling that the declaration is bad because of them.

[3] The defendant contends that the declaration has not sufficiently negatived the application to any of the aliens named of the last two provisions of section 2. It contends that no facts concerning the alien, from which the court can say that he is not within the exempted classes, have been specifically alleged. As has appeared, however, the declaration states generally as to each alien that he was not within the exempting provisions, and this seems to me sufficient, in connection with the allegations that they were contract laborers.

[4] Lastly, it being alleged that the aliens, assisted as charged, did migrate to the United States, I am unable to say that the declaration is

bad for want of allegations that they migrated or arrived at those places within the United States referred to in the various alleged offers of employment.

I find no sufficient ground for sustaining the demurrer, and it is therefore overruled. But this applies only to the first 97 counts thereof. For reasons stated in another opinion of this date (210 Fed. 85), the order of March 31, 1913, allowing the second amendment, is modified so as to apply only to said 97 counts and not to the 25 remaining counts.

UNITED STATES v. DWIGHT MFG. CO.

(District Court, D. Massachusetts. November 19, 1913.)

No. 254.

LIMITATION OF ACTIONS (§ 127*)—AMENDMENT OF PLEADINGS—ADDITION OF CAUSES OF ACTION BARRED.

In an action by the United States to recover penalties for importation of alleged contract laborers, defendant consented to the addition of 25 causes of action not originally sued on and already barred by lapse of time, while its demurrer filed to the government's second amended declaration was pending. The government, having submitted such second amended declaration to the court on the demurrer without waiting for a decision thereon, abandoned such declaration and substituted for it a declaration containing a redraft in different terms of each count, including the 25 causes of action in question. *Held*, that the substituted counts having charged new and different statements of the offense, and not having consisted of mere formal and unimportant changes, defendant was not bound by its consent that the government might so add the 25 additional causes of action and was not barred by such consent to thereafter claim that the causes so added were barred by limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

Action by the United States against the Dwight Manufacturing Company. On motion to modify a prior order allowing a second amendment to the declaration. Granted.

See, also, 210 Fed. 74, 81.

Asa P. French, U. S. Atty., of Boston, Mass.

Charles F. Choate, Jr., of Boston, Mass., for defendant.

DODGE, Circuit Judge. The plaintiff was allowed, for reasons given in the opinion dated March 31, 1913 (210 Fed. 85), to file a second amended declaration. As was then stated, the first amendment had been allowed December 4, 1912, by consent, and it consisted, in part, of adding 25 counts, each charging a violation of section 4 in the case of 25 aliens not mentioned in the original declaration.

As is stated in the same opinion, the latest in date of all the alleged violations was October 26, 1907, this suit having been begun January 22, 1912. The first amendment therefore was allowed after the limitation prescribed by Rev. St. § 1047 (U. S. Comp. St. 1901, p. 727), had become effective as to all; though filed before that time.

The defendants moved, immediately after the order allowing the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

second amendment, for a modification making it apply only to the 97 counts relating to the 97 aliens named in the original declaration, and not to the 25 counts added in the first amended declaration of December 4, 1912, relating to aliens then named for the first time.

In support of the motion there is an affidavit by counsel for the defendants, from which it appears that the defendants' willingness to consent that the 25 counts referred to might be added by the first amendment was communicated to counsel for the government on September 19, 1912; but that it was not until November 25, 1912, that an amended declaration was actually made up including these counts and the defendant's indorsement of consent thereon asked. Such consent was, however, indorsed after the above period of limitation had expired.

The affidavit states further that such consent was given, "Relying on the sufficiency of the demurrer filed April 15, 1912, and assuming and believing that the plaintiff would not seek to further amend or be permitted to further amend"; also, that the defendant would not have consented to the addition of 25 new causes of action, after the expiration of the statutory period, had it been supposed that a still further amendment would be sought or permitted.

The determination of this motion has been delayed to await the decision of the court on the defendant's demurrer to the second amended declaration, which demurrer is this day overruled for the reasons given in an opinion this day filed (210 Fed. 74), so far as it applies to the first 97 counts.

The defendant consented to the addition of 25 causes of action not originally sued on, and already barred by lapse of time, while its demurrer of April 15, 1912, which applied to the second amended declaration, was pending. Having submitted the sufficiency of the second amended declaration to the court upon that demurrer, but without awaiting the decision thereon, the government afterwards abandoned it and substituted for it a declaration containing a redraft in different terms of each and every count. It seems to me manifestly unfair, in an action of this kind, to treat the defendants as having consented that the government might add these 25 charges of violating the act, after the statutory limitation had become applicable, no matter how or in what terms the charges might be made. The changes made in the substituted counts did not indeed set forth wholly new causes of action, but they were by no means merely formal and unimportant changes. They made a new and different statement of the offense. As the charges made in these counts are only in the case by the defendant's consent, and as it cannot be presumed that such consent would have been given had the counts been in their present form on December 4, 1912, I think the defendant entitled to have the modification for which it asks, and it is therefore ordered.

UNITED STATES v. DWIGHT MFG. CO.

(District Court, D. Massachusetts. November 19, 1913.)

No. 254.

ALIENS (§ 58*)—CONTRACT LABORERS—PENALTY—DECLARATION.

A declaration by the United States to recover a penalty for the importation of contract laborers in violation of Immigration Act Feb. 20, 1907, c. 1134, §§ 4, 5, 34 Stat. 900 (U. S. Comp. St. Supp. 1911, p. 503) which merely alleged the alien to have been "a certain alien contract laborer" without setting out facts which showed him to have been within such definition, was demurrable.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113, 114; Dec. Dig. § 58.*]

Action by the United States against the Dwight Manufacturing Company. On demurrer to amended declaration. Sustained in part. See, also, 210 Fed. 74, 79.

Asa P. French, U. S. Atty., of Boston, Mass.

Charles F. Choate, Jr., of Boston, Mass., for defendant.

DODGE, Circuit Judge. The second amendment of the declaration, filed February 14, 1913, and allowed as a whole March 31, 1913, has, by a modifying order this day entered, been disallowed, to the extent that it seeks to amend the last 25 counts of the preceding amended declaration. 210 Fed. 79. The sufficiency of a pending demurrer to the counts of said preceding declaration, filed April 15, 1912, is thus left to be determined so far as it applies to said last 25 counts thereof.

These counts being alike, except as to names, places, and dates, what is below said applies to all.

No violation of section 4 of the Immigration Act of 1907 seems to me sufficiently alleged.

The facts alleged do not make it appear with sufficient distinctness that the alien, whose migration the defendant is charged with assisting by prepaying his passage, was a "contract laborer" within the definition of the statute at the time of the alleged prepayment. It is not enough to allege him to have been "a certain alien contract laborer," without setting forth facts which clearly bring him within said definition.

There are no allegations negating the application to the alien named of the last two provisos of section 2 of the act.

The demurrer is therefore sustained as to all the 25 counts referred to.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—6

In re LANE LUMBER CO.

(District Court, D. Idaho, N. D. December 2, 1913.)

1. BANKRUPTCY (§ 188*)—LIENS—VALIDITY—EFFECT.

The rule that with certain exceptions liens created by authority of or in compliance with the statutes of the state will be recognized and sustained in bankruptcy is not affected by Bankr. Act July 1, 1898, c. 541, § 47, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1501), conferring on trustees in bankruptcy all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, etc.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

2. BANKRUPTCY (§ 188*)—LIENS—VENDOR'S LIEN—WANT OF RECORD—TRUSTEE—"PURCHASER OR INCUMBRANCER FOR VALUE."

Rev. Codes Idaho, § 3441, provides that one who sells real property has a vendor's lien for so much of the price as remains unpaid and unsecured, otherwise than by the personal obligation of the buyer, and section 3443 declares that such liens shall be valid against every one claiming under the debtor except a purchaser or incumbrancer in good faith and for value. *Held*, that a trustee in bankruptcy of a vendee, though entitled to the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, as provided by Bankr. Act July 1, 1898, c. 541, § 47a, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1501), was, nevertheless, not a purchaser or incumbrancer in good faith and for value, and hence a vendor's lien is valid and enforceable as against the vendee's trustee in bankruptcy, though not recorded.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

For other definitions, see Words and Phrases, vol. 7, p. 5860.]

3. BANKRUPTCY (§ 188*)—VENDOR'S LIEN—VALIDITY—PROCEEDINGS TO FORECLOSE.

Where vendors of real property had a valid lien against the bankrupt vendee for the unpaid portion of the price, such lien was not affected by the vendors' failure to commence suit to foreclose the lien prior to the institution of bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

In Bankruptcy. In the matter of the Lane Lumber Company. On petition for review of an order sustaining the validity of certain vendors' lien claims of M. K. Wall and others. Affirmed.

E. N. La Veine, of Cœur d'Alene, Idaho, for trustee.

Frank Langley, of Cœur d'Alene, Idaho, for claimants.

DIETRICH, District Judge. The one question submitted by the trustee upon these several petitions is whether or not the vendor of real estate in Idaho has and may maintain a lien for the unpaid purchase price upon land sold, after an adjudication in bankruptcy against the vendee; the vendor having, prior to the institution of the bankruptcy proceeding, commenced no action to foreclose the lien.

It is conceded that such liens are recognized and established by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

statutes of the state. Section 3441 of the Idaho Revised Codes is as follows:

"One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

And section 3443:

"The liens of vendors and purchasers of real property are valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value."

It is unnecessary to relate the facts involved, for the trustee concedes that such liens originally vested in the several vendors, the claimants here, which, if lost or divested at all, have been so lost or divested by reason of the institution of the bankruptcy proceeding, and for no other cause. Indeed, the question for consideration is still further limited by the express concession on the part of the trustee "that prior to the amendment to the bankruptcy act of 1910, amending section 47, the vendor's lien might be established." We need therefore expressly decide only whether, upon the institution of a bankruptcy proceeding, the provisions of this amendment automatically operate to nullify or extinguish a pre-existing, valid vendor's lien. Section 47, so far as pertinent, is as follows, the amendatory language being italicized:

"Sec. 47a. Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them on property of such estate; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; *and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.*"

It will be noted that the amendment does not in terms purport to act upon liens or to prescribe the conditions under which they may be either created or enforced; it defines the status of a trustee in bankruptcy, and declares the scope of his rights and remedies. As suggested by counsel for the trustee, not unlikely the controlling purpose of the amendment was to relieve trustees from the disability imposed by the rule adopted by the courts, notably in such cases as *In re Economical Printing Co.*, 110 Fed. 514, 49 C. C. A. 133, and *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. But this rule relates, not to the validity of certain classes of liens under the state laws, but only to the right of the trustee to question claims that are defective or invalid under such laws.

[1] The rule is now, as it always has been, that, with certain exceptions immaterial to the present inquiry, liens created by authority of, and in compliance with, the statutes of a state will be recognized and sustained in bankruptcy proceedings. The amendment of section 47 has in no wise affected this rule. *Loveland on Bankruptcy* (4th

Ed.) § 372. There is nothing in *Pacific State Bank v. Coats* (C. C. A.) 205 Fed. 618, out of harmony with this view. Section 67d of the Bankruptcy Act provides that:

"Liens given or accepted in good faith and not in contemplation or in fraud upon the act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act."

[2] It is not questioned that these claims are in good faith, and that the liens were for a present consideration, and that no record thereof was required by the state statutes; as already stated, it is conceded that at the moment the bankruptcy proceeding was instituted the claims were valid subsisting liens. The act declares only that:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of creditors of the bankrupt shall not be liens against his estate." Section 67a.

Here then is the test: Were these liens invalid against the creditors of the bankrupt merely because they were not recorded? If they were, then the trustee might, under the amendment to section 47, challenge them; his right so to do is conferred by the amendment, and that is its only purpose and effect; it does not operate directly upon the claims of lien. Now, as we have seen, under the Idaho statute a vendor's lien, though unrecorded, is valid as against all the world, excepting only "a purchaser or incumbrancer in good faith and for value." Unless, therefore, a trustee has, by virtue of the amendment to section 47 of the bankruptcy act, the status of such a purchaser or incumbrancer, he cannot assail the lien, for under the law it has validity against all other claimants. The controversy is therefore reduced to the question merely of the meaning of the clause in the state statute, "purchaser or incumbrancer in good faith and for value." At most, if we assume that the lands here are in the custody of the court, the trustee has the status only of a "creditor holding a lien by legal or equitable proceedings thereon," as, for example, the plaintiff in an attachment suit, or a judgment creditor after a levy of execution. But such a creditor is not a purchaser, nor is he an "incumbrancer in good faith and for value." A citation of authorities upon this proposition is scarcely necessary.

The purpose and scope of the amendment, and the distinction between the claims here and cases to which it was intended to apply may be illustrated by reference to another provision of the Idaho statutes. In section 3408 of the Revised Codes it is declared that, unless a chattel mortgage is executed with the formalities therein prescribed and filed for public record, it is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value. Differing from vendor's liens, it will be observed, such an unrecorded mortgage is void not only against purchasers and incumbrancers, but against "creditors." Prior to the amendment of section 47, it was quite generally held that a trustee in bankruptcy could not, upon behalf of general creditors, assail the validity of such an instrument, because such creditors, having

no specific lien upon the property, were in no position to make the attack, and therefore the trustee, acting upon their behalf, could assert no better right. In *re Economical Printing Co.*, 110 Fed. 514, 49 C. C. A. 133. *Remington on Bankruptcy*, §§ 1207½ to 1210. The amendment meets this emergency by conferring upon him the status of a creditor who has such lien, and may therefore object to the assertion of a lien under an unrecorded mortgage. See, also, section 3170, which provides that transfers of personal property not accompanied by delivery of possession to the transferee are void not only against incumbrancers and purchasers, but also against "creditors." Possibly Congress might have conferred upon trustees all the rights and remedies of a purchaser or incumbrancer for value and in good faith, but it has not done so; it has chosen to limit their rights and remedies to those of one holding a lien arising out of legal or equitable proceedings.

[3] It is unimportant that the claimants did not commence actions to foreclose their liens prior to the institution of the bankruptcy proceedings. A suit to foreclose a lien is not material to its validity. The lien is established by operation of law, and is quite as complete before as after the institution of the proceedings to foreclose it.

It follows that the referee was right in holding that as a matter of law the claimants were entitled to liens. The record suggests some other questions, such as whether the claimants, or any of them, are estopped to assert their claims, or whether the trustee should be subrogated to the rights of the mortgagee or trustee in a trust deed securing a large issue of bonds covering these and other lands, which indebtedness the trustee has now paid, but they have not been argued, and I therefore express no opinion relative thereto.

The order of the referee will in each case be affirmed.

UNITED STATES v. DWIGHT MFG. CO.

(District Court, D. Massachusetts. March 31, 1913.)

No. 254.

1. LIMITATION OF ACTIONS (§ 127*)—COMMENCEMENT OF ACTION—DECLARATION—AMENDMENT.

Where, in an action by the United States to recover penalties for violation of the Immigration Law (Act Feb. 20, 1907, c. 1134, 34 Stat. 898 [U. S. Comp. St. Supp. 1911, p. 499]) as to the importation of contract laborers, the five-year period of limitation expired after a demurrer had been filed, but before it was heard, but either party might have insisted on an earlier hearing, the hearing having been delayed for their mutual accommodation, the government's application to amend its declaration, filed after the period of limitations had expired, should be considered without prejudice by that fact.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. ALIENS (§ 58*)—VIOLATION OF IMMIGRATION LAWS—PENALTIES—DECLARATION—AMENDMENT—LACHES OF OFFICIALS.

An application by the United States to amend a declaration, in a suit to recover penalties for violation of Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 499), relating to the importation of contract laborers, could not be prejudiced by the laches of government officials, if any, in instituting the suit.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113, 114; Dec. Dig. § 58.*]

3. ALIENS (§ 58*)—IMMIGRATION LAWS—PENALTIES FOR VIOLATION—DECLARATION—AMENDMENT.

It was no answer to an application by the government to amend a declaration, in a suit to recover penalties for violation of Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 499), with reference to the importation of contract laborers, that the amendment would operate to assist a private persecutor in the maintenance of similar suits against defendant.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113, 114; Dec. Dig. § 58.*]

4. LIMITATION OF ACTIONS (§ 127*)—COMMENCEMENT OF ACTION—DECLARATION—AMENDMENT.

Where an action was brought by the United States to recover penalties for violation of Immigration Act Feb. 20, 1907, c. 1134, §§ 4, 5, 34 Stat. 900 (U. S. Comp. St. Supp. 1911, p. 503), prohibiting the importation of contract laborers, between six and nine months before the expiration of the five-year statute of limitations, and a demurrer, having been filed within the time, was not heard until long after the time had expired, when counsel for the government applied to amend, so as to obviate some of the objections raised by the demurrer, but not to set up any new causes of action, an amendment should be allowed on the understanding that the government's case should stand or fall by the declaration as amended.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

At Law. Action by the United States against the Dwight Manufacturing Company to recover penalties for violation of Immigration Act Feb. 20, 1907, c. 1134, §§ 4, 5, 34 Stat. 900 (U. S. Comp. St. Supp. 1911, p. 503), prohibiting the importation of contract laborers. On motion by the United States to amend its declaration. Granted.

See, also, 210 Fed. 79.

Asa P. French, U. S. Atty., of Boston, Mass.

Charles F. Choate, Jr., of Boston, Mass., for defendant.

DODGE, Circuit Judge. This is a suit to recover penalties under sections 4 and 5 of the Immigration Act of 1907, c. 1134, 34 Stat. 900 (U. S. Comp. St. Supp. 1911, p. 503).

The writ is dated January 22, 1912; the suit was entered in this court at its March term (March 20) 1912; the defendant filed a demurrer to the declaration April 15, 1912; a motion to amend it was filed by the plaintiff August 8, 1912; and this was allowed by consent December 4, 1912. The demurrer filed April 15th applying to the declaration as amended, there was a hearing on the demurrer February 1, 1913, but, before a decision upon the questions raised, the present mo-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion to further amend the declaration was made; a proposed amendment being offered for filing February 14, 1913. Upon this latter motion to amend a hearing was had March 4, 1913.

As originally filed, the declaration had 97 counts, each charging the violation of section 4 in the case of a named contract laborer. The amendment allowed December 4, 1912, made corrections in the alleged names in some of the counts, and also added 25 more counts charging violations of section 4 in the cases of 25 other alleged contract laborers. In all respects save the name of the particular contract laborer, or the date of his migration or importation, all the counts are alike in form.

The objections raised in the pending demurrer are to each of the present 122 counts. For the present, the general nature of these objections may be said to be that no one of the counts states a cause of action under the statute. The validity of the objections depends upon a careful construction of the language of the statute in reference to the language in which the counts of the declaration are expressed.

In argument upon this motion the plaintiff asserts that the difference between the original declaration and the proposed amendment is almost wholly a difference of form, and that the effect of the amendment is:

"To clarify and make more definite the allegations concerning the illegal acts of the defendant, especially with reference to the offer of employment alleged to have been made by the defendant to the several contract laborers counted on, the time when and the place where the said offer was made, and the time when the several laborers migrated to the United States in consequence of such offer."

The amendment purports to obviate some of the objections raised by the pending demurrer. It may be said, however, that it does not so far change the original declaration as to set forth any new causes of action; though some of the changes are rather substantial than merely formal.

In two suits brought against the same defendant by one Uppercu in this court, on May 31 and August 26, 1910, penalties for 100 violations of the same statute were claimed, and the contract laborers mentioned in those suits appear, by comparison of names and dates alleged, to have been wholly or in great part the same as those mentioned in this case. Demurrers to the declarations in each of those cases were sustained March 9, 1911. Subsequent applications for leave to amend were denied June 1, 1911. No appeal was attempted, nor were any other suits brought by that plaintiff.

The violations of the statute asserted in this case are alleged to have been committed on various dates between July 20 and October 26, 1907. Under Rev. St. § 1047 (U. S. Comp. St. 1901, p. 727), no suit for penalties incurred by them can be maintained unless commenced within five years from the time when the penalties accrued. When this suit was commenced, therefore, from six to nine months only remained of the time after which the right to sue for such penalties would have expired by limitation, and the demurrer was filed at least three months before the expiration of that time. If leave to amend is refused, and if the pending demurrer be sustained, it is now too late to bring another suit. When the suits brought by Uppercu were disposed

of as above, ample time remained for the beginning of other suits by him, so far as Rev. St. § 1047, is concerned.

[1] The circumstances seem to me to require that the government's application should be in no way prejudiced by the fact that the five years referred to have expired since the demurrer was filed on April 15, 1912, and before it was heard on February 1, 1913, or before this motion which has followed upon the hearing. At any time after the demurrer was filed and before it was heard, it was equally in the power of either counsel to insist upon a hearing. Counsel for the United States, it may be presumed, would have insisted had they supposed that the prosecution would otherwise lose rights. The defense cannot be supposed to have attempted, and ought not to be allowed to gain, any advantage merely by refraining from demanding such a hearing. The delay appears to have been due to the fact that both counsel were pressed with other engagements and there was mutual accommodation. The court cannot say that either has had an undue share of accommodation, or a greater share than the other. I must treat the motion to amend precisely as it would have been treated if made upon a hearing on the demurrer had as soon as the demurrer had been filed and before the five-year period had expired.

In dealing with the motions to amend in the *Uppercu* Cases above referred to, the delay of more than 2½ years in bringing them, after the alleged commission of the violations of the statute charged, was regarded as a serious objection to any exercise of discretion in the plaintiff's favor. It was thought that, when a private plaintiff claims statutory penalties for his own benefit, he should be required, after so long a time had elapsed, to put on record at the outset, at his peril, a sufficient statement of the violations charged to show on its face that they were in fact violations of the statute sued on. The suits were regarded as so plainly unconscionable in their nature as to prevent the court from relaxing in any degree the strict rules often applied to actions of that character.

[2] Though brought under the same statute, and though relating to the same alleged contract laborers, I am unable to believe that the same principles can be properly applied to the present suit. It seems to be true that, in the reported instances in which actions for penalties have been so regarded and treated, the plaintiffs were private persons pursuing their own advantage. To proceedings by the sovereign itself, for the public benefit, the objections relied on would seem to apply with far less, if with any, force. The government would not be barred from recovering penalties of this kind by any statute of limitations except its own; clearly declaring, as Rev. St. § 1047, does, the intent of Congress that it should apply to proceedings of the kind in question. Nor, within the limited period, can the defendant in such proceedings complain of any delay in instituting them. From the laches of the government officials, if any, he can derive no benefit.

[3] The defendant contends that to allow the amendment offered will be to "assist *Uppercu* in his persecution of this defendant," and urges that it has been constantly harassed since May, 1910, with suits brought and instigated by him. It seems to me, however, impossible,

in any event, for the court to inquire into the motives which induced the proper officials of the government to set this prosecution on foot; nor do I find anything in the record which supports the view which the defendant urges.

[4] I am, on the whole, unable to believe that the court would be justified in refusing the leave to amend asked for. Upon the understanding, suggested by the government itself, that it is to stand or fall by the declaration as now amended, the amendment is allowed.

WILLCOX, PECK & HUGHES v. AMERICAN SMELTING & REFINING CO.

(District Court, S. D. New York. December 27, 1913.)

1. SHIPPING (§ 195*)—GENERAL AVERAGE—EXPENSES SUBJECTS OF COMPENSATION—COMMON PERIL.

A steamship grounded in Raritan Bay, which is a land-locked harbor, by reason of the failure of tugs to meet her as ordered to tow her to her destination at Perth Amboy while the tide was sufficiently high, and owing to the prevailing wind the water was kept low for several days. Her bow was embedded in soft mud, and mud banks were formed around her by the action of the tides. Her stern was in deeper water, and there was danger that she might be slewed around by the wind and broken or strained amidships to the injury of a part of her cargo, which consisted of nitrates, the remainder being ore. Several unsuccessful attempts were made to float her by tugs assisted by her own engines in which her machinery was injured, and her master, believing her to be in peril, caused a part of her cargo to be lightered, and it was delivered at its destination. *Held*, that there was a common peril to ship and cargo, and that the expenses resulting from engine damage and cost of lightering were proper subjects of general average.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 618-621; Dec. Dig. § 195.*]

2. SHIPPING (§ 195*)—GENERAL AVERAGE—LIABILITY TO CONTRIBUTE—"COMMON DANGER."

"Common danger" which gives a right to contribution in general average does not mean equal danger, and that a part of the cargo of a stranded steamship was of a kind which was in little danger of injury does not relieve it of liability to contribute.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 618-621; Dec. Dig. § 195.*]

3. SHIPPING (§ 195*)—GENERAL AVERAGE—PERILS ENTITLING TO CONTRIBUTION.

If the master in making a sacrifice for the benefit of ship and cargo appears to have acted under an honest apprehension of imminent peril, there must be very strong evidence to overcome the presumption attaching to his opinion and to defeat the right to contribution in general average.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 618-621; Dec. Dig. § 195.*]

In Admiralty. Suit by Willcox, Peck & Hughes, trustees for the Steamship Trojan Company, Limited, owner of the British steamship Trojan, against the American Smelting & Refining Company, on general average bond. Decree for libellant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. Parker Kirlin, of New York City, for libellant.

Lawrence Kneeland, of New York City, for respondent.

HOUGH, District Judge. [1] The Trojan grounded in Raritan Bay, while in, or almost wholly in, the channel leading to her port of destination—Perth Amboy. The proximate cause of stranding was failure of the necessary tugs to reach her on time and as ordered, whereby she slowed and stopped so as to miss the height of the tide. She could not be expected to get through except at full high water. Thereafter the prevailing winds kept the water low for several days, and she did not float until 1,300–1,500 tons of cargo had been lightered. She was carrying ore and nitrate. The latter would have been ruined had it been water soaked. Before lightering was resorted to, endeavors were repeatedly made to get her off with tugs; the ship's engines assisting. These efforts injured the machinery. An adjustment was made, and the principal items admitted are expenses resulting from engine damage, and cost of lightering cargo. An average bond having been given, this action is by the adjusters as trustees, against the owners of ore cargo.

The questions raised by answer may be reduced to the contention that there was no peril common to ship and cargo, and therefore no ground for a general average adjustment.

If there was a common peril, the case seems to present no difficulty, for undoubtedly damage done to a vessel or her machinery through efforts to float her, when stranded, are general average when the ship is in a position of peril; and when such stranding occurs near her destination, and cargo is discharged and delivered at such destination by lighters, the salvage and other extraordinary expenses up to the time of delivery of cargo are also general average. Coe, pp. 32 and 46. If any objection to the average items more specific than above noted was intended to be made, it has not been specially pleaded nor raised in argument.

The single question then remains: Was the Trojan and cargo in peril when aground on soft mud, in a large but land-locked harbor, even if there detained for several days by winds that prevented those normal high tides on which alone so large a steamer could get through the channel, even if she had not grounded?

It is noticeable that once aground the tide flow formed a mud bank against the vessel, so that detention for even one tide made it harder to get off at the next.

In my judgment the evidence shows a real and common peril. The Trojan took ground at her bow. She always had the deeper water aft. She did not lie level. There was actual danger that a very possible combination of tide and wind would slew her into such a position that her midship section would be (considerably) unsupported. If in such plight she did not break, she certainly would strain and leak, to the probable ruin of the nitrate. The local traffic in Raritan Bay is heavy, and largely composed of tows—at best unwieldly. The weather was actually foggy, and fogs are to be expected at the season of the year in question. A collision would have been most serious, and was

reasonably to be feared. These matters were actually present in the master's mind, as he swears, and did induce a belief in "an impending peril apparently imminent." This is enough to support a general average, even though subsequent investigation leads to the belief that less drastic and expensive methods might have been sufficient. *The Wordsworth* (D. C.) 88 Fed. 315, and cases cited.

If, as I believe, the findings above made are supported by the proofs, this decision is quite long enough; but the argument extended to matters of such interest that I yield to temptation and join in the discussion.

[2] Doubtless there must at least be a reasonable apprehension of common danger before the sacrifices made can become the subject of average. If there be a danger, it must be of a very peculiar character not to be common to the whole adventure. But it would reduce the equity of average to an absurdity, to insist that common danger means equal danger. Such insistence, if recognized at all, should extend to different kinds of cargo; of which this case is an illustration,—for in a very real sense the Trojan's ore was in slight danger as compared with the nitrate. The thought was advanced in respect of salvage of specie in *The St. Paul*, 82 Fed. 105, citing *The Longford*, 4 Asp. 385, and met with the favor it deserved.

[3] The query remains: What is the kind or measure of "danger" that may become the foundation of general average?

It is always interesting to listen to a master mariner on the subject of marine peril, and the interest largely lies in the fact that what he fears is often so far beyond the landsman's ken, as to seem less dreadful than matters easily supplied by any reader of poems—which are rarely composed by seamen. Yet, as Mr. Lowndes justly observes, landsmen of eminence, if not of what is technically called authority, have essayed the difficult task of laying down how much danger is requisite to justify an act of sacrifice. Lowndes (5th Ed.) p. 45. All such efforts are worse than useless. The shipowner entrusts his ship, and the shipper his cargo, to the master, confiding in his experience, ability, honesty, and courage. No apparatus of insurance or shipping documents can take away this ultimate confidence and responsibility. If, after due examination by all parties in interest, such master mariner appears to have acted under an honest apprehension of imminent danger, there must be very strong evidence to upset the presumption attaching to his opinion. If he finds danger in a land-locked harbor, in shallows, at anchor, or moored to a wharf, it should be no answer to register a landsman's opinion as to the necessary absence of danger at such a place.

Each case depends on its own facts, and danger in general average must always remain as elusive of definition as negligence or patentable invention. To me there is nothing absurd or unjust in the extreme case put by Kelly, C. B., and cited by Lowndes, *supra*, p. 44.

Decree for libellant.

ENG v. SOUTHERN PAC. CO.

(District Court, D. Oregon. December 22, 1913.)

No. 6,220.

1. REMOVAL OF CAUSES (§ 3*)—CAUSES SUBJECT TO REMOVAL—INJURIES TO SERVANT OF CARRIER—EMPLOYERS' LIABILITY ACT.

Under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), providing that no case arising under the act, brought in a state court of competent jurisdiction, shall be removed to any court of the United States, such action is not removable, though it would otherwise be removable on the ground of diversity of citizenship.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*]

2. COMMERCE (§ 27*)—INJURIES TO SERVANT—SERVANT OF CARRIER—EMPLOYERS' LIABILITY ACT.

Where a carrier is engaged in both intrastate and interstate commerce, using the same instrumentalities, appliances, and employes in both classes of commerce, an injured servant will be regarded as having been engaged in interstate commerce, so as to entitle him to sue under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), when the work in which he is engaged at the time of the injury is so closely connected with interstate commerce as to be a part thereof.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

3. COMMERCE (§ 27*)—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT.

A servant of a carrier engaged in both interstate and intrastate commerce is entitled to maintain an action under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), where at the time of his injury he was engaged in the use of or maintaining in proper condition an instrumentality or appliance used by the carrier in interstate commerce, though such instrumentality or appliance might also be used for intrastate business.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

4. COMMERCE (§ 27*)—INJURIES TO SERVANT—CARRIERS—FEDERAL EMPLOYERS' LIABILITY ACT—REPAIR OF FREIGHT SHED.

Plaintiff, who was employed by defendant railroad company, which was engaged in both interstate and intrastate commerce, was injured while engaged in framing a new office in a freight shed belonging to defendant, and in sawing boards and nailing them in place on the wall. The shed was owned, controlled, and operated by defendant, in furtherance of and in carrying on its business, for both interstate and intrastate shipments of freight. *Held*, that such work did not amount to a construction of new instrumentalities of commerce, but was rather in the nature of a repair of an instrumentality then in use, and that the work in which plaintiff was engaged was connected with interstate commerce, and hence plaintiff was entitled to sue under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

At Law. Action by Elias Eng against the Southern Pacific Company. On motion to remand to state court. Granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John F. Logan and Littlefield & Smith, all of Portland, Or., for plaintiff.

Wm. D. Fenton, Ralph E. Moody, and John F. Reilly, all of Portland, Or., for defendant.

BEAN, District Judge. This action was commenced in the state court by an employé of the defendant company to recover damages for an injury alleged to have been received by him while engaged in framing up a new office in a freight shed belonging to the defendant and in sawing boards and nailing them in place on the wall. It appears from the complaint that the defendant is engaged in both intrastate and interstate commerce, and that the freight shed in question was owned, controlled, and operated by it in furtherance of and in carrying on such business for both interstate and intrastate shipments of freight. The action was removed to this court on the ground of diversity of citizenship, and the plaintiff now moves to remand, for the reason that it is one arising under the federal Employers' Liability Act, and is not removable.

[1] The federal statute (35 Stats. at Large, 65) makes every common carrier, while engaged in interstate commerce, liable in damages for the injury to or death of any person while he is employed by such carrier in such commerce, and gives courts of the United States and the state courts jurisdiction of actions arising thereunder. It is also provided that no case arising under the act, brought in a state court of competent jurisdiction, shall be removed to any court of the United States, and the uniform holding is that such an action is not removable, although it would otherwise be removable on the ground of diversity of citizenship. *Burnett v. S. P. & S. Ry. Co.*, 210 Fed. 94, decided by this court October 13, 1913, and *Patton v. Cincinnati, N. O. & T. P. Ry. (D. C.)* 208 Fed. 29, and authorities there cited.

[2] When a carrier is engaged in both intrastate and interstate commerce, using the same instrumentalities, appliances, and employés in both classes of commerce, it is difficult to draw the line of demarcation between the two classes of employment; but the result of the decisions up to this time seems to be that, when the work in which the employé was engaged at the time of his injury is so closely connected with interstate commerce as to be a part thereof, it comes within the statute. It has been so held in the case of persons engaged in repairing tracks, bridges and cars used in both state and interstate commerce (*Pederson v. D., L. & W. Ry. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, decided by the Supreme Court May 26, 1913; *Zikos v. Oregon R. & Navigation Co.* [C. C.] 179 Fed. 893; *Northern Pac. Ry. Co. v. Maerkl*, 198 Fed. 1, 117 C. C. A. 237; *Stafford v. Norfolk & W. Ry. Co.* [D. C.] 202 Fed. 605), and in coupling cars so used while standing on a switch (*Johnson v. Great Northern Ry. Co.*, 178 Fed. 643, 102 C. C. A. 89).

[3, 4] The principle seems to be that one employed at the time of his injury in the use of or maintaining in proper condition any instrumentality or appliance used by the carrier in interstate commerce comes within the statute, although such instrumentality or appliance may also

be used for intrastate business. Now, freight sheds, depots, and warehouses or other facilities provided and used by a carrier for receiving, handling, and discharging interstate freight are, I take it, instrumentalities used in interstate commerce under the doctrine of the cases, and are so closely connected therewith as to be a part thereof for the purposes of the federal Employers' Liability Act.

Claim is made that, since plaintiff at the time of his injury was at work in framing a new office in the freight shed, he is in the position of one employed to construct buildings, tracks, engines, or cars, which have not yet become instrumentalities of commerce. But the freight shed in question was being so used by the defendant in its interstate business. The work in which the plaintiff was engaged, as appears from the complaint, was in the nature of the repair of an instrumentality so used, and not the construction of new work.

I conclude, therefore, that the motion to remand should be allowed.

BURNETT v. SPOKANE, P. & S. RY. CO. et al.

(District Court, D. Oregon. October 13, 1913.)

(No. 5899.)

1. REMOVAL OF CAUSES (§ 16*)—RIGHT TO REMOVAL.

The right of removal of causes from the state to the federal court is purely statutory and exists only in such cases as Congress has seen proper to provide for.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 6; Dec. Dig. § 16.*]

2. REMOVAL OF CAUSES (§ 106*)—REMAND—WAIVER—FILING REPLY.

Under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65), as amended in 1910 (Act April 5, 1910, c. 143, 36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1322]), declaring that federal and state courts shall have concurrent jurisdiction, and that no case arising thereunder instituted in a state court shall be removed, where such an action is removed and defendants answered after the record had been filed in the federal court, the fact that plaintiff filed a reply did not constitute a waiver of his right to move to remand the case nor confer jurisdiction on the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 216; Dec. Dig. § 106.*]

At Law. Action by Walter S. Burnett against the Spokane, Portland & Seattle Railway Company. On motion to remand. Granted.

Littlefield & Smith, of Portland, Or., for plaintiff.

Carey & Kerr, of Portland, Or., for defendants.

BEAN, District Judge (orally). This case is an action brought originally in the state court under the federal Employers' Liability Act and was removed to this court by the defendants, nonresidents of the state, on the ground of diversity of citizenship. After the record had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been filed here, the defendants answered. The plaintiff thereupon filed a reply, and it is claimed that by so doing he submitted himself to the jurisdiction of this court and waived the objection that he otherwise might have made to the removal.

Now the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65), as amended in 1910 (Act April 5, 1910, c. 143, 36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1322]), declares that the federal and state courts shall have concurrent jurisdiction of actions brought for a violation thereof, but that no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States. This language is plain and unequivocal and is not open to interpretation. It was the intention of Congress, as disclosed by the legislation and debates concerning it, to except from the removal statutes all actions brought under the federal Liability Act, and that has been the construction placed upon the law. Moreover, the Judicial Code adopted in 1911 (Act March 3, 1911, c. 231, 36 Stat. 1087 [U. S. Comp. St. 1901, p. 128]), after defining what actions may be removed, contains a clause that no case arising under the Employers' Liability Act or any amendment thereto shall be removed to any court of the United States.

[1] Now the right of removal is purely statutory. It exists only in such cases as Congress has seen proper to make provision therefor. Without some federal statute, no action brought in the state court can be removed to this court.

[2] When, therefore, Congress, in adopting the Judicial Code, incorporated a provision that no case arising under the federal Employers' Liability Act in a state court of competent jurisdiction should be removed to a federal court, it took from the effect of the removal act actions of that character. And, that being so, I do not think the mere fact that plaintiff filed a reply would give this court jurisdiction. I do not undertake to say that if a case of this kind had been removed, and the parties should appear in this court and ask for some appropriate action of the court, or should proceed to trial without objection, it might not be held to be a waiver. But the mere filing of a reply is not in my judgment sufficient. In any event, the jurisdiction is doubtful, and the court should, I take it, resolve the doubt against its own jurisdiction.

The motion to remand will be allowed.

WANNER v. BISSINGER & CO.

(District Court, D. Oregon. September 29, 1913.)

No. 6098.

REMOVAL OF CAUSES (§ 84*)—PETITION AND BOND—FILING—NOTICE.

Judicial Code, § 29 (Act March 3, 1911, c. 231, 36 Stat. 1095 [U. S. Comp. St. Supp. 1911, p. 142]), providing that written notice of a petition and bond for removal shall be given to the adverse party before being filed, is mandatory, and a failure to give such notice is ground for remanding the case.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 164; Dec. Dig. § 84.*]

At Law. Action by Frank Wanner against Bissinger & Co. On motion to remand. Granted.

Littlefield & Smith, of Portland, Or., for plaintiff.

Sheppard & Brock, of Portland, Or., for defendant.

BEAN, District Judge (orally). This case was submitted on motion to remand. The action was brought originally in the state court. The defendant, being a nonresident, filed a petition and bond for removal to this court, and the cause was removed. A motion is now made to remand because no written notice of the filing of the bond and petition was given plaintiff. Section 29 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1095 [U. S. Comp. St. Supp. 1911, p. 142]) requires written notice of a petition and bond for removal to be given to the adverse party before the same are filed. Judge Van Fleet, in a very well-considered opinion in *Goins v. Southern Pac. Co.* (D. C.) 198 Fed. 432, held that this provision is mandatory and jurisdictional, and that the failure to give written notice is ground for remanding the case to the state court. In a recent case in the Court of Appeals for the Sixth Circuit (*U. S. v. Sessions*, 205 Fed. 502, 123 C. C. A. 570), this question is referred to, and, while not necessary to a decision of the case, the court does in its opinion say that this provision of the statute is either mandatory or inoperative and intimates very strongly that it is a mandatory provision and jurisdictional.

I conclude, therefore, that failure to give written notice as required is ground for remanding the case to the state court, and an order will be made to that effect.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PODOLIN et al. v. LESHER WARNER DRY GOODS CO.

(Circuit Court of Appeals, Third Circuit. January 26, 1914.)

No. 1752.

1. BANKRUPTCY (§ 28*)—SCHEDULES—DUTY TO FILE—INFORMATION—CRIMINAL PROSECUTION.

Bankrupts made a financial statement to creditors June 10, 1911, and on October 17th following a petition in bankruptcy was filed against them. Thereafter criminal proceedings were instituted against them for conspiracy to defraud creditors by the fraudulent use of the mails, consisting of the sending through the mail of such prior financial statement, which was claimed to be false and fraudulent. *Held*, that there was no such connection between the bankrupts' condition in June and at the time it became their duty to file their schedules as would entitle them to refuse to give a list of creditors holding securities, a list of those whose claims were unsecured, a list of liabilities in bills or notes discounted, which ought to be paid by drawers, etc., a list of stock in business and the value thereof, and a list of personal property and debts due them on open accounts, on the theory that to do so would tend to incriminate them, in that the government, from such schedules when filed, might be able to obtain evidence to show that the financial statement was false.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 27; Dec. Dig. § 28.*]

2. BANKRUPTCY (§ 28*)—WITNESSES—CONSTITUTIONAL PRIVILEGE.

Where a bankrupt claims his constitutional privilege to refuse to testify or furnish information, on the ground that it will tend to incriminate him, it must at least appear to the court, from the character of the information sought or the question propounded, that his claim is justified, or he must produce facts on which he bases such claim, in order that the court may judge of their sufficiency to support it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 27; Dec. Dig. § 28.*]

Petition for Review from the District Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Judge.

In the matter of bankruptcy proceedings of Israel Podolin and others, trading as the Franklin Suit & Skirt Company. On application of the Leshner Warner Dry Goods Company, an order was entered requiring the bankrupts to complete their schedules, and, this order having been affirmed (205 Fed. 563), the bankrupts petition for review. Affirmed.

Clinton O. Mayer, of Philadelphia, Pa., for petitioners.

J. Howard Reber, of Philadelphia, Pa., for respondent.

Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

GRAY, Circuit Judge. This is an appeal from the decree of the court below affirming, with a modification, the order of the referee in bankruptcy, that the bankrupts above named should, within 30 days, complete their schedules in bankruptcy by the addition of a list of creditors holding securities; a list of creditors whose claims are unsecured; a list of liabilities in notes or bills discounted which ought to be paid

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by makers, drawers and acceptors; a list of stock in business and the valuation thereof; a list of personal property of whatever description and the place where situate, and a list of debts due bankrupts on open accounts; as required by the bankrupt law and the orders in bankruptcy.

On the 17th day of October, 1911, a petition in involuntary bankruptcy was filed against Israel Podolin, Louis Brod, and Benjamin Dein, individually and trading as the Franklin Suit & Skirt Company.

On the 3d day of November, 1911, a receiver having been appointed, he filed a petition for an order on one Samuel Rudsky, to deliver over unto him certain merchandise claimed to be the property of the alleged bankrupts. An issue was made, the case proceeded with before a special referee, the bankrupts called for examination therein, and a report made. It was therein found that the bankrupts, in conjunction with Rudsky and others, had fraudulently removed these goods from their place of business under an alleged delivery of the same as collateral security for a loan, and that the property was the property of the receiver, and not of Rudsky. This finding was affirmed by the court below, and there has been no appeal therefrom.

On December 19, 1911, a warrant was issued in the District Court, on information filed by the Postal Department against the bankrupts, alleging a conspiracy to defraud creditors by fraudulent use of the mails. An indictment was found against the three bankrupts at the March sessions, 1912, of that court, charging them with having sent through the mails a statement of their financial worth which was false and fraudulent and gotten up for the purpose of cheating and defrauding creditors. This indictment is pending and undisposed of.

An adjudication in bankruptcy was made on the 28th day of June, 1912, and the bankrupts declined to file schedules in the case, as required by the bankrupt act and the orders in bankruptcy made thereunder, on the ground that they would tend to incriminate them. The referee, upon argument, decided that the bankrupts should file their schedules in bankruptcy, and that whenever particular information required under those schedules was such as might incriminate them, they should refuse to furnish it, upon the specific ground that in doing so it might incriminate them. The referee's decision was sustained by the District Court.

The bankrupts then filed schedules, which answered certain of the questions which they were required to answer, but declined to answer questions or give lists under the following heads:

- List of creditors holding securities;
- List of creditors whose claims are unsecured;
- List of liabilities in notes or bills discounted which ought to be paid by drawers, makers, acceptors, or indorsers;
- List of stock in trade in business and the value thereof;
- List of goods or personal property of any other description, with the place where it is situated;
- List of debts due bankrupts on open accounts.

A petition was then filed by a creditor of the bankrupt, asking for an order that the bankrupts should complete their schedules in bankruptcy

so as to contain the matter omitted. The bankrupts filed an answer, averring that they had replied to all the questions except such as should tend to incriminate them.

The learned referee, whose statement of the case we have so far followed, in the course of his clear and well reasoned report, says:

"The indictment found against the bankrupts is based upon an alleged statement of theirs, dated September 6, 1911, containing a statement of their accounts as of June 10th of the same year. It embraces a list of book accounts and merchandise on hand on the asset side, and open accounts and loans on the liability side, and they allege that if they are compelled to set forth a list of their creditors as of the date of the filing of the petition in bankruptcy, even though it were several months after the date of the statement, it would furnish the names of the parties with whom they dealt and from it could be obtained a statement of the accounts of the bankrupts with them as of June 10, 1911, the sum total of which might differ entirely from the statement of liabilities as set forth in the bankrupts' statement upon which they were indicted.

"It has been repeatedly held that a bankrupt pleading his constitutional privileges must give such information to the court as will enable it to judge whether he is within such privilege, and the question before the referee is therefore, whether under the circumstances of this case, the filing of the omitted lists would furnish information to sustain the criminal charge. It is not, in the referee's opinion, material that these lists might in some unlikely contingency, give such information. They must be such as would evidently do so."

The referee concludes with an order that the bankrupts should, within 30 days, complete their schedules in bankruptcy, above referred to, as required by law.

On the petition of the bankrupts, the referee certified to the District Court, under General Order No. 27 (89 Fed. xi, 32 C. C. A. xxvii) the facts in the case touching the refusal by the bankrupts to give complete lists in the schedules required by law to be filed by them, on the ground that to do so would incriminate them, and the order and action of the referee in regard thereto, as above stated.

The matter having been heard before the District Court on this certificate, the learned judge thereof filed a memorandum, as follows:

"The referee's order of May 12, 1913, will be so modified, *ex majori cautela*, as to provide expressly that the bankrupts may omit from their schedules any reference to the transaction with Rudsky. They are still exposed to the danger of prosecution in connection with that transaction, and they should not be compelled to run the not remote risk of having their statements used against them in such a prosecution. The connection between such statements and the evidence required to sustain the prosecution is direct and immediate.

"But their objection to filling out the other schedules cannot be sustained. These (A3, A4, B2c and B3a) require them to set forth certain facts about their financial condition in October, and I have not been convinced that these facts have so close a connection with the written representations about their condition that were mailed in the preceding June as would tend to convict them of a postal crime in making such representations. In my opinion the connection, if it exists at all, is remote and contingent, and need not be taken into account.

"With the foregoing modification, and with a slight change in date, so that the bankrupts are now directed to file their schedules on or before June 16th, instead of the date fixed by the referee—his order is affirmed."

Thereafter, a decree was entered, directing the bankrupts to file the schedules as required by the bankrupt law, and the general orders made thereunder, showing their financial condition in October, 1911, but

omitting any reference to their transaction with Rudsky. We recognize the importance of the question involved in this case, and have given it due consideration. No decision of the supreme court, or of any federal court, has been cited exactly in point and covering the precise question here involved. That question is, whether the bankrupts are justified, under the fifth amendment of the Constitution of the United States, which declares that "no person * * * shall be compelled in any criminal case to be a witness against himself," in refusing to comply with the requirement of section 7 of the Bankrupt Act of 1898 (30 Stat. 548, c. 541 [U. S. Comp. St. July 1, 1901, p. 3424]), that they should, within 10 days after adjudication, make oath to and file a schedule of their property, showing the amount, kind, and location thereof, its money value in detail, and a list of their creditors, showing their residences, if known, the amounts due each of them, the consideration therefor, and the security held by them, if any, in the manner prescribed by the orders in bankruptcy.

Whatever may have been the opinion, therefore, as to the scope of the privilege conferred by this constitutional provision, it has been settled ever since the Counselman Case, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, that the privilege is not confined to a criminal case against the person himself who claims it.

Counselman had been subpoenaed before a grand jury in the Northern district of Illinois, to testify in an investigation requested by the Interstate Commerce Commission, and then being conducted by the district attorney for that district, as to whether certain railroads engaged in interstate commerce had violated the provisions of the act in that behalf, by charging to certain shippers less than their published tariff rates for the transportation of grain, and in this manner giving preference to such shippers. Counselman was a large shipper of grain, with offices in Chicago, and in his examination he declined to answer, on the ground that to answer might tend to incriminate him, such questions as the following:

"Have you during the past year, Mr. Counselman, obtained a rate for the transportation of your grain on any of the railroads coming to Chicago from points outside of this state, less than the tariff or open rate?"

Other and kindred questions to the same purport were submitted to him, all of which he declined to answer, upon the same ground. Having been committed for contempt by the District Court, for refusal to answer these questions, a writ of habeas corpus was sued out in his behalf, which finally reached the Supreme Court.

In discussing the scope of the constitutional provision invoked by Counselman, the Supreme Court says:

"It is broadly contended on the part of the appellee that a witness is not entitled to plead the privilege of silence, except in a criminal case against himself; but such is not the language of the Constitution. Its provision is 'that no person shall be compelled in *any* criminal case to be a witness against himself.' This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the interstate commerce act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the Act. The case before

the grand jury was therefore a criminal case. The reason given by Counselman for his refusal to answer * * * was that, if he answered the questions truly and fully (as he was bound to do if he should answer them at all), the answers might show that he had committed a crime against the Interstate Commerce Act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case. * * * The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

"It is argued for the appellee that the investigation before the grand jury was not a criminal case, but was solely for the purpose of finding out whether a crime had been committed. * * * In support of this view reference is made to article 6 of the amendment to the Constitution of the United States, which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. * * *

"But this provision distinctly means a criminal prosecution against a person who is accused and who is to be tried by a petit jury. A criminal prosecution under article 6 of the amendments is much narrower than a 'criminal case,' under article 5 of the amendments. It is entirely consistent with the language of article 5, that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury."

The court then commented upon section 860 of the Revised Statutes (U. S. Comp. St. 1901, p. 661) then in force, providing:

"That no answer or other pleading of any party and no discovery or evidence obtained by means of any judicial proceeding from any party or witness * * * shall be given in evidence or in any manner used against such party or witness * * * in any court of the United States or in any proceeding by or before any officers of the United States in respect to any crime."

It was held that this provision of the statute in no way superseded or interfered with the assertion of the privilege of exemption granted by the fifth amendment. It merely prevented such admissions of the accused from being proved against him, and did not cover a refusal to testify in some other proceeding, on the ground that the answer might tend to incriminate the one who was interrogated. In other words:

"The protection afforded of section 860 is not coextensive with the constitutional provision."

In the very recent case of *Ensign v. Pennsylvania*, 227 U. S. 592, 33 Sup. Ct. 321, 57 L. Ed. 658, the Supreme Court, in an opinion by Mr. Justice Pitney, was dealing with a case which arose in the state court of Pennsylvania, in which the question was, whether the schedules filed by a bankrupt and the books and papers which he turned over to the trustee under the peremptory requirement of the bankrupt law, could be used in a criminal trial of the bankrupt in a state court. It was decided that the fifth amendment to the Constitution of the United States is not obligatory upon the governments of the several states, or their judicial establishments, and regulates the procedure of the federal courts only. The question debated was, whether the bankrupt in a criminal trial could rely upon that part of clause 9 of section 7 of the bankrupt law, which declares:

"But no testimony given by him shall be offered in evidence against him in any criminal proceeding."

It was held that the word "testimony" more properly refers to oral evidence, and that it is only the testimony given upon the examination

of the bankrupt under clause 9, that is prohibited from being offered in evidence against him in a criminal proceeding. That the schedules, therefore, filed by a bankrupt were not within the prohibition of this clause.

Referring to section 860 of the Revised Statutes, it was said:

"This section (since repealed by Act of May 7, 1910, c. 216, 36 Stat. 352 [U. S. Comp. St. Supp. 1911, p. 272]) was in force at the time of the trial of plaintiffs in error, but by its own terms it is limited to criminal proceedings in 'any court of the United States,' and constitutes no limitation upon the procedure of the state courts."

It is plain that this decision does not touch upon the question with which we are here concerned, viz., the right of the bankrupt, under the fifth amendment to the Constitution, to decline to file the schedules which the seventh section of the bankrupt law makes it obligatory upon him to file.

Cases like that of *Johnson v. United States* (C. C. A. First Circuit) 163 Fed. 30, 89 C. C. A. 508, and *Cohen v. United States* (C. C. A. Fourth Circuit) 170 Fed. 715, 96 C. C. A. 35, based on the prohibition of section 860, do not help us in the determination of this question.

It is plain that what was really decided in the *Counselman* Case was, that a witness before a grand jury which was investigating the matter of an alleged violation of the provisions of the Interstate Commerce Act by certain railroads engaged in interstate commerce, could not be compelled, as a shipper on such roads, to answer the direct question, whether he had received in his shipments any rebate from said railroads. The court seemed to think it necessary to decide that the investigation in which the grand jury was engaged was a criminal case, within the meaning of those words as used in the fifth amendment, and that in such an investigation, therefore, the witness was not compelled to give testimony which in itself would show that he had committed a crime.

It is true that, in the extended discussion of the exemption declared by the fifth amendment, and of the decisions under the common law in England, and by state courts in regard to similar provisions in state constitutions, the learned justice who delivered the opinion of the court used language indicative of an opinion that the amendment should be so liberally construed as to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime.

Assuming this to be so, it remains to consider whether a bankrupt may in every such case as this decide for himself whether the information that is required of him, by the mandatory provisions of the bankrupt law, is of such a character that permits him to invoke the protection of the fifth amendment, in refusing to comply with the law.

In such a case as that of *Counselman*, it is apparent that, if the witness answer the questions put to him in the affirmative, he directly incriminates himself, and his refusal to answer is of course an admission that his answer, if true, would have had to be an affirmative one.

[1] What was required of the bankrupts in the case before us was entirely independent of the charge in the indictment, then pending

against them, of having made a false statement of their assets and liabilities as of the date of June 10, 1911, for the sending of which they had used the United States mail.

The petition in bankruptcy was filed the following October 17th. The bankrupts claimed that as the statement of June 10th may be false, the furnishing of the data in these schedules, showing the assets, and liabilities as of October 17th, might incriminate them. The financial statement of June 10, 1911, was in the usual form of all financial statements, giving the lump amount of assets on hand as of that date, the total amount of the book accounts and the total amount of liabilities. Is it conceivable, as asked by counsel for the appellee, that a statement of June 10, 1911, giving the lump amount of merchandise at a certain figure, could possibly have any reasonable connection with the amount of merchandise in the bankrupt's possession on the following October 17th, especially when we have evidence of the exact amount of merchandise which came into the possession of the receiver. Or again, is it conceivable that the amount of outstanding accounts on October 17th can have any possible direct connection with the gross amount of outstanding accounts, as shown in the statement of June 10th, or that a list of creditors or the setting forth a list of liabilities or notes discounted, which ought to be paid by the makers as of October 17th, can have any directly incriminating relation to a statement of gross liabilities in a lump sum issued in the previous June. We think with the court below that the connection is too remote and contingent to furnish the basis for the assertion of the privilege conferred by the fifth amendment. The giving of such information certainly does not make the bankrupts witnesses against themselves, within the meaning of the fifth amendment. To hold otherwise, it seems to us, would in a large measure hinder the efficient administration of the bankrupt law, and would extend to confessedly dishonest persons a privilege never intended for their benefit.

[2] Where the bankrupt claims his constitutional privilege under the amendment, and refuses to give the information required by the Bankrupt Act, on the ground that it may incriminate him, it must at least appear to the court from the character of the information sought or the question propounded, that his claim is justified, or the bankrupt must produce facts on which he bases such claim, in order that the court may judge of their sufficiency to support it. *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819.

In the trial of Aaron Burr, 1 Burr's Trial, 190, 193, cited in both the majority and dissenting opinions in *Brown v. Walker*, supra, a witness called before the grand jury was asked whether he had, under instructions from Aaron Burr, kept a certain paper which was then exhibited to him. This question the witness refused to answer, lest he might thereby incriminate himself. The Chief Justice holding that the witness must be interrogated on oath, as to whether his answer to the question would incriminate himself, the witness replied that it might in a certain case. Thereupon, the Chief Justice, as cited in the dissenting opinion above referred to, expressed himself as follows:

"When a question is propounded, it belongs to the court to consider and to decide whether any *direct* answer to it can implicate the witness. If this

be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a *direct* answer to it *may* criminate himself, then he must be the sole judge what his answer would be."

Liberal as the scope given to the fifth amendment by the court is and ought to be, it was never intended that a bankrupt, dishonest or otherwise, should be clothed with the power to decide for himself when and under what circumstances he was authorized by the amendment to interrupt the bankruptcy procedure, by refusing to conform to the requirements of the law. In the present case, there is clearly no direct and apparent self incrimination that necessarily attaches to the information that is required to be given in the schedule, and in the absence of the facts and details of what that information would be, there is no basis upon which the court could sustain the asserted right of the bankrupts to decline to comply with the requirements of the law. There is merely a suggestion that, though not directly incriminating, it might perhaps to their disadvantage give clues for investigation in the prosecution of the indictment against them. As said by the Supreme Court in the case of *In re Harris*, 221 U. S. 274, 31 Sup. Ct. 557, 55 L. Ed. 732, in deciding that the bankrupt's books belonged to the trustee in bankruptcy and cannot be withheld from him on the ground that they incriminate the bankrupt, "that is one of the misfortunes of bankruptcy if it follows crime."

We think the judgment of the court below should be affirmed, and it is so ordered.

MOLONEY v. CRESSLER et al.

CRESSLER v. MOLONEY.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)

Nos. 1,912, 1,921.

1. REMOVAL OF CAUSES (§ 48*) — SEPARABLE CONTROVERSIES — SEPARATE RELIEF AGAINST REMOVING DEFENDANT.

To ascertain the removability of a cause on the ground of the existence of a separable controversy, these tests are established: (1) there must be a separable and distinct controversy between the removing party and his adversary which can be fully determined as between them; and (2) the whole subject-matter must be capable of being so determined and complete relief afforded as to the separate cause of action without the presence of others originally made parties to the suit.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 93, 94; Dec. Dig. § 48.*]

2. REMOVAL OF CAUSES (§ 48*)—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.

A bill alleged that complainant entered into a contract to purchase from one of the defendants a majority of the stock of a gas company which was placed in escrow with a partnership, the members of which were joined as defendants, to be delivered to complainant on payment by him of the stated purchase price; that the first-named defendant to induce the purchase made false and fraudulent representations as to the property of the gas company and agreed to make certain alterations and improvements in the plant at a stated cost which he had not done; that complainant rendered services in clearing the title to the property and oth-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

erwise for which such defendant should pay; and that the sum justly due complainant on account of such services and breaches of the contract, together with the payments made by him, exceeded the purchase price of the stock; but that the depositories refused to deliver the same to him. The bill prayed for an accounting, that complainant be permitted to recoup the amount found due him, offered to pay any balance found due from him, and that specific performance of the contract be decreed, and the depositories be required to deliver the stock to him. Such defendants answered disclaiming any interest in the stock, and offering to turn the same over as directed by the court. *Held*, that the bill was essentially one for specific performance of the contract, comprehending but a single issue, which was performance of the contract by complainant and a single ground for relief, that to enable the court to make such relief effective if granted the members of the depositary firm were indispensable parties, and, as some of them were citizens of the same state as complainant, the cause was not removable by the other defendant as involving a separable controversy.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 93, 94; Dec. Dig. § 48.*]

Removal of cause, separable controversy, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valletown Mineral Co.*, 35 C. C. A. 155; *Pollitz v. Wabash R. Co.*, 100 C. C. A. 4.]

Appeal from the District Court of the United States for the Northern District of Illinois; George A. Carpenter, Judge.

Suit in equity by Maurice T. Moloney against Alfred D. Cressler and others. From the decree, complainant appeals. Reversed.

The appellant, Moloney, a citizen of Illinois, filed his bill in the circuit court for Cook county, against the appellee, Cressler, a citizen of Indiana, joining as parties defendant the members of the copartnership N. W. Harris & Co., a number of whom were citizens of Illinois, others of New York, others of Massachusetts.

The allegations of the bill are:

In December, 1898, Cressler represented to Moloney: (1) That he owned and controlled the capital stock of the Ottawa Gaslight & Coke Company, 450 shares of the par value of \$100 per share; (2) that he desired to and would sell it to appellant for \$115,000. (3) That the corporation owned a gas plant at Ottawa, Ill., which appellee intended putting in "first-class condition," giving in detail alterations, improvements, and repairs so contemplated. Appellant—being unacquainted with gas plants, their construction, operation, or the requisites of equipment or operation of a first-class plant—stated to the appellee that he would require a statement in writing showing the then condition of the gas plant; also, the main features of the contemplated improvements; that if he should agree to purchase such stock appellee "must agree to make all the repairs and improvements necessary to make such plant a first-class, well equipped gas plant, to be passed upon and approved by a thoroughly competent expert before acceptance," by appellant.

To the conditions last above, appellee assented, agreeing to furnish such written instrument, to make the repairs and improvements, the same to be completed not later than July 1899, if the contemplated purchase and sale was carried out. Appellee further represented good title in the corporation, subject only to a \$25,000 mortgage; that an abstract of title would be furnished; that imperfection in title would be remedied; that all indebtedness of said corporation contracted prior to January 1, 1899, would be paid by him if the sale were consummated. Appellant was willing to risk \$15,000 of his own money in purchasing the plant if it were improved as promised, but was unwilling to put in \$115,000; and was willing to purchase it on condition that \$100,000 could be borrowed on the security of the plant—to which appellee assented.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Thereupon the agreement was made, appellant to buy, appellee to sell, said stock for \$115,000. The latter, pursuant to his promise, furnished appellant a written statement showing the extent and condition of, and the contemplated improvements to, the plant. It contained a description of the real estate and machinery; the projected additions and improvements, such as gas-holder, hydraulic elevators, new pipe connections, tramway and dump car, repairs in purifying room, retort room changes, new boiler room as specified, painting buildings, etc.; all estimated to cost \$17,000, and when completed, enable delivery of gas at a cost of one-half of gross receipts, i. e., if the latter were \$30,000, the profit would be \$15,000.

Such statement represented the coal gas and water gas capacities of the plant to be 170,000 and 150,000 cubic feet, respectively, per 24 hours. The connection, mains, leakage, and gas sales are detailed and described. It was therein further endeavored to demonstrate the effect of the contemplated improvements in increasing the earnings of the plant through a saving in items such as coal fuel expense, proper holding capacity, purifying, new tramway, etc., aggregating an amount to total of \$2,520.27.

It was also in such statement declared that 21 miles of new mains had been laid, and most, if not all of the buildings erected in six years last past; 760 new meters had been purchased in such years, and in eight years last past improvements aggregating in cost \$75,000 had been made. The holder was in good repair for substantial work.

This statement was made January 1, 1899. Appellant soon after the making of the agreement inquired of N. W. Harris & Co. whether \$100,000 could be borrowed on the plant. They assured him that, in view of the contemplated improvements, such loan could be effected, on first mortgage, provided good title and corporate power in the company be shown.

After such assurances had been given, and, to wit, on March 22, 1899, appellee induced appellant to advance him \$28,000 on account of the purchase. Thereupon an additional and supplemental contract was entered into, which recites the making of the agreement to sell for \$115,000, and that an outstanding issue of \$25,000 bonds is to be paid out of the purchase price; that certain improvements are to be made as per "plans and specifications" submitted; and contains these provisions:

- (1) That appellant had paid \$28,000 as part of \$115,000, purchase price.
- (2) Balance of consideration to be paid, the \$25,000 of bonds to be deposited with N. W. Harris & Co. to be paid by them as directed by Cressler. When they have been paid, \$20,000 in addition to be retained by them "until the improvements hereinbefore referred to are completed in said plant by Cressler."
- (3) After payment of the bonds, Cressler shall receive the balance of the consideration except the \$20,000 above specified to be held until improvements are made.
- (4) Moloney "shall then be entitled to receive the said stock" controlling the company as of January 1, 1899. All outstanding indebtedness on that date to be paid by Cressler. Moloney thereafter to receive all benefits and bear the burdens.
- (5) " * * * That the stock hereinafter referred to is placed with the agreement in the vaults of N. W. Harris & Co. as an escrow, to be delivered and the legal title of which to pass to the said Moloney when the said Cressler receives all of the consideration hereinbefore mentioned in manner and form as hereinbefore stated."

(6) Cressler to liquidate indebtedness owing and to receive moneys earned prior to January 1, 1899.

(7) Instrument executed in triplicate, "one to be deposited with the stock as aforesaid," the parties retaining the other two.

The bill further averred:

The furnishing of an abstract of title, which, being submitted to said N. W. Harris & Co., resulted in objections to the title. Appellant, as attorney, was instructed by Cressler to render the service necessary to clear the title. Such service was reasonably worth \$600.

Cressler was unable to pay the \$25,000 bonds. They were paid by Moloney, at Cressler's request, principal and interest, \$27,708.95. He was put to large

expense in carrying out this request, which, with the reasonable value of his services as attorney in that behalf, amounted to \$500.

After paying the \$28,000, and before effecting the \$100,000 loan, said N. W. Harris & Co. informed appellant that the gas company was forbidden to mortgage its property, and that the contemplated loan could not be made; but that such loan might be effected by organizing another corporation under a different law, which, when consolidated with the old company, could execute the mortgage to secure such loan. Thereupon Cressler advised Moloney to take the steps necessary to accomplish such purpose, and this was done. Moloney's expense in doing this was \$175, the value of his services, \$1,000.

The loan of \$100,000 was accordingly effected August 15, 1899, and thereupon Moloney deposited with N. W. Harris & Co. the \$20,000 to be paid for the improvement account as stated. Harris & Co. paid out of this for improvements which Cressler should have paid, \$10,332.15, leaving in their hands \$9,667.85.

Moloney, on August 15, 1899, paid Cressler \$20,000, and August 18, \$15,000 both on account of the purchase price and in reliance upon the agreement to improve the plant.

Moloney also collected outstandings of the company for which he is entitled to a reasonable collection fee.

Cressler failed to make the improvements necessary to put the plant in a first-class condition. Moloney expended for that purpose \$18,000.

Cressler falsely represented to Moloney at the time the sale was negotiated that 21 miles of new mains had been laid within six years then last past, whereas in truth there were but 17 miles, 8 of which were not new, laid within six years, but in fact old and had been laid nearly forty years. His representations respecting the size of mains were false, many of such mains being much smaller than stated. He falsely represented the inlet and outlet connections to be eight inches, when in fact they were six; that the water gas machinery had a capacity of 150,000 feet per 24 hours, when it did not exceed 90,000. Moloney relied upon these representations which Cressler knew to be false, and has been damaged \$15,000.

Cressler failed in his agreement to improve the plant and put it in a first-class condition by July 1, 1899. Much of the machinery was not of the quality specified, nor was it installed until more than two years after July 1, 1899. The holder to be erected was not properly constructed, having the defects detailed in the bill. The damage to appellant by reason thereof is set at \$5,000.

Pursuant to the "supplemental agreement" of March 22, 1899, the stock certificates were placed in the hands of N. W. Harris & Co. "in escrow to be delivered to your orator upon your orator's payment of the purchase price of said stock." That such stock is now in their hands. "That your orator has paid the full purchase price of said shares of stock and has frequently demanded said certificates from said N. W. Harris & Co., and from said Cressler, but that said N. W. Harris & Co. as well as said Cressler refuses to deliver the same to your orator."

The bill concludes:

"And your orator further says that in justice and equity the several items of damage sustained by your orator by reason of the failure of said Cressler to perform his agreements, as is hereinbefore set forth and by reason of the false representations made as aforesaid by said Cressler and the moneys expended by said N. W. Harris & Co. and your orator as aforesaid, ought to be recouped from the purchase price of said shares of stock, and that your orator is justly and equitably entitled to compensation from the said Cressler for said services rendered and said expenses incurred by your orator at the request of said Cressler, and that the amount thereof should be set off against the purchase price of said shares of stock, and if such damages shall be recouped from, and such compensation for your orator's services and expenses, and moneys advanced and expended as aforesaid, shall be applied upon said purchase price then your orator has already paid to said Cressler more than the balance of said purchase price and said Cressler ought to be compelled to deliver the said shares of stock to your orator and to pay to your orator whatever sum your orator has overpaid upon said purchase price of said stock. And your orator

says that he has made frequent applications to said Cressler to come to an amicable settlement of the matters in dispute between them, but that said Cressler on various pretenses has utterly failed to do so.

"In consideration whereof * * * your orator now prays that the damages sustained by him as hereinbefore stated and set forth may be awarded and determined by or under the direction of this honorable court; and that the expenses incurred and the value of the services rendered by your orator for said Cressler, as hereinbefore stated, may be ascertained and determined in like manner; and that the amount of such damages, expenses, and value of your orator's said services, and money expended, when so ascertained, may be applied upon the purchase price of said shares of stock; and that an account may be taken under the direction of this honorable court of all and every, the said transactions and dealings between your orator and said Cressler; and that the same may be fully adjusted and the respective rights of your orator and said Cressler be ascertained; and that said Cressler may be decreed to pay to your orator what, if anything, shall appear upon such accounting to be due from him to your orator, your orator being ready and willing, and hereby offer, to pay to said Cressler what, if anything, shall appear to be due from him to said Cressler; and that said Cressler may be decreed to specifically perform his said agreements to sell said shares of stock to your orator, and to assign and deliver the same to your orator; and that said N. W. Harris & Co. be required and decreed to deliver said stock so in their possession to your orator; and that your orator may have such other and further relief in the premises as the circumstances of the case may require and to your honors shall seem meet."

The defendants N. W. Harris & Co. thereupon filed their answer admitting the allegations of the bill respecting the organization of the gas company, defendant's assurances to complainant that a loan of \$100,000 could be obtained upon the conditions stated; that objections were raised, whereupon the formation of a new company and its consolidation and merger with the old was effected, resulting in the making of the loan as alleged; that on August 15, 1899, Moloney paid the answering defendants \$20,000, which was "to be held in trust and paid to said Moloney or his order when the improvements under way have been completed and paid for and all claims against said estate extinguished"; out of the sum so deposited \$10,332.21 was paid to Moloney, leaving the balance alleged. Defendants are informed that Cressler was the contractor for certain of the improvements and has a claim against the gas company on account thereof; but they do not know whether Moloney is entitled to the money balance in their hands.

The answer proceeds:

"And these defendants admit that there was deposited with said N. W. Harris & Co. by said Moloney and Cressler a package said to contain the stock of the Ottawa Gaslight & Coke Company, to be held by said N. W. Harris & Co. in escrow and to be delivered according to memorandum on said package, that these defendants are ignorant and do not know what is contained in said package, but show that a receipt was given by said N. W. Harris & Co. for said package in the words and figures following, to wit:

"Chicago, Mar. 24, 1899.

"Received of A. D. Cressler and M. T. Moloney, a sealed envelope said to contain \$87,000 of stock of the Ottawa Gaslight and Coke Co., but the contents of which we have not examined, to be delivered according to the memorandum on the said envelope.

N. W. Harris & Co., Chicago.

"G. W. Hoover, Cash.

"No. b. 419."

"That the memorandum on said package was in the words and figures following, to wit:

"The within contains the stock of the Ottawa Gaslight & Coke Company, and a contract between A. D. Cressler and M. T. Moloney relating to the same.

"The contents are to be delivered to Moloney on payment to Cressler of \$87,000, less \$25,000 in bonds now outstanding and which are to be paid or taken up by Moloney."

"And these defendants further answering say that said firm of N. W. Harris & Co. has always been and is willing to pay the amount of said balance remaining in their hands to such person or persons, as shall be lawfully entitled thereto and to whom they could deliver the same in safety, and deliver said package now in their possession to such person, or persons, as shall be lawfully entitled thereto and to whom they could deliver the same in safety, and they hereby offer to pay over and deliver unto such parties as this court shall direct the said money and package, or bring the same into court as the court shall direct for the benefit of such of said parties hereto as shall be entitled thereto, and these defendants disclaim all right and title of, in and to the same or any part thereof."

After the filing of such answer, the defendant Cressler appeared and filed his petition for removal of the cause to the United States Circuit Court, alleging therein the diversity of citizenship and that the controversy between the said Moloney, complainant, and Cressler, defendant, is a different and separable controversy from that between Moloney and the other defendants to the bill.

The cause having been removed, Moloney made a motion to remand it to the circuit court for Cook county, which was overruled.

The defendant appellee then answered, also presented his cross-bill for recovery of the balance due him upon the transaction; and upon the issues tendered by such pleadings the cause was heard, resulting in a decree whereby Moloney, after being credited with advances made by him in behalf of Cressler in respect of the agreed improvements, was adjudged to be indebted to the latter on the contract in the sum of \$23,580.88, but that Moloney had suffered damage in the sum of \$5,000 through Cressler's failure to make the improvements within the stipulated time, which was deducted from such contract indebtedness, leaving \$18,580.88. The decree then directed that upon payment of this sum, with interest, aggregating \$28,248.03, by Moloney to Cressler, the former shall be the "complete owner and entitled to take possession of * * * the stock held in escrow" by Harris, etc.

Complainant has appealed from such decree.

Hiram T. Gilbert, of Chicago, Ill., and Vincent Duncan, of Ottawa, Ill., for appellant.

William S. Oppenheim and Harrison Musgrave, both of Chicago, Ill., and John S. H. Lee, for appellees.

Before BAKER and SEAMAN, Circuit Judges, and GEIGER, District Judge.

GEIGER, District Judge (after stating the facts as above). [1] Was the cause properly removed? To ascertain the removability of a cause on the ground of the existence of a separable controversy, these tests are established:

(1) There must be a separate and distinct controversy between the removing party and his adversary, which can be fully determined as between them.

(2) The whole subject-matter must be capable of being so determined, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit. *Thayer v. Life Ass'n*, 112 U. S. 717, 5 Sup. Ct. 355, 28 L. Ed. 864; *Railway Co. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. 738, 29 L. Ed. 66; *Crump v. Thurber*, 115 U. S. 56, 5 Sup. Ct. 1154, 29 L. Ed. 328; *Brooks v. Clark*, 119 U. S. 502, 7 Sup. Ct. 301, 30 L. Ed. 482; *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987; *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528; *Wilson v. Oswego Township*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70.

The application of these tests involves recognition of the elementary principle that, in determining the jurisdiction of federal courts and the removal of causes thereto, indispensable parties only are considered—all others may be dismissed or disregarded if their presence would oust the jurisdiction or restrict the right.

[2] The inquiry therefore is: What is the nature of the suit or controversy disclosed by complainant's bill; the object sought to be accomplished and the relief grantable; the essential determination therein; and, finally, the parties indispensably necessary to the accomplishment of such object and the granting of such relief?

The ultimate facts disclosed by the bill may be thus further summarized:

(1) That Moloney and Cressler entered into a contract for the purchase by the former from the latter of the gas stock described, at the price stipulated in the contract.

(2) That, to induce Moloney to make the purchase, Cressler made certain representations respecting the condition, equipment, and capacity of the gas plant owned by the corporation whose stock was the subject of purchase and sale.

(3) That Cressler also agreed, in consideration of the purchase and sale, to make specified changes and alterations in such gas plant, which were to cost an amount stated, and which, when made, would improve its condition and increase its efficiency.

(4) That representations made by Cressler respecting the condition, equipment, and efficiency of the plant, were false; that he failed to perform his agreement to improve the plant.

(5) That Moloney has paid a portion of the agreed purchase price—the balance he seeks to set off, or recoup against the damages sustained by him through the false representations, and the breaches of the agreement to improve the plant, whereof Cressler was guilty, as alleged.

(6) That Moloney has endeavored to induce Cressler to adjust the dispute which has arisen between them. He is ready and willing to pay such amount as, upon the determination of such dispute, may be found due from him to Cressler.

(7) By the agreement the gas stock was deposited with the defendants Harris & Co. to abide Moloney's performance in respect of payment. They now hold such stock, and he has demanded it. At the time of removal they had filed an answer disclaiming any interest in the stock and in certain funds in their hands; and offered to surrender the same as, and to whomsoever, the court may direct.

The appellant contends that the controversy, or the cause of action comprehended within the bill, pertains to the assertion and enforcement of the right which he acquired through his contract with Cressler, his right to the stock which is the subject-matter of that contract; that the dispute between the parties is over the performance of the reciprocal obligations of such contract, upon which depends the successful assertion of complainant's rights; that, although complainant has not paid the full stipulated money consideration to the defendant Cressler, yet the latter, through his actionable misrepresentations, through his breaches of the obligations to improve the gas plant, has damaged

complainant in an amount which, if and when ascertained and allowed, will more than equal the unpaid balance of such consideration; and the claim is made that such damages should, in equity, be set off and recouped against, or treated as the equivalent of, such balance; that the controversy thus tendered is one and inseparable, having but a single ground for the relief—which latter, to be adequate, must include compulsory surrender of the stock by Harris & Co. who have it in their possession.

On the other hand, to support the removal of the cause, it is urged by the appellee Cressler that it affirmatively appears that complainant has no recourse against the defendants Harris & Co. because the conditions of the escrow agreement have not been complied with; that an ascertainment of complainant's damages alleged to have arisen through Cressler's misrepresentations and breaches of the agreement can be had only upon the trial of what are really separate causes of action at law upon which affirmative relief may be awarded; that Harris & Co. have no interest therein and, for the determination thereof, are neither indispensably nor properly in the suit. Hence the controversy between Moloney and Cressler is asserted to be separable within the meaning of the removal act; and they alone are indispensable to the determination thereof; that Harris & Co. can be party to no controversy relating to the title of the stock until complainant has paid the consideration of, or performed, the contract; that the purpose of complainant's bill is to determine the state of the account between him and Cressler, and, until that is accomplished, he can enforce no right whatever against Harris & Co. as escrow, and they are not properly in court.

Upon the question of removability, we are concerned, as stated, with the nature of the controversy, its essential elements, and not its merits. Whether the cause of action, whose nature and purpose is disclosed, is legally sufficient, or whether the facts, if true, entitle complainant to relief, are not relevant inquiries. If therefore respect be given to the allegations of the bill showing that the contract for the purchase of the stock is the foundation of the relations between the complainant and both defendants Cressler and Harris & Co., that the dispute arises out of such contract, that such dispute concerns merely complainant's asserted right to the stock which was the subject-matter of the contract, if, further, we respect the prayer of the bill expressly asserting the object to be an adjudication of complainant's title and ownership of such stock, we are fairly warranted in saying that the suit is one to compel specific performance by the defendants of their obligation under such contract to vest the stock in complainant, when he had performed. Now it may be that complainant would, independently of such purpose, have a right of action at law against the defendant Cressler for damages arising either through the false representations or through the breaches of the agreement, or that he could recover the reasonable value of professional services rendered as stated in the bill. But, when the dominant contract relation between the parties is considered in connection with the expressed purpose sought to be accomplished, then these so-called affirmative grounds of relief become

significant only as subordinate elements through which complainant seeks to establish his main ground of performance—upon which latter he asserts his right. They have an evidentiary purpose only. True, they may not establish payment or performance, or the equivalent thereof; but that does not call in question the real nature of complainant's suit, nor the ultimate object sought to be accomplished as one of specific performance. To say that, because the bill affirmatively shows a failure to pay the stipulated money consideration, it therefore fails to state any grounds for relief against the escrow or bailee, is but to deny what complainant seeks to establish—a denial of merit, but, by implication, an admission of the character of the suit and the object sought to be accomplished. In effect, it is an assertion that the cause should not be removed because complainant cannot prevail upon the merits against one of the defendants; whereas, the test is whether such defendant need be present to enable complainant to press the controversy, and, if successful, to obtain the full relief to which he is entitled.

The controversy therefore concerns complainant's right to the stock which was the subject-matter of the contract with the defendant Cressler. The essential elements to be established in order that he may prevail in the assertion and enforcement of that right are (1) the contract, (2) his performance, and (3) the refusal of defendant. Now the right, to be thus asserted and enforced, is not satisfied by an adjudication that Cressler, who agreed to sell the stock, perform his obligation; but that every one who, by virtue of that contract, could withhold from complainant the enjoyment of the right if he has not performed his obligation, shall also perform—and yield the title and possession, if the complainant is adjudged to have performed. In other words, to maintain his suit against Cressler, complainant must establish the contract and that he has paid or performed. To maintain it against Harris & Co. he must establish that he has paid or performed. Either can or could refuse to give up the stock solely upon the ground of nonperformance. That is the only ground of the controversy.

The view that Harris & Co., holding the stock under the contract whose enforcement is thus sought, are indispensably necessary parties to a suit brought for that purpose, is fully supported by *St. Louis & San Francisco Ry. Co. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. 738, 29 L. Ed. 66; *Wilson v. Oswego Township*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70; *Construction Co. v. Cane Creek Township*, 155 U. S. 283, 15 Sup. Ct. 91, 39 L. Ed. 152; *Crump v. Thurber*, 115 U. S. 56, 5 Sup. Ct. 1154, 29 L. Ed. 328.

The importance of the question as one of jurisdiction justifies an analysis and review of three of these cases.

In *St. Louis & San Francisco Ry. Co. v. Wilson*, complainant, a citizen of Missouri, brought suit against a Missouri corporation joining two codefendants, citizens of New York, praying for the transfer to him of stock in said corporation standing in the name of such codefendants. After removal, the cause was ordered remanded; and the Supreme Court, affirming such order, said:

"There is but one controversy in this case, and that is as to the duty of the railroad company (defendant) to transfer to Wilson (complainant) the stock standing in the name of the Seligmans on its books and to issue new certificates therefor. Upon the one side of that controversy is the plaintiff, a citizen of Missouri, and on the other side the railroad company, a Missouri corporation. The sole purpose of the suit is to establish the duty and enforce its performance. This cannot be done without the presence of the company, for it is upon the company itself that the decree must operate. The Seligmans are made parties only in aid of the principal relief which is asked. As the stock stands in their names on the books, the company may well claim a judicial finding in the cause which shall bind them, if upon the final hearing a transfer is ordered. The suit therefore is in truth and in form against both the company and the Seligmans on a single cause of action, and cannot be removed unless the separate answer of the Seligmans introduces a separate controversy. This we have held in *Louisville & Nashville R. Co. v. Ide* [114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63], just decided, is not necessarily the effect of separate issues under separate defenses to the same action. No relief whatever can be granted unless it is found to be the duty of the company to transfer the stock, and as to that controversy the company is an indispensable party."

In *Wilson v. Oswego Township*, the facts were:

A Missouri railroad corporation, as an aid in the construction of its road, received from Oswego township (Kansas) certain bonds. One Burgess, a citizen of Missouri, had contracted for and was proceeding with the construction work of a portion of the road. Pending this, at the request of Burgess and in consideration of the work performed and to be performed, the railroad company delivered to him and to one Montague (Kansas) as trustee, jointly, certain of the bonds "upon the agreement and understanding between the railroad company, Burgess and Montague, that upon completion of the work then in progress on the railroad, up to the amount of the value of the * * * bonds, Montague would relinquish for himself and for all others, these bonds to Burgess, which would then become the absolute property of the latter." To carry out this arrangement, the bonds were placed by Burgess and Montague, jointly, with the Union Savings Association as trustee or bailee (a Missouri corporation) there to remain until completion of the work by Burgess, then to be delivered to him upon the joint order of himself and Montague. Thereafter, Wilson, as assignee of Burgess, filed suit in the Missouri state court, the savings association, railway company, and Montague being defendants therein, charging that Burgess had completed the work as agreed, thereby became entitled to the bonds, and that Montague had ceased to have any right thereto. The railway company defaulted, the Union Savings Association answered offering to surrender the bonds to the party legally entitled thereto. Oswego Township intervened and joined with Montague in a petition to remove the cause, alleging the existence of a separable controversy.

The Supreme Court reversed the judgment upon the ground that the cause had been improperly removed, saying:

"The plaintiff, as his assignee, claimed that Burgess had complied with and completed his contract, thereby becoming the owner of the bonds, and entitled to their possession; and that thereafter he assigned his right, title, and interest in the same to the plaintiff, who by his petition only sought to recover possession of the bonds. The Union Savings Association, being the bailee or trustee of the bonds, was a necessary and indispensable party to the relief sought

by the petition, and that defendant, being a citizen of the same state with the plaintiff, there was no right of removal on the part of Montague, or of the intervening defendant, the Oswego township, on the ground that the Union Savings Association was a formal, unnecessary, or nominal party. * * *

"Considering the nature of the suit and the relief sought thereby, these defendants cannot be treated and regarded as purely formal and unnecessary parties. The character of the relief sought made the Union Savings Association, which occupied the position of a bailee or trustee, a necessary and indispensable party. * * *

"Considering the character of the relief sought by the original bill, and the situation of the parties, it cannot be properly said that the whole subject-matter of the suit was capable of being finally determined between the plaintiff, on the one side, and Montague and the Oswego township, on the other, without the presence of the Union Savings Association, so as to warrant the removal as a separable controversy."

In *Construction Co. v. Cane Creek Township*, complainant commenced suit in the United States Circuit Court for the District of South Carolina, against Cane Creek township, a citizen of the latter state, joining as codefendant Boston Safe Deposit & Trust Company, a citizen of Massachusetts, the state of complainant's citizenship. The bill averred that bonds of the defendant township had been deposited with the defendant trust company, to be delivered to complainant upon completion of a certain railroad as agreed; that the road had been completed, but that the certificate evidencing such completion was wrongfully withheld by the commissioners who were required to execute it; that the defendant trust company had and claimed no interest in the bonds. The prayer was that the defendant township be required to specifically perform its agreement by "assenting to the delivery" of the bonds in the hands of the trust company defendant; and that the latter be decreed to deliver them to complainant. The jurisdiction of the court was challenged because the defendant trust company and complainant were of the same citizenship. Such exception to the jurisdiction was overruled, and complainant was awarded a decree. Obviously, the question presented involved the status of the defendant trust company as a party. Mr. Justice Brewer said:

"The plea to the jurisdiction should have been sustained. The substantial object of the suit was to obtain possession of the bonds. The deposit and trust company was the party in possession, and, although it claimed no interest in the bonds as against the plaintiff and its codefendant, yet possession could not be enforced in favor of the plaintiff except by a decree against it. Where the object of an action or suit is to recover the possession of real or personal property, the one in possession is a necessary and indispensable (and not a formal) party. The case of *Wilson v. Oswego Township*, 151 U. S. 56 [14 Sup. Ct. 259, 38 L. Ed. 70], is decisive on this point."

In each of these cases, it will be observed, the alleged separable controversy contained the same fundamental element and required the same determination essential to the establishment of complainant's right, as were involved in the whole controversy. In each, the sole question was whether complainant had performed or complied with the engagement or condition upon which depended his asserted title or right to the possession of the property. True, the party in possession disclaimed interest therein or right thereto; this, however, could not affect the legal aspect or character of the "controversy" disclosed in the bill, but served merely to indicate such party's attitude toward

or in the controversy; and, the nature and scope of a controversy having been determined, its separable or removable character calls for an inquiry respecting the status of parties in such controversy, and not the attitude or course which, having such status, they may elect to take.

The cases cited on behalf of the appellee, some of which we will discuss, are not inconsistent with the views above expressed; but, on the contrary, sustain us in the application of the tests to be applied in determining the removability of a cause.

In *Geer v. Alkali Works*, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122, complainants, minority shareholders in one of two defendant corporations, filed a bill in the state court to cancel a conveyance which such defendant corporation had made to the other. Both corporations were of citizenship diverse from complainants, and removed the cause. But the directors of the conveying corporation were made codefendants and were sought to be charged with the loss and damage suffered by their principal by reason of their tortious conduct. Some of such directors were of the same citizenship with one or more of complainants. This, of course, was fatal to federal jurisdiction unless their presence in the controversy relating to annulling the conveyance between the corporations, could be dispensed with. It was held that such controversy was separable. Clearly, this was a cause of action whose determination could be accomplished and full relief therein—in that controversy—could be granted, without the presence of the directors.

In *Wallin v. Reagan* (C. C.) 171 Fed. 758, an ejectment suit, the plaintiff joined a tenant at will as codefendant with the principal defendant. The tenant was a citizen of the same state as plaintiff; hence, if an indispensably necessary party to the suit, it could not be removed. The tenant had appeared and disclaimed interest in the lands. The court sustained the removal, observing that the tenant was not "anything more than a stakeholder and without real interest in the controversy." Now, irrespective of the question whether plaintiff in ejectment must join those who hold lesser estates under the principal defendant, the assumption that a tenant at will is a "stakeholder," and for that reason alone not an indispensable party, is at variance with the principles of *Wilson v. Oswego Township*, and the other cases referred to. The same criticism is applicable to *Johnston Ry. Frog & Switch Co. v. Buda Foundry & Mfg. Co.* (C. C.) 148 Fed. 883. In other words, the circumstance that a defendant is, or claims to be, a stakeholder, is not controlling.

In *Fritzen v. Boatman's Bank*, 212 U. S. 364, 29 Sup. Ct. 366, 53 L. Ed. 551, the question of jurisdiction was presented upon an appeal from the Supreme Court of Kansas. The case, in another aspect, was before the Circuit Court of Appeals (135 Fed. 650, 68 C. C. A. 288), where the identical question of jurisdiction was considered and determined. These were the facts: A second mortgagee brought suit to foreclose. He joined as codefendant with the mortgagor, a first mortgagee, averring priority of his own mortgage and attacked the nominally first mortgage as fraudulent and void. The right of the first mortgagee (who was of different citizenship) to remove the

cause was sustained upon the ground that the issue of validity of his mortgage was separable from the essential elements comprising the issue in foreclosure. The case is an apt illustration of the proper application of the tests upon removal of causes. It is pointed out that, when a complainant seeks to foreclose a mortgage, the elements embodied in his case are: his debt; the default of the mortgagor; the rank of complainant's mortgage; and satisfaction, either through redemption or sale; that other mortgagees are made parties solely to ascertain and adjudicate the question of priority and thereby to fix and limit the redemption right. Therefore those who have or are charged to have junior liens are indispensably necessary to enable accomplishment of this element of the foreclosure purpose. If nothing further is charged, the cause of action or controversy is single and contains nothing which is separable from or not germane to the fundamental purpose of foreclosure—the latter involves the very idea of determining the rank of other liens which are assumed to be valid. But, when the complainant mortgagee charges that, because of fraud or other circumstances, the nominally senior mortgage is not only junior, but is fraudulent and void, he has injected an element not embodied in the foreclosure purpose. He can and must by his foreclosure bill litigate the rank of his own mortgage; but he cannot, as indispensably incident to the issue of rank or priority, seek to nullify the mortgagor's contracts with other defendants. He cannot, by injecting an issue of validity of a defendant's mortgage, seek an adjudication that there is no redemption right because there is no mortgage. His foreclosure purpose is accomplished when the rank of his mortgage relatively to other valid mortgages—acknowledged to be such—is determined. When therefore a defendant's mortgage is charged to be void, when it is sought to nullify it as a lien created by the mortgagor, then such defendant is made the object of a charge, a party to an issue or controversy which is not germane to an issue of priority; and a controversy arises which is separable therefrom, wholly determinable and full relief grantable therein, without the necessary presence of the parties to such issue of rank or priority.

Recurring now to the present case: Has Moloney in his bill alleged anything more than the contract with Cressler and the manner or means whereby he seeks to establish performance? The analysis of the Boatman's Case suggests, as an analogous situation, if the complainant second mortgagee therein, instead of alleging that the first mortgage is void, had averred that the defendant first mortgagee had taken his security with knowledge that the second mortgagee had already advanced money to the mortgagor, on the faith of a promise that he should have a first mortgage; therefore the nominally first mortgage should be reduced to a position of juniority. Under such circumstances, no separable controversy would appear; but the allegations would bear merely upon the issue of priority which is indispensably involved in the foreclosure purpose. So in the present case, the bill comprehends but a "single cause of action and a single ground of relief" (*Wilson v. Oswego Township*, supra), and, in its legal aspects and effect, the situation presented by the bill is no different than it

would be if Moloney had alleged the contract, payment, or performance, and upon the trial had sought to establish such allegations by proving the facts narrated in the bill. Every such fact, if established, also the result of any accounting, is relevant only to the fundamental issue of performance. It cannot be doubted that a suit for specific performance involves as necessary elements, though not as different or separable controversies, questions respecting the default of one party as an excuse for the other's failure to perform, as agreed; that it is likewise permissible therein to show the acts of the parties under the contract and connected with its subject-matter, as bearing upon the right of the one to have, or the other to withhold, performance. While therefore complainant in the present case, if he so elected, might have sued Cressler for damages arising through the latter's breaches, and his misrepresentations respecting the subject-matter of the contract, also for the reasonable value of services rendered as stated, the inclusion of these matters in the present bill, for the purpose of establishing one of the elements necessarily comprised within its issues, does not bring in a separable controversy.

It may be added that the allegations just referred to can be ignored, and complainant's bill would still stand as one seeking plainly to enforce specific performance grounded (1) upon the contract, (2) the partial payment made, (3) the disputed balance, and (4) complainant's willingness to pay whatever sum may be found due—his offer to do equity. The fact that he has not literally performed by paying the full money consideration stipulated in the contract does not make the bill frivolous, thus justifying the claim that Harris & Co. are fraudulently joined. In a suit for specific performance, an offer by complainant to justify his own nominal default and to show that it is not a real default, coupled with an offer to perform as may be adjudged, is consonant with equity. 4 Pomeroy, Eq. Jur. 1407. Therefore, irrespective of the question whether Moloney's claims for recoupment are allowed or allowable, Harris & Co., as escrow or bailee, are given a status as indispensable parties in the suit for specific performance, to enable granting the complete relief sought by the bill; they are indispensable to the end that complainant may have the fruition of the decree prayed, if it is awarded. *Crump v. Thurber*, *Wilson v. Oswego Township*, and *Construction Co. v. Cane*, *supra*.

Some of the defendants who comprise the firm of Harris & Co. are citizens of Illinois, the state of complainant's citizenship. The cause was therefore not removable by the defendant Cressler.

The judgment is reversed, with directions to grant the motion to remand the cause to the state court.

On Cross-Appeal.

PER CURIAM. This is a cross-appeal by Cressler from the decree considered in No. 1,912, herewith decided. In view of the conclusions reached in that case, the decree is reversed at Cressler's costs, and the cause is remanded to the District Court, with the direction to remand to the state court.

NEW YORK, N. H. & H. R. CO. v. VIZVARI.

(Circuit Court of Appeals, Second Circuit. December 18, 1913.)

No. 29.

1. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—ASSUMED RISK.

Where a risk of injury alleged to have been assumed by servants was one of the ordinary risks of his employment, defendant may take advantage thereof without pleading it; but if the risk was an extraordinary one, assumption thereof must be pleaded, if relied on, unless the evidence to prove such assumption is introduced by plaintiff himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

2 MASTER AND SERVANT (§ 204*)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—ASSUMED RISK.

Federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), providing that the employé shall not be held to have assumed the risks in any case where the violation by the common carrier of any statute enacted for the safety of employes contributed to the employé's injury or death, does not abrogate the defense of assumed risk, where the injury resulted from a violation of a common-law, as distinguished from statutory, duty by the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

3. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—DUTY TO FURNISH TOOLS AND APPLIANCES.

A master owes a duty to his servants to furnish reasonably safe tools and appliances, viz., such as will commend themselves to a reasonably prudent man as reasonably safe and suitable, and such duty is discharged only when the master or its agents whose business it is to supply such instrumentalities exercise due care, as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably safe for use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

4. MASTER AND SERVANT (§ 208*)—INJURIES TO SERVANT—SIMPLE TOOLS—STEEL CHISEL.

A steel chisel for cutting steel railroad rails is not a simple tool within the rule that a servant assumes the risk of the use of the simple tools and appliances furnished by the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 551; Dec. Dig. § 208.*]

5. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—ASSUMED RISK.

Plaintiff, having been directed to use a steel chisel with which to cut a steel rail believing that the same was not a good chisel and liable to chip, complained to his foreman, who informed him that the chisel was good, that he should try it, and that if he did not want to try it he could go home. Plaintiff, believing that this meant that he would either have to use the chisel or lose his position, started to use it, and during its use was injured by a chip that flew from the chisel and destroyed his eye. Held that, though plaintiff had knowledge of the danger, his election to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

use the chisel under such circumstances did not charge him with assumption of the risk of injury therefrom as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

Ward, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of New York.

Action by Joseph Vizvari against the New York, New Haven & Hartford Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This action is brought by an alien, a subject of the Emperor of Austria, against the defendant corporation, a citizen of the state of Connecticut, engaged in interstate commerce and doing business in the state of New York. At the time of the commencement of the action the plaintiff was a resident of the state of New York. The action is to recover damages for an injury suffered by the plaintiff while employed by the defendant as a "section hand" or laborer on the railroad. The injury occurred while the plaintiff was striking a steel chisel with a sledge hammer for the purpose of cutting a steel rail. The chisel and hammer were furnished by the section foreman in charge of the defendant. It is claimed that the chisel at the time and for a long time prior thereto was in a defective, unsafe, insecure, and dangerous condition. The plaintiff asserts that the chisel was so beaten, used up, and mushroomed that scales and splinters formed thereon, and that when the chisel was struck by the hammer particles of steel were liable to break off and fly about with force and velocity, and that the particles, because of their shape and size, could not be detected by the naked eye. He alleges that the danger was not fully appreciated by him. While the plaintiff was engaged at his work and was striking the head of the chisel with the hammer, the chisel being held on the rail by another of the defendant's employes, one of the scales, he claims, flew off the chisel and struck him in his right eye, destroying the sight. For the permanent injury thus suffered and for his physical and mental pain and loss of wages he asked damages in the sum of \$15,000.

Charles M. Sheafe, Jr., of New York City (Frederick J. Moses, of New York City, of counsel), for plaintiff in error.

Rufus M. Overlander (Herbert C. Smyth and Roderic Wellman, both of New York City, of counsel), for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This cause comes here on writ of error to the District Court of the United States for the Southern District of New York to review a judgment entered in favor of the plaintiff below for the sum of \$5,626.61. The judgment is based upon the verdict of a jury in the amount of \$5,500 with interest thereon from the 7th day of November, 1912, to the date of the judgment, together with the costs. This judgment was awarded to the plaintiff below for injuries received by him while in the employ of the defendant below while working for it in repairs upon its tracks near Bridgeport, Conn.

[1] The plaintiff below alleged in his complaint that there was no negligence or want of care on his part contributing to the injury. The defendant in its answer alleged that, if the plaintiff sustained the injury claimed, it resulted to him solely by reason of his contributory negli-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gence and lack of care. The defendant did not plead assumption of risk, but it relied upon it at the trial, and the court left it to the jury to say whether the plaintiff assumed the risk of the use of the chisel. In considering the necessity and sufficiency of the pleas of assumed risk, it is necessary to observe that a difference exists between the assumption of the "ordinary" risks of the employment and the assumption of "extraordinary" risks. If the risk is of the former kind, it is not incumbent on the defendant to plead it; but, if the risk is of the latter kind, the rule in some jurisdictions is that, if the defendant desires to rely upon it as a defense, he must specially plead it. See *Labatt on Master & Servant*, vol. 4, § 1636; *Bailey on Personal Injuries* (2d Ed.) vol. 3, § 851. But in this court the question is controlled by the rules which obtain in the state in which the action is tried. *Canadian Pacific Ry. Co. v. Clark*, 73 Fed. 76, 81, 74 Fed. 362, 20 C. C. A. 447.

Whether in New York the defense needs to be specially pleaded, it is not necessary to inquire, inasmuch as where the evidence going to prove assumption of risk is given by the plaintiff—as it was in the case at bar—it is the rule in New York, and perhaps in all jurisdictions, that the defendant may have the benefit of it. *White v. Lewiston & Y. F. Ry. Co.*, 94 App. Div. 4, 87 N. Y. Supp. 901, 903.

[2] The action is based on the Employers' Liability Act passed by Congress on April 22, 1908. The act provides that the employé "shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé." 35 Stat. 66, pt. 1, c. 149, § 4 (U. S. Comp. St. Supp. 1911, p. 1323). In *Central Vermont Ry. Co. v. Bethune*, 206 Fed. 868, 124 C. C. A. 528, the Circuit Court for the First Circuit held that the section cited limited the abrogation of the doctrine of assumed risk to instances where the violation of an express statutory duty by the carrier was charged. The court said:

"This section by its letter is clearly limited to a violation of a statute. In the case at bar there was no violation of any statute. * * * In order that the provision might apply here, instead of using the words 'violation of any statute,' it should have been broadened out to cover all the obligations of a carrier required either by the common law or by statute. * * *"

In this construction of the statute we concur. And we do not know of any statutory provision for the safety of employés which the defendant violated in furnishing the plaintiff with the chisel which occasioned the injury of which he has complained. Whatever the obligation may have been respecting the chisel, it rested upon the common law and was not derived from statute. The Employers' Liability Act makes the doctrine of assumption of risk inapplicable in certain cases, but is without application to the facts of this case. The case is to be decided on the principles of the common law.

[3] The first question to be considered is whether the defendant was guilty of a breach of duty to the plaintiff. A master is in default as respects his servant unless the appliances furnished are such as would commend themselves to a reasonably prudent man. His duty is to furnish such instrumentalities as are reasonably safe and suitable.

The Supreme Court of the United States, in *Hough v. Railway Co.*, 100 U. S. 213, 218, 25 L. Ed. 612, said:

"The corporation is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all its parts, of the machinery or apparatus which may be provided for the use of employes. Its duty in that respect to its employes is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employes."

The same court in *Union Pacific Railway Co. v. Daniels*, 152 U. S. 684, 690, 14 Sup. Ct. 756, 758 (38 L. Ed. 597), found no error in an instruction to the jury which said:

"The law is well settled, both here and in England, our mother country, that the employer should adopt such suitable implements and means to carry on the business as are proper for that purpose; and where there are injuries to its servants, or its workmen, and they happen by reason of improper or defective machinery or appliances in the prosecution or carrying on the work which they are employed to render, the employer is liable, provided he knew, or might have known, by the exercise of reasonable skill, that the apparatus was unsafe and defective."

[4] Conceding this to be the law, the defendant claims that the appliance furnished by it to the plaintiff is not governed by the law as stated because the chisel was a "simple" tool and that the rule governing "simple" tools constitutes an exception to that which applies to tools in general. The courts are not in all respects in accord as to the master's duty respecting the "simple" tool doctrine. See *Labatt on Master & Servant* (2d Ed.) vol. 3, § 924A.

It is undoubtedly true that in some cases the courts have gone to the length of saying that the rule requiring the master to use ordinary care in furnishing reasonably safe appliances does not apply where the injury was caused by a simple tool. Conceding that to be the case, we do not think that a steel chisel used for cutting steel rails is a "simple" tool within the meaning of the rule. The testimony of one of the defendant's witnesses made it evident that such a chisel would be safe or unsafe according to the temper of the steel. The witness was asked:

"If the steel is so hard that it will not mushroom after the striking, what will be the effect on the chisel?"

He answered:

"If you make it that way and strike it with a sledge, it is liable to go through some person—the whole head is liable to burst off it."

He also testified:

"A very hard steel is brittle. And the striking head is made softer, so it will mushroom instead of splitting. I would not care to work around one that would not mushroom, because something would happen."

And the manufacturer feels it necessary to test his product—from three to five or six out of every lot turned out, by striking the chisel on the head with a twelve pound sledge 5,000 or 6,000 blows. It will not do to assert that chisels of this dangerous character fall within the "simple" tool rule, and say that an employer putting such instruments into the hands of a workman is under no obligations to observe reason-

able care in seeing that they are suitable for the purposes for which they are to be used.

[5] The defendant, however, asserts that the injury for which this action was brought was one of the risks which the plaintiff voluntarily assumed, and that therefore the defendant is not liable even though it should be found to have been guilty of negligence. We think, for reasons already mentioned, that while the defendant did not set up this defense in its answer, it can have the benefit of the defense so far as the plaintiff's evidence discloses an assumption of the risk.

The plaintiff testified that he objected to the chisel and that his conversation with the foreman was as follows:

"I says, Mr. Collins, this is no good chisel. And Mr. Collins says, that chisel is good; to try it. Mr. Collins says, this chisel is pretty good, you try it; if you don't want to try it you go home."

On cross-examination he testified:

"I was complaining to Collins because the head (of the chisel) was not good. And that is what I had in mind when I said to Collins, these chisels are no good." "I was not sure that a piece would come off. At the same time, I thought some time it might—a piece fly and kill somebody."

Again he testified:

"And he told me I would have to use that chisel or go home and stop work. He said if I don't want to work with that chisel I can go and start to go home. And I thought he meant I would lose my job if I quit work and did not work with that chisel. I was afraid of losing my job. That is why I did so."

The testimony showed that the plaintiff had been in the employ of the defendant for 51½ years.

A servant on accepting employment assumes all the ordinary and usual risks and perils incident thereto. The "ordinary" risks are those which are a part of the natural and ordinary method of conducting the business and which are often recurring. The "usual" risks are those which are common, frequent, and customary. Every risk which is not caused by a negligent act or omission on the part of the employer is an ordinary risk. *Fortin v. Manville Co.* (C. C.) 128 Fed. 642; *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551; *Patton v. Southern R. R. Co.*, 82 Fed. 979, 27 C. C. A. 287.

But a servant does not assume the extraordinary and unusual risks of the employment and he does not assume the risks which would not have existed if the employer had fulfilled his contractual duties. But only those risks are assumed which the employment involves after the employer has done everything that he is bound to do for the purpose of securing the safety of his servants. *Labatt on Master and Servant* (2d Ed.) vol. 3, §§ 893, 894; *Hough v. Texas, etc., R. Co.*, 100 U. S. 213, 217, 25 L. Ed. 612; *Pantzar v. Tilly Foster Iron Min. Co.*, 99 N. Y. 376, 2 N. E. 24; *McGovern v. Central Vermont R. Co.*, 123 N. Y. 280, 25 N. E. 373; *Illinois Steel Co. v. Bauman*, 178 Ill. 351, 53 N. E. 107, 69 Am. St. Rep. 316; *Severance v. New England Talc Co.*, 72 Vt. 181, 47 Atl. 833. As said by the Supreme Court of Vermont:

"It is only such injuries as have arisen after the exercise of that diligence and care on the part of the master that can properly be termed accidents or casualties, which the servant has impliedly agreed to risk, and for which the master is not liable." *Noyes v. Smith*, 28 Vt. 59, 65 Am. Dec. 222.

If the plaintiff did not in his original contract of hiring assume the risk growing out of the defective character of the machinery, tools, and appliances which might be furnished him by the defendant, did he assume the risk when with knowledge of the defective character of this chisel he went to work with it? The earlier decisions proceed upon the theory that an employ   cannot recover from the employer if it appears that he continued in the employment with full comprehension of the risk from which his injury resulted. In a leading case (*Woodley v. Metropolitan District R. Co.*, 1877 L. R. 2 Exch. Div. 384), Chief Justice Cockburn said:

"If he (the employ  ) continues to take the benefit of the employment he must take it subject to its disadvantages. He cannot put on the employer terms to which he has now full notice that the employer never intended to bind himself. It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for them under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger, are highly reprehensible, as I certainly think the company were in the present instance."

But the law thus laid down has been superseded in England and in its dependencies. It has been at last settled in the English courts after prolonged consideration and an elaborate discussion in which some of the ablest of English judges participated, that the employer is not excused from a breach of his duty to the employ   unless the evidence discloses something more than that the servant knew of and comprehended the risk from which the injury resulted. This doctrine which had been announced in a number of cases was finally confirmed by the House of Lords in *Smith v. Baker* (1891) A. C. 325. In the course of his opinion in that case Lord Herschell said:

"I think that, where a servant has been subjected to risk owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows of the risk, and does not remonstrate, does not preclude his recovering in respect of the breach of duty, by reason of the doctrine, *volenti non fit injuria*, which, in my opinion, has no application to such a case."

And Lord Halsbury in the same case put the matter in this wise:

"It appears to me that the proposition upon which the defendants must rely must be a far wider one than is involved in the maxim, '*Volenti non fit injuria*.' I think they must go to the extent of saying that wherever a person knows there is a risk of injury to himself, he debars himself from any right of complaint if any injury should happen to him in doing anything which involves that risk. For this purpose, and in order to test this proposition, we have nothing to do with the relation of employer and employed. The maxim in its application in the law is not limited; but where it applies it applies equally to a stranger as to any one else; and if applicable to the extent that is now insisted on, no person ever ought to have been awarded damages for being run over in London streets; for no one (at all events, some years ago,

before the admirable police regulations of later years) could have crossed London streets without knowing that there was risk of being run over."

In the case of *Williams v. Birmingham Battery & Metal Co.*, L. R. Q. B. Div. (1899) vol. 2, pp. 338, 345—a case in the Court of Appeals—Romer, L. J., said:

"Many authorities bearing on the question we have to decide have been cited and discussed. I do not propose to review them. They appear to me to establish the following propositions as to the liability at common law of an employer of labour. If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If by reason of breach of that duty a servant suffers injury, the employer is *prima facie* liable; and it is no sufficient answer to the *prima facie* liability for the employer to show merely that the servant was aware of the risk and of the non-existence of the precautions which should have been taken by the employer, and which, if taken, would or might have prevented the injury. In order to escape liability the employer must establish that the servant has taken upon himself the risk without the precautions. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of each case. In considering such a question, the circumstance that the servant has entered into, or continued in his employment, with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive, against him."

A recovery was allowed in the above case although the injury was occasioned by the failure of the employer to furnish proper appliances. The deceased workman had the same means of knowing the dangerous risk he was exposing himself to as his employer had and he actually knew it was dangerous.

In *Beven on Negligence* (3d Ed. 1908) p. 620, the law is stated as follows:

"Whether continued working in circumstances of danger amounts to an acceptance of the risk or not, is now settled to be a question of fact that must not be withdrawn from the jury."

In this country it seems to have been generally taken for granted by our courts that the earlier English doctrine was correct. See *Labatt on Master & Servant* (2d Ed.) vol. 1, p. 988. The Supreme Court of Massachusetts has recognized the latter doctrine of the English courts as expressed in *Smith v. Baker*, *supra*, as "a just and reasonable doctrine." That court in *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366, said:

"But in a much larger class of cases it (the assumption of the risk) is a question of fact, when one has been injured by reason of an exposure which he knew involved some risk, whether he voluntarily took the risk of the injury which he received. The question divides itself into two parts: First, whether he understood and appreciated the risk, which is sometimes a question of law and sometimes a question of fact; secondly, if he appreciated it, whether he assumed it voluntarily or acted under such an exigency, or such an urgent call of duty, or such constraint of any kind, as, in reference to the danger, deprives his act of its voluntary character. He may reluctantly, so far as the danger is concerned, and under extraneous pressure which amounts almost to compulsion, expose himself to a danger which originates in another's fault, and under such circumstances it cannot be said that he assumes the risk voluntarily. * * * The tendency of recent decisions is to hold that, in regard to dangers growing out of the master's negligence, which are not covered by the implied contract between the master and servant when the service was undertaken, it is a question of fact whether a servant who works on appreciating the risk assumes it voluntarily, or endures it because he feels constrained to."

In *Fitzwater v. Warren*, 206 N. Y. 355, 99 N. E. 1042, 42 L. R. A. (N. S.) 1229 (1912) the New York Court of Appeals has decided that, where a master fails to comply with the requirements of a statute for the protection of his servants, it cannot be held as a matter of law that the servant, by knowledge of such failure, assumes the risk caused by the master's violation of the law. The case of *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367, asserting a contrary doctrine, is overruled. In the opinion in *Fitzwater v. Warren*, supra, Chief Justice Cullen said:

"There seems, at the present day, an effort by constitutional amendment to render a master liable to his employé for injury received in his employment, though the master has been guilty of no fault whatever, and I feel that such effort is in no small measure due to the tendency evinced at times by the courts to relieve the master, though concededly at fault, from liability to his employé on the theory that the latter assumed the risk of the master's fault."

We confess we do not see any adequate reason for making any distinction between an obligation imposed by the common law and one imposed by statute and holding that if with knowledge of the defect one continues to work with a defective instrument furnished him in violation of a common-law obligation, he assumes the risk as matter of law but if the defective appliance is furnished in violation of statutory obligation he does not as matter of law assume the risk even though he had knowledge of the risk arising from the master's failure to comply with the statutory requirement. It almost seems that any such distinction is fanciful and contrary to common sense. We do not understand that the New York court asserts that any such distinction exists.

The attention of the court has been called to *Southern Pacific Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391. That case involved the right of a railroad employé to recover for an injury in an attempt to couple a car to a train. In attempting to make the coupling he put his foot into an unblocked frog at the switch. He had been warned at the time not to put his foot into the frog as it would be caught if he did so. He disregarded the warning, put his foot into the frog from which he was unable to extricate it, and was killed. The Supreme Court of the United States held that as matter of law he could not recover as he had been guilty of contributory negligence and that the jury should have been instructed to find in the defendant's favor. The court said:

"It was not pretended in the present case that the frog in which Seley had put his foot was defective or out of repair. The contention solely is that there is another form of frog, not much used, and which, if used by the defendant, might have prevented the accident."

That case differs in every essential respect from the case at bar. In that case the appliance was not out of repair and the risk incident to its use was simply the "ordinary" risk which the servant assumed when he entered the employment. In the case at bar the appliance used was alleged to have been out of repair and the risk assumed was, if the allegation was correct, one of the "extraordinary" risks which was not assumed when the plaintiff entered the employment and which it would be necessary for the defendant to prove that the plaintiff voluntarily

assumed thereafter. Moreover, in the case at bar the plaintiff had complained of the appliance and only continued in its use after assurance from his superior that it was all right and that he was to go on or lose his job.

In *Texas & Pacific Ry. Co. v. Archibald*, 170 U. S. 665, 672, 18 Sup. Ct. 777, 779 (42 L. Ed. 1188), the court in referring to the rule that the servant does not assume the risk arising from the neglect of the master to furnish appliances free from defects, goes on to say:

"An exception to this general rule is well established, which holds that where an employé receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used."

That principle does not govern the case at bar. In this case the servant gave notice of the defect and continued at work under specific orders, and what we hold is that the question whether he voluntarily and negligently continued to use the defective appliance was a question for the jury. The question whether, under such circumstances as existed in this case, it was for the court or for the jury to determine whether he voluntarily and negligently continued to use the appliance, was not determined nor discussed in the *Texas & Pacific Ry. Co. Case*, supra. So in *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 25 (48 L. Ed. 96), the court said:

"In other words, if he (the servant) knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and in such case cannot recover."

In that case the assumption of risk was left to the jury.

We know of no decision in the Supreme Court of the United States or in this circuit which requires us to hold that on such a state of facts as exists here the court should say as matter of law that the plaintiff is not entitled to recover and that the jury should have been so instructed. Courts have in some cases, as it appears to us, overemphasized the doctrine of assumption of risk and underemphasized the duty of employers to furnish safe appliances to their employés. Some of the theories which courts have advanced have led to conclusions the justice of which as respects the relation of master and servant has not commanded general assent. For courts to assume as matter of law that one voluntarily assumes the risks involved in continuing to work with unsafe appliances furnished by the master, rather than lose his employment and subject himself to the consequences which are apt to ensue from the loss of his position, seems to us a harsh and unwise doctrine. It assumes that physical compulsion is the only coercion which a court of justice can recognize. At a time when enlightened states in Europe and America are enacting Employers' Liability Laws and Workmen's Compensation Acts to modify established principles of the law which are now thought to be unsuited to existing economic and social conditions, the courts should be careful not to fall into the error of assuming as matter of law what is far more properly matter

of fact. The question of negligence is generally a deduction of fact from other facts and not a conclusion of law. It is not a question of law unless the statute or the decisions of the courts have established a definite rule of conduct for a given situation. Thus if the law of a particular jurisdiction establishes the rule that one approaching a railroad track "must stop, look, and listen," and one in disregard of the rule undertakes to cross the track and is injured, there is nothing to submit to the jury. Negligence in such a case is a matter of law, and the question of whether his conduct evinced a want of prudence and discretion cannot be submitted to the jury. The question must go to the jury where the facts are in dispute or where fair minds might draw different conclusions from the facts as disclosed by the evidence. *Thompson on Negligence*, §§ 429, 430. And so in reference to assumption of risks, where an employé has knowledge of a defect or danger and calls, as in this case, the attention of the employer or his representative to it, and is ordered to go on with the work, the question should go to the jury to say whether the danger was so manifest that a person of ordinary prudence and caution would have incurred it and also whether the risk was imminent.

Where the facts are clearly established and the conclusion to be drawn from the facts is a matter which cannot reasonably be the subject of any doubt or controversy, the question of negligence is for the court and not for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question is for the court. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361. The doctrine of the Supreme Court of the United States is that the trial court is bound to submit the case to the jury unless a recovery is impossible upon any view that can be properly taken of the facts which the evidence tends to establish. *Dunlap v. Northeastern R. Co.*, 130 U. S. 649, 9 Sup. Ct. 647, 32 L. Ed. 1058; *Kane v. Northern, etc., R. Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339.

The question of negligence where the facts are undisputed seems to have sometimes been regarded as one of law. But this is believed to be a radically unsound view of the matter.

On the facts disclosed in this case we are not prepared to say that all reasonable men would reach the same conclusions.

The questions involved are not questions of law for the court, but questions of fact for the jury. It was for the jury to say whether the defendant was negligent in furnishing this chisel to the plaintiff, and whether the plaintiff voluntarily assumed the risks incident to its use, and whether those risks were imminent and such that no man of ordinary prudence would encounter them.

We find no error in the charge given to the jury.

The judgment is affirmed.

WARD, Circuit Judge (dissenting). I find myself unable to concur in the opinion of the court. The sole question for consideration is whether the plaintiff assumed the risk of what injured him. The law

itself writes into the contract between master and servant that the servant shall assume the ordinary risks of the employment he enters. A chisel is a tool in ordinary use in the maintenance of all railroads. Its use necessitates the spreading and abraiding of the head. Indeed, it would be proof that the metal was unsuitable if this did not happen. Splinters frequently fly off when the chisel is struck by the hammer. All these things the plaintiff knew. He had used such chisels for over five years and testified as follows:

"Q. And when you say the head was no good, you meant a piece might fly off when it was struck; was that what you were complaining about? A. I was not sure that a piece would come off. At the same time, I thought some time it might, a piece fly and kill somebody. And I thought it might fly off, and that is the reason I complained to Collins.

"Q. And you had seen other chisels used that, after being used during the day had frayed off and bent over on the top and had broken off this way, hadn't you? A. I did not see it.

"Q. You never saw any other chisel bent over like this? A. Yes, I did, many of them.

"Q. And did you never see a piece fly off and break off, or a chisel from which a piece had broken off? A. I did see that many times more, but it did hit nobody. It might hit somebody on the leg or fall on the ground. And I had seen that happen often, and when I say this chisel had a head bent over like that, and I complained of it, I had in mind that pieces might fly off this chisel the same as they had from others. Collins told me to use the same chisel, because it was a chisel that was good for use; because the point was not sharp to be used; they told me to use this chisel. And he told me I would have to use that chisel or go home and stop work; he said if I don't want to work with that chisel I can go and start to go home. And I thought he meant I would lose my job if I quit work and did not work with that chisel. I was afraid of losing my job. That is why I did so.

"Q. And you thought this piece might fly off? A. I thought it would fly off, but I was not sure it would. And I went on and worked rather than lose my job. After this accident, this thing struck me in the eye; it hurt me so much that I did not know what to do with myself."

If he had continued to use the chisel because he relied upon the judgment of the foreman as better than his own or because the foreman had led him to believe that another chisel would be substituted, there might have been a question for the jury. But he states explicitly that he continued to use the chisel rather than quit. I could understand a case being sent to the jury in which the only knowledge the injured servant had of the particular thing which injured him was that imputed to him as matter of law, because he assumed the ordinary risks. But where the servant actually knew and appreciated precisely what the particular danger was, as in this case, before he used the thing which injured him, it seems to me there is no question for the jury. What was there for them to find? Could they, in the face of the plaintiff's own testimony, hold that he did not know and did not appreciate the risk? Or could they say that he continued to strike the chisel for some other reason than the one he himself gave?

I think the motion to direct a verdict in favor of the defendant should have been granted.

In re BACON.

(Circuit Court of Appeals, Second Circuit. December 9, 1913.)

No. 11.

1. PLEDGES (§ 11*)—REQUISITES—DELIVERY OF PLEDGED PROPERTY.

Under both the civil and the common law it is necessary to the validity of a pledge that possession of the pledge be delivered to the pledgee or to some one for him; such delivery being of the very essence of the contract.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28-35; Dec. Dig. § 11.*]

2. BANKRUPTCY (§ 288*)—RECOVERY OF ASSETS—ADVERSE CLAIM—JURISDICTION.

Where, in a proceeding by a bankrupt's trustee to recover corporate stocks alleged to belong to the bankrupt, but in the hands of a bank, another bank claimed a lien on the stock under a pledge contract between itself and the bankrupt, and the trustee's petition was framed on the theory that the latter had valid claims secured by the stocks, the interest of the bank was adverse to that of the trustee and could not be determined by summary proceedings in the bankruptcy court over its protest.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

3. BANKRUPTCY (§ 288*)—RECOVERY OF ASSETS—ADVERSE CLAIM—JURISDICTION—CONSENT.

Summary proceedings having been instituted by a bankrupt's trustee to recover corporate stock on which a bank claimed a lien as pledgee, the bank objected to the court's jurisdiction and filed a statement of its claims. When ordered to do so, it introduced some evidence in support of such claims, but throughout the whole proceeding and at every opportunity insisted that the court had no jurisdiction. *Held*, that the filing of such statement did not operate as a consent to a determination of the bank's rights in summary proceedings in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

Petition to Revise Order of the District Court of the United States for the Western District of New York.

In the matter of the bankruptcy of Francis Bacon. Petition by George E. Zartman, as bankrupt's trustee, for review of order (196 Fed. 986) reversing a referee's order directing the surrender of certain stocks held by a bank to the trustee on his payment of a lien amounting to \$498.82. Affirmed.

See, also, 205 Fed. 545.

Francis Bacon was adjudged a bankrupt on May 4, 1904. Prior to that adjudication, and on February 20, 1899, he had pledged to the Exchange National Bank of Seneca Falls, N. Y., as collateral security for the payment of certain obligations of his held by the bank, 461 shares of the stock of the Waterloo Wagon Company and 253 shares of the stock of the First National Bank of Waterloo. On February 15, 1902, while these stocks were still held by the Exchange National Bank, he transferred the same stocks to the First National Bank of Waterloo as collateral security for the payment of certain obligations held by that bank.

On August 22, 1910, the trustee in bankruptcy petitioned the referee for an order requiring the pledgees to show cause why they should not prove their liens, and why the trustee should not pay to them the respective amounts due,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—9

and redeem such stocks and securities. The Seneca Falls Bank appeared, and waived its lien on the stocks. The First National Bank challenged the jurisdiction of the court, claimed title to the stocks, and asserted its right to have the controversy determined in a plenary action. The objection made by the First National Bank to the jurisdiction was overruled. Under the direction of the referee to proceed, the First National Bank offered proof in support of its claims against the bankrupt, which claims aggregated \$17,836.20. The referee only recognized a lien to the amount of \$498.82 and on the 28th day of July, 1911, made an order that upon the payment of \$498.82, with interest on \$451.22 from the 28th day of July, 1911, to the date of payment by the trustee in bankruptcy, the First National Bank should surrender the stocks and deliver to the trustee a discharge of all its claims against the stocks and pay over all dividends which had accumulated upon the stocks since the date of the adjudication of bankruptcy. The referee also found as a matter of law that the title was not in the First National Bank but was in the trustee. The bank took the matter for review to the District Court for the Western District of New York. That court reversed the decision of the referee and dismissed the petition of the trustee in bankruptcy for want of jurisdiction.

George E. Zartman, of Waterloo, N. Y., for petitioner.

Bacon & Huff, of Waterloo, N. Y. (W. Smith O'Brien, of Geneva, N. Y., of counsel), for defendant.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). A trustee in bankruptcy comes into this court asking to have reviewed the action of the District Court which reversed an order of the referee on the ground that the latter acted without jurisdiction in entertaining summary proceedings against an adverse claimant.

The contract made by Francis Bacon and the First National Bank refers to the fact that the said Bacon has deposited with the Exchange Bank certain stocks which are specifically set forth, and then continues:

"The said Francis Bacon hereby agrees with the First National Bank of Waterloo that the said certificates of stock above named are transferred to and may be held by the said First National Bank of Waterloo as a continuing collateral security for the payment to it of any indebtedness or liability of any kind, absolute or contingent now existing or that may hereafter exist, arise, accrue or be contracted on the part of the Waterloo Wagon Co., Limited, or himself, to said bank and said shares of stock upon their surrender by the Exchange National Bank shall be deposited with the said First National Bank of Waterloo."

There is no evidence that the Exchange Bank ever agreed to surrender the stocks to the National Bank or to hold the stocks in trust for it. The National Bank has at no time had the certificates of stock in its possession. The agreement seems to be nothing more than an agreement that, when the Exchange Bank surrendered the certificates to Bacon, they would be deposited by him with the National Bank as security for debts due to it from Bacon. In *Re Sheridan* (D. C.) 98 Fed. 406, where an agreement to pledge was made more than four months prior to the filing of the petition, but there had been no consummation of the agreement by the making of the pledge until a few days before the petition was filed, it was held that the pledgee's title did not attach until the goods were actually in his possession, and therefore the transfer was preferential and voidable.

[1] Under both the civil and the common law it is necessary to the validity of a pledge that the possession of the pledged property be delivered to the pledgees or to some one for him, and delivery is the very essence of the contract. While delivery may be made to a third person to hold for the pledgee, such third person must know of the agreement and accept the obligation it imposes. *Lanaux's Succession*, 46 La. Ann. 1036, 15 South. 708, 25 L. R. A. 577. It appears that this agreement, as originally drawn, did not conform to the actual agreement of the parties, and a suit was commenced in the Supreme Court of New York to reform it, and a decree was entered, reforming it. The case was affirmed in the Appellate Division, and in the course of its opinion that court said the agreement amounted to a valid pledge of the stocks, and that, while delivery of possession of property was ordinarily essential to the making of a pledge, yet in the case of stock no delivery of possession was necessary, and that a pledge of property not capable of manual delivery might be created by written transfer. *First National Bank of Waterloo v. Bacon*, 113 App. Div. 612, 614, 98 N. Y. Supp. 717. What the court said as to the validity of the pledge and as to the duty of the National Exchange Bank to deliver the stocks to the First National Bank would seem to have been purely obiter dicta. The action, as the court itself remarked, was "merely to reform the contract, not to establish any indebtedness thereunder. That will be determined in another action." Agreement to give a pledge is as readily reformable as an agreement creating the pledge. The case was taken to the Court of Appeals, which affirmed without an opinion (189 N. Y. 533, 82 N. E. 1126). It was carried to the Supreme Court of the United States (*Zartman v. First National Bank*, 216 U. S. 134, 30 Sup. Ct. 368, 54 L. Ed. 418), which also affirmed it. The only question which the Supreme Court of the United States considered was whether the jurisdiction of equity to reform a written contract made prior to a petition in bankruptcy was suspended by the bankruptcy law, and it was answered in the negative. The courts have held that an agreement, even though in writing and under seal, that certain stocks and bonds of the debtor shall be collateral security for a debt due the creditor does not amount to a pledge of the stocks in the absence of a delivery. *Seymour v. Hendee* (C. C.) 54 Fed. 563; *Robertson v. Robertson*, 186 Mass. 308, 71 N. E. 571; *Atkinson v. Foster*, 134 Ill. 472, 25 N. E. 528; *Lanaux's Succession*, 46 La. Ann. 1036, 15 South. 708, 25 L. R. A. 577; *Vanstone v. Goodwin*, 42 Mo. App. 39; 31 Cyc. 807. But we are not required to pass on that question in this case.

[2] It is enough to know that the First National Bank claims that under the law of New York it has a lien on these stocks as a security for debts due from Bacon to it. The trustee's petition was framed upon the theory that the bank had valid claims secured by these stocks. The bank has been throughout asserting an adverse claim and that its right in the stocks has been established by the New York courts.

It seems to have been at one time a favorite opinion of referees that the moment a man was declared a bankrupt all questions relating to his property and credits came within the exclusive province of the bank-

ruptcy courts, and that they could bring any person who contested with the assignee disputed rights of property or of contracts into the bankruptcy court under an order to show cause and there force a settlement of his claim in a summary way. But in *Eyster v. Gaff*, 91 U. S. 521, 525 (23 L. Ed. 403), the Supreme Court, in alluding to this prevalent practice of referees, said, "This court has steadily set its face against this view."

The right of a trustee in bankruptcy to bring suit depends upon the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]).

Section 23a of the act confers upon United States Circuit Courts jurisdiction of all controversies at law and in equity between trustees as such and adverse claimants concerning property claimed by the trustees in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. In instituting the present proceedings, the trustee was not acting under this provision.

Section 23b provides that suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted unless by consent of the proposed defendant, except suits for the recovery of property under section 60, subd. "b", and section 67, subd. "e." As the proceeding which the trustee in this case instituted against this defendant was without his consent and over his emphatic objection, the proceeding, in order to be maintained, should fall either within section 60, subd. "b," or section 67, subd. "e."

Section 60, subd. "b," however, relates to preferences given by a bankrupt and grants concurrent jurisdiction to the state and bankruptcy courts of suits to set aside such preferences and give the property to the trustee. And section 67, subd. "e," relates to conveyances, transfers, or assignments of property made or given by a bankrupt within four months prior to the filing of the petition in bankruptcy and with intent to hinder, delay, or defraud creditors, and it gives to the bankruptcy and state courts concurrent jurisdiction of suits brought by the trustee to recover property so transferred. Neither of these provisions has any relation whatever to the present proceeding.

Section 70, subd. "e," authorizes trustees to avoid any transfer which any creditor of the bankrupt might have avoided, and gives to the bankruptcy and state courts concurrent jurisdiction. The trustee in the present proceeding is not seeking to avoid any transfer, nor is he alleging any fraud in the transactions between the bankrupt and the defendant bank. The District Court fell into error in supposing that the proceeding before the referee was under this provision. It has no application whatever to such a proceeding as the one under consideration.

Neither do we think that the trustee is proceeding under general order 28 (89 Fed. xi, 32 C. C. A. xxviii). That order regulates the manner in which a trustee, who admits an indebtedness, may get au-

thority from the bankruptcy court to settle with a secured creditor. As the trustee is not admitting the indebtedness the bank claims and asking authority to settle it, the order is without any application to this proceeding.

We find nothing in the act, therefore, which justifies the course which has been pursued. What the trustee sought to do was to compel the bank to submit to the bankruptcy court for adjudication, in a summary proceeding, the adverse claims of the bank. This the trustee could not do without the bank's consent.

It was repeatedly held under the Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) that the right of an assignee in bankruptcy to assert a title to property which the bankrupt had transferred to a third person prior to his bankruptcy, and which such third person claimed adversely to the assignee, could only be asserted in a plenary suit and not by summary proceedings, notwithstanding the declaration in the act that the jurisdiction in bankruptcy should extend "to the collection of all the assets of the bankrupt," and to "all acts, matters and things to be done under and in virtue of the bankruptcy" until the close of the proceedings in bankruptcy. *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481; 5 Cyc. 250, note 68. And in 1900 the Supreme Court of the United States decided in *Bardes v. Hawarden First National Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, that under the act of 1898 no jurisdiction existed in the United States bankruptcy courts over adverse claimants, and such suits could only be brought in the state courts or, in case of diversity of citizenship, in the United States Circuit Courts. Since the bankruptcy courts exercised no jurisdiction at all over adverse claimants, they could exercise none by summary proceedings. See *Remington on Bankruptcy*, vol. 1, § 1653. Then in 1903 Congress amended the act and conferred jurisdiction on the bankruptcy courts over suits instituted by trustees to recover property or the proceeds of property transferred in fraud of creditors, including payments in money or property to preferred creditors. The additional jurisdiction then conferred was not to be exercised by summary process but by regular plenary action. So that the summary jurisdiction was not enlarged by that amendment, and the law as to summary proceedings was left precisely as it had existed prior to the amendment. It is not important now to inquire whether the Amending Act of 1910 (Act June 25, 1910, c. 412, 36 Stat. 838 [U. S. Comp. St. Supp. 1911, p. 1493]) had any effect upon the summary jurisdiction of the bankruptcy court, as that act expressly provided that it "should not apply to bankruptcy cases pending when" it took effect, and the case of *Francis Bacon* was pending in the bankruptcy court at that time and so was not affected by it. The law is that if the claims are adverse the claimants are entitled to be heard in a plenary suit, but if the claims are not adverse they may be summarily adjudicated in the bankruptcy courts. See 5 Cyc. 250. The District Courts can only entertain jurisdiction to recover and collect debts brought by a trustee against a third person when it appears that the defendant has consented thereto.

The intention of Congress was that the bankruptcy court should

control the trustee, settle his accounts, and order the distribution of the moneys in his hands, and in respect to such matters the jurisdiction of the federal courts was made exclusive. But it was not intended that the bankruptcy court should assume the burden of all litigations which might be necessary in the collection of the assets of a bankrupt. The policy of Congress evidently was to give to the bankruptcy courts the narrowest and to the state courts the amplest control over proceedings for the recovery of property claimed to belong to the estate of the bankrupt. The courts of bankruptcy have full power by summary proceedings to determine all disputes relating to the title of property which is in the possession of the court. *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183. It is also true that such courts have jurisdiction to recover property belonging to the bankrupt's estate and which is in the possession of a naked bailee or agent who has no claim of title as against the trustee. *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. But the pending proceeding was not instituted upon any such theory. The petition recognizes the existence of a valid lien and seeks to redeem therefrom.

The courts of bankruptcy undoubtedly have a right to ascertain whether, in a particular instance, the claim asserted is an adverse claim existing at the time the petition is filed. If it be ascertained by proper inquiry that a real adverse claim exists, no matter how ill supported it may appear to be, a court of bankruptcy cannot summarily decide as to the validity of the claim. *Collier on Bankruptcy* (5th Ed.) p. 268; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; *In re Teschmacher & Mrazay* (D. C.) 127 Fed. 728; *In re Davis* (D. C.) 119 Fed. 950; *In re Kane* (D. C.) 131 Fed. 386.

That a trustee takes the property of a bankrupt subject to all subsisting and valid liens, incumbrances, or equities, whether created by operation of law or by the act of the bankrupt, is not subject to question. *Yeatman v. New Orleans Savings Institution*, 95 U. S. 764, 24 L. Ed. 589; *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993. The act of 1867 specifically provided for the redemption of property pledged. The act of 1898 does not in specific words authorize the redemption of such property, but such authority is implied under authority to "cause the estates of bankrupts to be collected, reduced to money and distributed." The bankruptcy court has jurisdiction to redeem the property of the bankrupt from liens if there be no controversy over the amount due and no adverse interest. *Remington on Bankruptcy*, § 1870. But it cannot acquire jurisdiction over adverse claimants in possession, nor can it litigate controversies with them in such proceedings. A petition to redeem is in the nature of an application to the bankruptcy court for its permission to pay off an uncontroverted lien. And if it appears that no adverse interest is asserted, the bankruptcy court under a petition to redeem has a right to summarily order the surrender of the property. *Remington on Bankruptcy*, § 1871. But the proceedings before the referee in this case disclosed the fact that a serious dispute exists between the trustee and the bank as to the extent of its claims; the referee rejecting the

greater part of them. Under such circumstances the validity of the claims cannot be disposed of in a summary proceeding in the bankruptcy court without the consent of the adverse claimant.

[3] The trustee does not deny that the First National Bank is an adverse claimant, but he alleges that the bank waived its objection to the jurisdiction by denying material allegations of the petition and by making affirmative allegations after its objection to the jurisdiction had been overruled. The bank denies that it ever pleaded to the merits. What it did was to file a statement of its claims and, when ordered to do so, introduced some evidence in support of its claim, but it was throughout the whole proceeding and at every opportunity insisting that there was no jurisdiction. We are satisfied that the bank never waived its objection to the jurisdiction. In Foster's Federal Practice (5th Ed.) vol. 2, § 609, that learned writer states the law as follows:

"The bankruptcy act by implication gives the courts of bankruptcy jurisdiction over suits by the trustees 'by consent of the proposed defendant.' Consent is given to the jurisdiction of a court of bankruptcy in summary proceedings against an adverse claimant, by his appearance and answer to the merits without raising the jurisdictional objection, but not when he joins in the same answer an objection to the jurisdiction with a defense upon the merits."

This statement of the law is fully justified by the decision of the Supreme Court of the United States in *Wood v. Wilbert*, 226 U. S. 384, 33 Sup. Ct. 125, 57 L. Ed. 264, overruling *Sheppard v. Lincoln* (D. C.) 184 Fed. 182. We think it effectively disposes of the pretense that the question of jurisdiction has been waived.

The order of the District Court reversing the decision of the referee and dismissing the petition of the trustee for want of jurisdiction is affirmed, with costs.

MURPHY v. MILFORD, A. & W. ST. RY. CO. (two cases).

(Circuit Court of Appeals, First Circuit. November 14, 1913.)

Nos. 1,026, 1,027.

APPEAL AND ERROR (§ 642*)—INSUFFICIENT BILL OF EXCEPTIONS—DISPOSITION OF CAUSE.

The rule applied that the Circuit Court of Appeals cannot remodel a bill of exceptions which is defective, but can only affirm or reverse the judgment, and will reverse and remand for a new trial where justice to either party requires it. *Roemer v. Simon*, 91 U. S. 149, 23 L. Ed. 267, distinguished.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 642.*]

In Error to the District Court of the United States for the District of Massachusetts; Francis C. Lowell, Judge.

Actions at law by John F. Murphy and by Rosella Murphy against the Milford, Attleboro & Woonsocket Street Railway Company. Judgment for defendant, and plaintiffs bring error. On motion in each case to dismiss writ of error. Denied.

See, also, 210 Fed. 137, 126 C. C. A. 651.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Francis I. McCanna, of Providence, R. I. (John Louis Sheehan, of Boston, Mass., and Barney & Lee, of Providence, R. I., on the brief), for plaintiffs in error.

William B. Sprout, of Boston, Mass. (Sprout & Kendall, of Boston, Mass., on the brief), for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. In these cases the defendant in error alleges that the bills of exceptions are essentially defective. The alleged defects relate particularly to a claim that evidence given by the defendant in the District Court in behalf of the defendant there was in the nature of rebuttal in regard to the alleged defect out of which the injuries were said to have arisen, especially in regard to the defendant's manner and system of inspecting its cars and equipment pertaining to such alleged defect. The motion refers to the fact that the bills of exceptions were not presented for allowance until almost six years after the trial, when the judge who presided at the trial had deceased, and the bills of exceptions were allowed by another judge sitting in the same court and the same district. The motion contains considerable extracts from the stenographic report of the evidence, which it is said was not submitted to the judge who signed the bills of exceptions, and as to which the defendant below had not been heard. The subject-matter of what is thus produced by the defendant seems to have been important, and perhaps material to the decision of the cases. Thereupon the defendant moves that each writ of error should be dismissed, without specifying what course of procedure should follow the dismissals. The court allowed the plaintiffs in error to file a brief in answer to the motions, but the same throws no particular light upon this issue.

The bills of exceptions were allowed in accordance with section 953 of the Revised Statutes, as amended by the act of June 5, 1900, c. 717, § 1, 31 Stat. 270 (U. S. Comp. St. 1901, p. 696). This provides for the allowance of a bill of exceptions by a succeeding judge under the circumstances occurring here; but it adds nothing to and detracts nothing from the procedure and the powers of the appellate court with reference to bills of exceptions when once allowed. The law is thoroughly settled that the appellate tribunal has no power to remodel a bill of exceptions; and this, so far as we know, has stood unchanged from the beginning. *Stimpson v. Railroad Company*, 3 How. 553, 556, 11 L. Ed. 722, decided at the January term, 1845, and *Metropolitan Railroad Company v. District of Columbia*, 195 U. S. 322, 330, 25 Sup. Ct. 28, 49 L. Ed. 219, decided on November 28, 1904.

Such being the fact, the practice has been fully settled in this circuit in *Merrill v. Floyd*, 50 Fed. 849, 2 C. C. A. 58, decided on June 30, 1892, in *Smith v. Weeks*, 53 Fed. 758, 3 C. C. A. 644, decided on January 10, 1893, and in *Greene v. United Shoe Machinery Co.*, 124 Fed. 961, 60 C. C. A. 93, and *Mossberg v. Nutter*, 124 Fed. 966, 60 C. C. A. 98, both decided on March 10, 1903. The only possible doubt arose from an attempt in these cases to relieve to some extent the hardship of the rule as applied in *Roemer v. Simon*, 91 U. S. 149,

23 L. Ed. 267. There something was said in reference to the result if the judge of the trial court should ask for a return of the record in order that it might be amended; but, in the absence of such a request, which is not found here, the opinion said that the appellate court could "only affirm, reverse, or modify the decree appealed from, and that upon the hearing of the cause." This, it is true, related to a bill in equity; but the rule is the same, as our decisions state, on writs of error.

According to the authorities cited, if we had dismissed these writs of error, it would, under the circumstances, bar the plaintiffs in error from any remedy whatever, so that the only practical effect of the defects in the bills of exceptions claimed by the defendant in error, which defects must have been casual, would have been to deprive the plaintiffs in error utterly of all relief. Under those circumstances, we would not, of course, dismiss the writs of error if we had merely been authorized to; and the law does not so authorize us. Fortunately, on the new trial which we have ordered, the defendant in error will have an opportunity to make up an entirely new record, under more favorable circumstances than those apt to arise in connection with the settlement of a bill of exceptions by a judge not familiar with the case, six years after the trial occurred.

In each case the motion to dismiss the writ of error is denied.

MURPHY v. MILFORD, A. & W. ST. RY. CO. (two cases).

(Circuit Court of Appeals, First Circuit. November 14, 1913.)

Nos. 1,026, 1,027.

1. CARRIERS (§ 318*)—ACTION FOR INJURY TO PASSENGER—PRESUMPTIONS—RES IPSA LOQUITUR.

The rule applied that the happening of an injurious accident is in passenger cases prima facie evidence of negligence on the part of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.*]

2. CARRIERS (§ 320*)—ACTION FOR INJURY TO PASSENGER—QUESTIONS FOR JURY.

Plaintiff was injured while a passenger in defendant's street car, caused by the breaking of a bolt in the back of a seat against which she was leaning. The bolt had a break which was invisible when it was in place, but could have readily been removed for inspection. The cars had been in use for five years, and there was no evidence that the bolt had been inspected during that time, although it was an important bolt and in a position which subjected it to strains. *Held*, that the question of defendant's negligence was one for the jury, and that it was error to direct a verdict in its favor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

In Error to the District Court of the United States for the District of Massachusetts; Francis C. Lowell, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

Actions at law by John F. Murphy and by Rosella Murphy against the Milford, Attleboro & Woonsocket Street Railway Company. Judgments for defendant, and plaintiffs bring error. Reversed.

See, also, 210 Fed. 135, 126 C. C. A. 649.

Francis I. McCanna, of Providence, R. I. (John Louis Sheehan, of Boston, Mass., and Barney & Lee, of Providence, R. I., on the brief), for plaintiffs in error.

William B. Sprout, of Boston, Mass. (Sprout & Kendall, of Boston, Mass., on the brief), for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. These suits were brought by a husband and wife for an injury to the wife, a passenger on an ordinary open street car, caused by the breaking of the usual bolt which supported one end of the seat against the back of which the female plaintiff was leaning. Under the direction of the court the jury returned verdicts for the defendant. The defense grew out of the fact that the bolt which supported the back of the seat which fell with the female plaintiff had a break which was invisible when the bolt was screwed into the upright. On that point apparently the verdict was directed for the defendant.

[1] The law is very simply stated. First of all is the rule given by the Court of Appeals for this circuit in *Whitney v. New York, N. H. & H. R. Co.*, 102 Fed. 850, 852, 43 C. C. A. 19, 21 (50 L. R. A. 615), that, as towards a passenger whom a carrier has taken into its safeguarding, such accidents are ordinarily presumed to be the results of the negligence of the carrier, for the reasons stated in that opinion. There the rule of the *Gleason Case*, 140 U. S. 435, 443, 11 Sup. Ct. 859 (35 L. Ed. 458), was applied as follows:

"The happening of an injurious accident is, in passenger cases, *prima facie* evidence of negligence on the part of the carrier; * * * and the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight."

[2] There can be no doubt that ordinarily the duty of inspection was one of the duties thus resting on the defendant. It is true that the car in this case was only about five years old, and was purchased under circumstances which justified the company in assuming it was in good condition when purchased; but five years of railroad wear involves ordinarily many changes, and there is no evidence of inspection during the five years. The bolt which broke, and which was, of course, covered in part by the socket into which it was screwed, was an important bolt, not very large, but getting the thrust of the back of the seat as it reached its rest on its descent backwards and forwards. It was so located and so used that, if it gave way, the back was liable to fall as it did in this case. It is evident that the bolt, with the use of proper tools, was easily inspected. In the absence of evidence of inspection, it could not be properly ruled by the court to a jury peremptorily that the defendant performed its entire duty in this matter. It was for a jury, under proper instruc-

tions, to determine whether inspection was proper or practicable, and, if yes, to what extent.

Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, cited by the plaintiff in error, affords no assistance in this case. It is only a general discussion of the question *res ipsa loquitur* with reference to the use of the X-ray. The case was decided in the court below against the plaintiff, which decision was finally sustained in the Supreme Court. It holds that the burden of proof does not change, which may be the local law of the District of Columbia. At least the case was not one of injury to a passenger. It is not so favorable to the plaintiff as those already referred to. The rule we apply here was last reaffirmed in *Patton v. Railway Co.*, 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361.

On each appeal the judgment of the District Court is reversed, the verdict is set aside, and the case is remanded to that court for further proceedings in accordance with law; and the plaintiff in error recovers the costs on appeal.

BINGHAM, Circuit Judge (concurring). The first action is brought by John F. Murphy to recover damages for the loss of the society of his wife, Rosella Murphy, and for expenses incurred by reason of an injury which she sustained while a passenger on the defendant's street railway.

The second action is brought by Rosella Murphy to recover damages for personal injuries sustained by her while a passenger, as aforesaid.

The actions were tried together, and at the close of all the evidence the court directed the jury to return verdicts for the defendant. To this order, and to the court's refusal to give certain requested instructions, plaintiffs excepted. These exceptions present the question of the sufficiency of the evidence to warrant the submission of the cases to the jury upon the question of defendant's negligence.

In *McDermott v. Severe*, 202 U. S. 600, 604, 26 Sup. Ct. 709, 710 (50 L. Ed. 1162), Mr. Justice Day, in delivering the opinion of the court, in a case where a child was injured through the alleged negligence of the defendant's motorman at a crossing used by travelers on foot, said:

"Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence. If fair-minded men, from the facts admitted, or conflicting testimony, may honestly draw different conclusions as to the negligence charged, the question is not one of law but of fact, and to be settled by the jury under proper instructions"—citing *Richmond & D. R. Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; *Northern P. R. Co. v. Everett*, 152 U. S. 107, 14 Sup. Ct. 474, 38 L. Ed. 373.

In *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, a grade-crossing case, Mr. Justice Lamar said:

"There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable or prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case

may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonably prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

The rule laid down in *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, has been cited with approval and made the basis of decision in *Gardner v. Michigan Central R. Co.*, 150 U. S. 349, 361, 14 Sup. Ct. 140, 37 L. Ed. 1107; in *Baltimore & O. R. Co. v. Griffith*, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274, a grade-crossing case; in *Texas & Pacific R. Co. v. Gentry*, 163 U. S. 358, 368, 16 Sup. Ct. 1004, 41 L. Ed. 186, a case where an employé was injured while crossing the tracks in the defendant's railroad yard in going to his train; and in many other cases.

In *Elliott v. Chicago, Milwaukee R. Co.*, 150 U. S. 245, 246, 14 Sup. Ct. 85 (37 L. Ed. 1068), where it appeared that the plaintiff, who was foreman of a section gang on defendant's road, was run over while crossing the tracks at one of its stations, Mr. Justice Brewer stated the rule as follows:

"It is true that questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury; yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict"—citing *Chicago, R. I. & P. Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Schofield v. Chicago, M. & St. P. R. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758.

In *Southern Pacific Co. v. Pool*, 160 U. S. 438, 441, 16 Sup. Ct. 338, 339 (40 L. Ed. 485), which was the case of a car repairer who was injured while working under a car by reason of another car being run into it, Mr. Justice White, in answer to the question whether the accident was caused by the negligence of Pool, said:

"To answer this question involves an analysis of the evidence (which the record fully sets out), not for the purpose of weighing the testimony, or of ascertaining the preponderating balance thereof, but in order to arrive at the undoubted proof, from which the legal consequence, negligence, results. There can be no doubt where evidence is conflicting that it is the province of the jury to determine, from such evidence, the proof which constitutes negligence. There is also no doubt, where the facts are undisputed or clearly preponderant, that the question of negligence is one of law. *Union Pacific Railway Co. v. McDonald*, 152 U. S. 262, 283 [14 Sup. Ct. 619, 627 (38 L. Ed. 434)]. The rule is thus announced in that case: 'Upon the question of negligence * * * the court may withdraw a case from the jury altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it'"—citing *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 472, 11 Sup. Ct. 569, 35 L. Ed. 213, and *Elliott v. Chicago, M. & St. P. Railway*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068.

In *Warner v. Baltimore & O. R. Co.*, 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491, a verdict had been ordered by the trial court for the defendant. That was a case where a passenger had been injured while crossing a track at a station to take a train standing on a track just beyond the one next to the station, and was run over by an incoming train. Mr. Justice White, in delivering the opinion, said:

"The learned court below, in affirming the judgment of the trial court, principally rested its conclusion on the ruling in *Elliott v. Chicago, Milwaukee & St. Paul Railway*, 150 U. S. 245 [14 Sup. Ct. 85, 37 L. Ed. 1068], and the authorities in that case referred to. But there the question for determination was the negligence of one not a passenger.

"The duty owing by a railroad company to a passenger, actually or constructively in its care, is of such a character that the rules of law regulating the conduct of a traveler upon the highway when about to cross and the trespasser who ventures upon the tracks of a railroad company are not a proper criterion by which to determine whether or not a passenger who sustains injury in going upon the tracks of the railroad was guilty of contributory negligence. A railroad company owes to one standing towards it in the relation of a passenger a different and higher degree of care from that which is due to mere trespassers or strangers, and it is conversely equally true that the passenger, under given conditions, has a right to rely upon the exercise by the road of care; and the question of whether or not he is negligent, under all circumstances, must be determined on due consideration of the obligations of both the company and the passenger."

In this case the court refused to follow the line of decisions of which *Elliott v. Chicago, M. & St. P. R.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068, is a type, and followed the rule laid down in *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, and the cases heretofore enumerated of like import.

In *Texas & Pac. R. Co. v. Harvey*, 228 U. S. 319, 33 Sup. Ct. 518, 57 L. Ed. 852, there was a verdict for the plaintiff, and one of the questions was whether there was evidence of negligence warranting the submission of the case to the jury. After stating the evidence the court proceeds to discuss it as bearing upon the question of contributory negligence, as follows:

"Can it be said that the inference of negligence is so plain that all fair-minded men would be compelled to that conclusion upon a consideration of the facts? The appellate court is not a jury for the trial of a case, nor do we have the powers of a court to grant a new trial, which in the federal practice is a matter resting in the sound discretion of the trial court. The question, and the sole question, is: Was the contributory negligence so evident, applying the rules we have already stated, that it became a question of law requiring the court to take the case from the jury by direction to return a verdict for the railway company because of the contributory negligence of the deceased? We are not prepared to answer this question in the affirmative. Under all the circumstances, as we have related them, we cannot say, as an appellate court, that the trial court was wrong in leaving the question to the jury under the fair and full instructions given."

And in *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, it was held that since the adoption of the seventh amendment to the Constitution, so far as actions at law are concerned, federal courts of appeal cannot weigh evidence and determine issues of fact, but are confined to considering errors of law.

While in some of the cases above referred to the rule of law may have been too favorably stated for the party in whose behalf the

verdict was ordered, it is to be observed that the power which federal courts of appeal exercise, in actions at law, is not that of weighing testimony and balancing probabilities, and is not the same as that exercised by a trial court on motion to set aside a verdict as against the evidence (*N. Y. Cent. & H. R. R. v. Fraloff*, 100 U. S. 24, 31, 25 L. Ed. 531), and that the true rule, and the one generally recognized and applied by the Supreme Court, where the error complained of is in the direction of a verdict, is whether on all the evidence reasonable men, in the exercise of a sound judgment, would be compelled to reach the same conclusion; and that if they would not there was error, and the question should have been sent to the jury.

In this case the plaintiff's evidence tended to prove that the defendant was a common carrier of passengers, operating a street railway, and that while the plaintiff, Rosella Murphy, was riding as a passenger in one of its open cars, the back of the seat upon which she was leaning separated at one end, and fell, causing her to fall between the seat and the back, and to suffer injury.

Upon this branch of the evidence the plaintiffs invoke the doctrine of *res ipsa loquitur*, and the question arises under what circumstances this doctrine is applicable as against a common carrier in negligence cases.

"There are decided cases to the effect that negligence may properly be inferred against a common carrier from the mere happening of an accident; * * * but this is a doctrine too broad to be sustained, and it has been expressly overruled in cases of high authority." *Paine v. Railway*, 58 N. H. 611, 613; 2 *Sherm. & Red. Neg.* § 516, and authorities *infra*.

"The carrier does not insure the passenger against injury from any cause during transportation, and there is no implied contract of safe carriage. The plaintiff's right of action is based on negligence, and negligence must be shown to authorize a recovery. If the accident may have been due to other causes than the carrier's negligence, the fact of the accident does not authorize the inference of negligence; but if the thing causing the injury is entirely within the control of the defendant, and in the ordinary course no accident would result if due care were exercised, the happening of such an accident may authorize an inference of negligence. 'The fact of an injury alone is not sufficient. It must be traced to the carrier. It must be shown to have proceeded from something under his control, or from some danger which, under the obligations of extraordinary care, it was his duty to anticipate and provide against.'" 3 *Thomp. Com. Neg.* §§ 2754-2762; *Scott v. London Docks*, 3 H. & C. 596; 4 *Wigmore's Ev.* § 2509; *Penn. R. R. v. MacKinney*, 124 Pa. 462, 17 Atl. 14, 2 L. R. A. 820, 10 Am. St. Rep. 601; *Phila.*, etc., R. R. v. *Anderson*, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483; *Barnowsky v. Helson*, 89 Mich. 523, 50 N. W. 989, 15 L. R. A. 33; *Western Trans. Co. v. Downer*, 11 Wall. 129, 20 L. Ed. 160; *Boucher v. Railroad*, 76 N. H. 91, 79 Atl. 993, 34 L. R. A. (N. S.) 728, Ann. Cas. 1912B, 847; *White v. Railroad*, 144 Mass. 404, 11 N. E. 552; 6 Cyc. 629.

The decision in *Whitney v. New York & New Haven R. R.*, 102 Fed. 850, 43 C. C. A. 19, 50 L. R. A. 615, is not in conflict with this view of the law when the facts of that case are considered. There it appeared that the car in which the plaintiff was riding was overturned, while being operated by the defendants. There was no question but that the car was within the defendants' exclusive control, and, this being so, the evidence would, on the doctrine of *res ipsa loquitur*, warrant the inference that the defendants were negligent.

Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115; McKinney v. Neil, 16 Fed. Cas. No. 8,865; Ware v. Gay, 11 Pick. (Mass.) 106; Stevens v. European, etc., R. Co., 66 Me. 74; 6 Cyc. 630b. The question whether the plaintiff was a passenger was important in that case, not so much as bearing upon the question whether the evidence would warrant the inference that the defendants were negligent as in determining the degree of care which they would be required to exercise with reference to him, and also whether the release from liability against accidents due to the negligence of the defendants and their servants, which the plaintiff had given to the defendants, was illegal and void. If the plaintiff was a passenger, the defendants were in duty bound to exercise the highest degree of care towards him. Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141. If he was a passenger, the release was illegal and void, and no defense to the action. Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627.

The question has arisen whether or not, in the passenger cases decided by the Supreme Court (all of which are cited in Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815), and where the doctrine of *res ipsa loquitur* was applicable, it was held that the plaintiff was relieved from sustaining the burden of proof upon the question of negligence, and that the burden was imposed upon the defendant of showing its freedom from fault. This question has been recently considered by that court in Sweeney v. Erving, 228 U. S. 233, 238, 33 Sup. Ct. 416, 418 (57 L. Ed. 815), and it was there held that in such cases it did not have the effect of shifting the burden of proof. After reviewing the earlier decisions, the court states its conclusion in these words:

"In our opinion *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."

In addition to the foregoing evidence on the question of the defendant's negligence, it appeared there was a metal socket attached to a post at the end of the seat, and a metal arm at the end of the back which fitted into the socket, and was held in place by a screw bolt. It also appeared that before the accident occurred a passenger on the car caught his coatsleeve on the projecting end of the bolt, and saw that it was loose; and that after the accident he looked again, and saw that the bolt had fallen out of the socket. When the bolt first became loose the evidence does not disclose; but, in view of the evidence that it was loose at the time the witness boarded the car, that the car had been in use for five years, that such bolts worked loose or got out of order through use, that it did not appear that any inspection had ever been made by the defendant to ascertain the condition of the bolt, and in view of the great care which the defendant was bound to observe in passenger transportation, and of the duty

of the court to construe the evidence in the light most favorable to the plaintiff, it surely cannot be said that all reasonable men would be required to find that the defendant was free from fault. It would rather seem that on this question reasonable men might honestly differ, and that the evidence presented a case for the jury.

I concur in the result reached by the majority of the court, and for the reasons here stated.

BUCHANAN v. W. M. RITTER LUMBER CO. et al.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1913.)

No. 1159.

1. REMOVAL OF CAUSES (§ 49*)—REMOVAL BY ONE OF TWO DEFENDANTS—JOINT CAUSE OF ACTION.

If a complaint states a joint cause of action against two defendants, the motive which prompted the joinder is immaterial on the question whether the cause is removable by one of the defendants.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 95-99; Dec. Dig. § 49.*]

2. REMOVAL OF CAUSES (§ 49*)—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.

A railroad company and the engineer of one of its trains may be sued jointly for an injury alleged to have been caused by the negligence of the engineer in the operation of the train; and the company cannot remove the cause from the state court, as involving a separable controversy, where its codefendant and plaintiff are citizens of the same state.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 95-99; Dec. Dig. § 49.*]

Removal of causes, separable controversy, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155; Pollitz v. Wabash R. Co., 100 C. C. A. 4.]

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville; James E. Boyd, Judge.

Action at law by D. L. Buchanan, administrator of Richard Buchanan, deceased, against the W. M. Ritter Lumber Company and Joe Effler. Judgment for defendants, and plaintiff brings error. Reversed.

J. W. Pless, of Marion, N. C. (John C. McBee, of Bakersville, N. C., on the brief), for plaintiff in error.

Landon C. Bell, of Columbus, Ohio (James H. Merrimon, of Asheville, N. C., on the brief), for defendants in error.

Before PRITCHARD, Circuit Judge, and CONNOR, District Judge.

CONNOR, District Judge. This action is prosecuted by plaintiff, as administrator of Richard Buchanan, deceased, for the recovery of \$30,000, damages alleged to have been sustained on account of the death of his intestate caused by the negligence of the defendants. The action was brought in the superior court of McDowell county, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexe.

upon the petition of defendant lumber company, a citizen and inhabitant of the state of West Virginia, removed into the District Court of the United States for the Western District of North Carolina. Plaintiff and defendant Joe Effler are citizens and residents of the state of North Carolina. Plaintiff, in apt time, lodged a motion to remand the case to the state court. The motion was resisted by defendant lumber company upon the contention that the complaint set out separate causes of action against defendants, upon each of which defendants would rely upon different defenses supported by different evidence; that their liability was dependent upon different principles of law, etc. Defendant further alleged that its codefendant was insolvent and that their joinder was for the purpose of preventing the removal by the nonresident defendant into the federal court. The motion to remand was refused; the court assigning no reason therefor, nor finding any facts. Plaintiff saved his exception, and, after a trial upon the issues, resulting in a verdict for defendants, directed by the court, sued out this writ of error, assigning as error the refusal of the court to grant his motion to remand.

[1, 2] The record contains other assignments of error which, in the view which we take of the record, need not be discussed. It will be taken that the refusal to remand was based upon the opinion of the court below that the complaint stated separate causes of action against each defendant. It was so argued in this court. It is well settled that, if the complaint states a joint cause of action against both defendants, the motive which prompted the joinder is immaterial. The exercise of a legal right cannot be said to constitute a fraud upon the jurisdiction of the court.

The decision in *Alabama G. S. Ry. Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147, is in point and decisive of the question presented upon this record. The questions there certified to the Supreme Court were:

(1) May a railroad company be jointly sued with two of its servants, one the conductor and the engineer of one of its trains, when it is sought to make the corporation liable only by reason of the negligent act of its said conductor and engineer in the operation of a train under their management and control, and solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing and not charged with any concurrent act of negligence?

(2) Is such a suit removable by the corporation, as a separate controversy, when the amount involved exceeds \$2,000, etc., and the requisite diversity of citizenship exists between the said company and the plaintiff; the citizenship of the individual defendants, sued with the company as joint tort-feasors being identical with that of the plaintiff?

The court, after a review of the authorities, answers the first question in the affirmative and the second in the negative. The sole question, therefore, to be answered in this case, is whether the complaint sets out a case coming within the terms of the first question quoted above. It must be conceded that the complaint falls far short of com-

pliance with the rule of pleading prescribed by the Code of Procedure of North Carolina, which directs that it contain:

"A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." Revisal, § 467.

The plaintiff either had a confused idea in his own mind as to what facts constituted the basis of his complaint against the defendants, or, as is too frequent, failed to draw the distinction between "facts constituting the cause of action" and "evidentiary facts." The latter should never be found in a pleading. It is difficult, in this case, to separate the two and ascertain the theory upon which the complaint is drawn. It appears, however, eliminating mere evidential averments, that while plaintiff's intestate was in the discharge of his duty as an employé of defendant Ritter Lumber Company, a common carrier operating a railroad for the carriage of freight and passengers for hire, he was riding upon the platform step on the engine of the defendant, where he was accustomed and required to ride, he was knocked from his position by a limb from a tree which had been by the company carelessly permitted to be placed near the track, and so injured that he died.

"That the said obstruction was in plain view of the operatives and engineer, Joe Effler, on said train, was known by him to be in the position in which it was, at the time of said injury, and was also in his plain view while approaching the same, and the same could and should have been seen by the said Joe Effler if he had been properly performing his duty, as he was required to do, in time to have stopped his engine and prevented the injury, and by reason of the said failure to keep a proper lookout, and to stop his engine, the plaintiff was struck by the said obstruction, or the said obstruction caused the said intestate to be knocked or thrown from his said position, where he fell beneath the wheels thereof, when he was finally so injured by the wheels of the engine that he died."

This, or equivalent language, with increasing intensity, is repeated in six allegations, without stating any different cause of action. The complaint does not profess to set out more than one cause of action. It concludes with the seventh allegation:

"That by reason of the negligence and carelessness of the two defendants as alleged, the plaintiff has been damaged and defendants are indebted to plaintiff in the sum of thirty thousand dollars."

It is manifest that the breach of duty, which plaintiff alleges as the proximate cause of the death of his intestate, is the failure of defendant Joe Effler to stop the train when he saw, or, by keeping a proper lookout, could have seen, the limb or piece of tree extending over the track. The physical conditions which he describes could not have resulted in the death of his intestate, except for the alleged negligence of the defendant Effler. This is the negligent act of the engineer in the operation of the defendant company's engine, and is the sole ground upon which its responsibility for the death of the intestate is based, and for this negligent act both the employer and employé are liable and may be sued jointly. They may have been sued separately, but the plaintiff had his election to sue them jointly. Mr. Chief Justice Fuller, in *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, says:

"It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy * * * is a separate one; for, as the court has often said, 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' Powers v. Chesapeake & Ohio Ry. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673."

As to whether, upon an alleged state of facts, the wrong complained of is joint or several, the federal court will follow the decision of the court of the state in which the cause of action accrued. *Dixon's Case*, supra. That a railroad company and its employes are jointly liable, and may be sued jointly for an injury sustained by reason of the negligent operation of the engine, is well settled as the law of this state by the Supreme Court of North Carolina. Mr. Justice Walker in *Hough v. Railroad*, 144 N. C. 692, 57 S. E. 469, says:

"The defendant the Southern Railway Company was the master, and its co-defendants servants of that corporation, and it is alleged that as such they owed a duty to the intestate which they disregarded and neglected, and that their joint omission of that duty proximately resulted in his death. * * * This is the substance of the cause of action, which, being for a tort, may be made joint by uniting all the tort-feasors as defendants in one action, or several by suing each in a separate action. The plaintiff, or party aggrieved by the wrong, may make it joint or several, at his election, and it is not open to the wrongdoer to complain of the election so made, or dictate how he shall make his choice."

That this is the doctrine of both state and federal courts is shown in the cases cited by Judge Walker. That the parties construed the complaint in this case as stating a joint cause of action is indicated by the form of the issue submitted on the trial. It was directed to the question "of the negligence and carelessness of the defendants as alleged in the fourth paragraph of the plaintiff's complaint." It is in the fourth paragraph that the real cause of action is set out. The remaining parts of the complaint might well be eliminated as surplusage, calculated to confuse the real issue.

There was error in refusing the motion to remand the case to the state court. This cause will be remanded, to the end that further proceedings may be had in accordance with this opinion.

Reversed.

LIBBY, McNEILL & LIBBY v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. November 12, 1913.)

No. 1174.

1. FOOD (§ 5*)—PURE FOOD STATUTES—MEANING OF WORDS USED ON LABELS.

Pure food laws are enacted for the protection of the general public as the ultimate purchasers, and where words in everyday use are found on the label of a food product, they are to be given their ordinary and popular meaning, rather than the commercial meaning which they have acquired among manufacturers and dealers.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

2. FOOD (§ 5*)—FOOD AND DRUGS ACT—ADULTERATION AND MISBRANDING.

Food and Drugs Act June 30, 1906, c. 3915, § 8 (4), subd. 1, 34 Stat. 771 (U. S. Comp. St. Supp. 1911, p. 1359), which provides that mixtures or compounds known as articles of food under their own distinctive names shall not be deemed adulterated or misbranded when sold under such name, and not an imitation of or sold under the distinctive name of another article, does not apply to a case where the name used in its popular meaning is accurately descriptive of another well-known food product.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

What constitutes a violation of pure food regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

3. FOOD (§ 5*)—FOOD AND DRUGS ACT—MISBRANDING.

A food product sold under the name of "Condensed Skimmed Milk" held to be adulterated and misbranded, where it contained 42 per cent. of cane sugar, the presence of which was not indicated on the label; it being shown that condensed skimmed milk unsweetened is also made and sold.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Prosecution by the United States against Libby, McNeill & Libby, a corporation. Judgment of conviction, and defendant brings error. Affirmed.

R. Randolph Hicks, of Norfolk, Va. (H. J. Aaron, of Chicago, Ill., on the brief), for plaintiff in error.

D. Lawrence Groner, U. S. Atty., of Norfolk, Va.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. This is a prosecution under the Food and Drugs Act. It raises two questions as to the construction of that statute:

First. Are words in everyday use to be given, when found on the labels of food products, their ordinary and popular meaning, rather than the commercial significance which they have acquired among manufacturers and dealers?

Second. Does the first proviso to section 8 of the act permit the use as a name for a compound or mixture intended for food of common words which will to an ordinary man appear to be descriptive, but which, if so understood, will be false and misleading?

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff in error was the defendant below. It will be so called here. It is a Maine corporation. Its factory is in Chicago. Among other things it there prepares what it calls the "Target Brand of Condensed Skimmed Milk." It does not put out this product under its own name, but under that of the "Foster Packing Company." That designation is not the name of an actual corporation, but is a mere trade-name under which the defendant, for some reason of its own, chooses to market some of its products. It is admitted that what it labels "Condensed Skimmed Milk" contains something more than two parts of cane sugar to something less than three parts of the more nearly solid constituents of skimmed milk. The information charged that the product was adulterated, because cane sugar had been in part substituted for skimmed milk, and that it was misbranded, because the label was false and misleading, in that the contents of the can were not wholly condensed skimmed milk, but were to the extent of 42 per cent. cane sugar.

The record shows that milk which has been reduced by evaporation to a fourth or less of its original weight is sometimes sweetened and sometimes is not. When it is sweetened, sugar is added to the skimmed milk while the latter is still in its natural state, in the proportion of 3 parts of sugar to 20 parts of milk. The mixture is then subjected to a process of condensation by evaporation, the effect of which is to reduce its weight by about 70 per cent. Of the 30 per cent. remaining, upwards of two-fifths will be sugar. Unsweetened skimmed milk is condensed or evaporated in the same manner, except that, of course, no sugar is added to it. Unsweetened condensed or evaporated milk, whether skimmed or unskimmed, must be thoroughly sterilized before being hermetically sealed. After the seal is broken, it will not keep as long as the sweetened. In the latter the sugar acts as a preservative.

The defendant offers much evidence that manufacturers and wholesale and retail dealers of and in food products know that what passes under the name of "condensed milk" or "condensed skimmed milk" contains a large percentage of sugar. Many of them said that when they order condensed skimmed milk they expect to get the sweetened article. If the unsweetened were sent them, they would feel that they had been imposed upon. From the testimony of some of these witnesses, however, it appeared that there were on the market many brands of sweetened condensed skimmed milk which were labeled "sweetened," and others which, containing no added sugar, were marked as "unsweetened."

[1] The defendant asked the court to give eight instructions to the jury. Six of these, although in varying phraseology, were to the effect that, if condensed skimmed milk as commercially known is concentrated milk to which sugar has been added, the defendant must be acquitted. These instructions were refused.

There is no question that words should sometimes be given their trade or commercial meaning rather than their more ordinary one. Such has been long the rule of construction applied to tariff and revenue acts.

Laws regulating the payment of duties are for practical application to commercial operations, and are to be understood in a commercial sense. Such laws are intended for practical use and application by men engaged in commerce, and hence it has become a settled rule in the interpretation of statutes of this description to construe the language adopted by the Legislature and particularly in the denomination of articles according to the commercial understanding of the terms used. *Tyng v. Grinnell, Collector*, 92 U. S. 470, 23 L. Ed. 733.

On the other hand, when it is alleged that a particular description, branding, or method of offering of goods for sale will enable one dealer to pass off his products for those of another, it is usually immaterial whether dealers in such articles are deceived or not. The inquiry in such cases is whether the ultimate purchaser will be misled. *Hopkins on Trade-Marks*, § 106.

Pure food laws are intended to protect the public, whose members may be, and in the more numerous part usually are, ignorant of the technical significance which ordinary words may have acquired in particular trades or industries. The Supreme Court of Michigan has said that decisions construing revenue acts—

"do not apply to cases arising under the pure food laws of state governments. Courts will take cognizance of the well-known fact that farmers, laboring men, and consumers are not generally familiar with the customs of trade and commerce in importing goods, or of the understandings of the trade between manufacturers and merchants who buy these products for retail trade. Such construction would emasculate the pure food laws, and deprive the people of the protection which the Legislature wisely intended to give them." *Armour & Co. v. Dairy and Food Commissioner*, 159 Mich. 10, 123 N. W. 580, 25 L. R. A. (N. S.) 616.

We fully concur in this statement of the true rule of construction to be applied to pure food statutes, whether state or federal. It follows that the learned judge rightly refused to instruct the jury otherwise.

[2] The other two requests of the defendant for instructions were that the jury should be told in effect that, if they should find that condensed skimmed milk as manufactured and sold to the public is a mixture or compound sold under its own distinctive name, the defendant was not required to indicate on the label of the product the presence of sugar in it. These requests were also denied.

It is not necessary in this case to attempt an exhaustive construction of the first proviso of section 8 of the act. In our view it has no application to the facts of this case. The words on the label were all in ordinary use. Each and every one of them could and would be understood by the general public to have been intended to convey their accustomed meaning; that is to say, the average man who read the label would suppose that the can contained skimmed milk which had been reduced in bulk by evaporating or otherwise driving off a part of its fluids.

Defendant does not question that unsweetened milk may be and habitually is subjected to this process and that a marketable product is thereby obtained. The description on its label would be strictly accurate if applied to such milk product, provided that the words

used are to be given their customary significance. Under such circumstances, the defendant may not use them to indicate the presence in substantial quantities of a constituent, the existence of which in the product they in their ordinary meaning impliedly deny.

[3] The construction which is here put upon the statute works no hardship upon the defendant or upon other manufacturers and dealers in like case with it. It does not claim that its trade will be hurt by telling the purchasers of its goods that there is sugar in them. Its whole contention here rests upon the assumption that they already know that there is. If that be true, no harm will be done by stating the fact in plain language upon the label.

The defendant assigns error in the instructions actually given by the court below. They, however, do not appear to be open to criticism. They left to the jury to find, in addition to the other essential facts, whether sugar was a component part of condensed skimmed milk.

Affirmed.

SCHENKEMEYER v. TUSEK.

(Circuit Court of Appeals, Third Circuit. Jan. 19, 1914.)

No. 1,784.

1. MASTER AND SERVANT (§§ 286, 289*)—INJURIES TO SERVANT—SAFE PLACE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to plaintiff, a stonecutter, while attempting to cut a stone from a pile by the fall of the pile, due to inherent weakness in the manner in which it was piled together with the fact that other stones were leaned against the pile, evidence *held* to require submission of defendant's negligence and plaintiff's contributory negligence to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050, 1089, 1090, 1092–1132; Dec. Dig. §§ 286, 289.*]

2. TRIAL (§ 253*)—INSTRUCTIONS—REQUEST TO CHARGE—APPLICABILITY TO EVIDENCE.

Where, in an action for injuries to a stonecutter by the fall of a stone pile alleged to have been negligently constructed, it appeared that plaintiff at the time of the injury, as was customary and as he had been directed, went to the pile to split off a section of the last stone in the pile to take to his bench and there cut it, a request to charge that if the jury found that, if a trestle had been provided in cutting the stone and he was injured while cutting on the boards in or near the pile, he was guilty of contributory negligence and could not recover, was misleading and inapplicable to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. § 253.*]

3. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—METHODS OF WORK—CUSTOMARY METHOD—EVIDENCE OF NEGLIGENCE.

Where, in an action for injuries to a servant by the fall of a stone pile constructed without binding strips between the layers, it was competent to prove as evidence of negligence, though not in itself establishing negligence, that it was customary in piling such stones to use binding strips between the tiers, accompanied by further proof that the departure rendered the pile less stable and increased the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913–927, 932; Dec. Dig. § 270.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Repr Indexes

4. APPEAL AND ERROR (§ 1067*)—REVIEW—REQUEST TO CHARGE—REFUSAL—PREJUDICE.

Where, in an action for injuries to a servant caused by alleged negligence in piling stones, the court gave a requested charge that, if the jury found from the evidence that the stone fell on plaintiff for some reason other than the defendant's faulty construction of the pile, a verdict must be for defendant, it was not prejudiced by the court's refusal to further charge that, if the jury were unable to find from the evidence definite proof of specific negligence without depending on probable theories or inferences as to a cause of the action, the verdict must be for defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.*]

In Error to the District Court of the United States for the Western District of Pennsylvania.

Action by Paul Tusek against Charles Schenkemeyer, doing business as the Johnstown Marble & Granite Works. Judgment for plaintiff, and defendant brings error. Affirmed.

Forest & Percy Allen Rose, of Johnstown, Pa., and George E. Reynolds and Louis Caplan, both of Pittsburgh, Pa., for plaintiff in error.

John F. Gloeckner and S. G. Porter, both of Pittsburgh, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Paul Tusek, the plaintiff, brought suit and recovered a verdict against Charles Schenkemeyer, a citizen of Pennsylvania, for damages sustained by him while in defendant's employ. On entry of judgment thereon defendant sued out this writ.

[1] Turning first to the refusal of defendant's request for binding instructions, we find the evidence tended to show these facts: Schenkemeyer had a contract for erecting a building and had piled on the building lot sawed stone from which sills, lintels, etc., were to be cut. He had for several weeks employed some stonecutters, who split or cut from such piled stone such parts as were required, carried them to benches a short distance away, and there dressed them to size. Tusek, who was also a stonecutter, worked with these men eight or nine days before his injury, and pursued the same course. While so cutting off a piece of sawed stone preparatory to removing it to his bench, a number of stones fell from a pile and crushed his right arm so as to necessitate amputation. The charge of negligence was that the stones "had been piled in a careless, reckless, and negligent manner without binders, one stone on top of the other, * * * the stones lying lengthwise, * * * and with large stones about 7'x7"x7" standing on edge and leaning against the piles." And it was averred that:

"By reason of the faulty and negligent construction of one of these piles of stone, and by reason of the large and heavy stones leaning against it, the place

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in which plaintiff was required to work was dangerous and unsafe, and plaintiff's safety imperiled, and further, for the same reasons, one of these piles of stone fell onto the plaintiff and injured him."

The stones were piled by Louis Schenkemeyer, a son of defendant, who was in charge of the work, and Valentine Gabriel, a stonecutter. The testimony of the former is that all the sawed stones were placed in a single pile about 25 feet long and on sloping ground, one end of the pile being 3 feet lower than the other; and that the stones were laid crossways of the slope upon two rows of sleepers 4 inches square and about 8 feet long. Upon each of the stones in the lower course a tier of six stones, unconnected by any cross-stick or binder, was carried to the height of the pile, which was 42 inches. On end and leaning against the end of the pile were stones 11 inches square and $5\frac{1}{2}$ feet long. His testimony, and that of several others, was that it was not customary in piling to put strips between courses of stone. The testimony of Gabriel, who was called by the plaintiff, differed from the foregoing, in that he said the stone was placed in separate piles, and the pile that fell on Tusek was about 4 feet high and 3 feet wide; that it stood by itself and was 18 inches or 2 feet from the stone on which Tusek was working when injured. Against this pile leaned on end four stones, two against the end 11 inches square and from $6\frac{1}{2}$ to 7 feet long; the other two against the side about 5 by 10 and from 5 to $5\frac{1}{2}$ feet long. He testified: That it was customary to place strips between the stones, and that they were used "to have the pile safe together; tight; and to keep the edge of the stone all right." That he called Schenkemeyer's attention to his not putting in strips and advised laying on the ground the pieces which were stood on end against the pile, but was told they were in a hurry to unload the car. It suffices to say, without detailing it, that there was evidence substantiating in some particulars both witnesses. Witnesses for the plaintiff testified that it was customary, and those for the defendant that it was not, to put strips or binders between the layers of stone. Coming down to the day of the injury, the proof is that on that morning, pursuant to orders given by Louis Schenkemeyer the night before, Gabriel, Tusek, and Friedman, another stonecutter, went to a pile to get some designated lots of stone. They in turn, and from time to time in the manner they had theretofore followed, split or cut and removed all the stones of that pile except the last one. It was too heavy for Tusek to move to his bench. Going between it and the adjoining pile, testified to by Gabriel, he measured off the desired length and, placing his pitching tool or chisel on the stone, struck two blows. As he struck the second blow, one of the large stones which was leaning against the next and last adjoining tier of six superimposed stones toppled over, carrying two rows of that tier with it, caught Tusek, and crushed his arm. Under these proofs, was the case for the jury?

There was evidence that the piles were separate. While it is now contended that Tusek jarred by his stroke the pile that fell and brought it down on himself, there was no testimony to support any such contention. It is true that Louis Schenkemeyer testified there were slabs or scantling under the single long pile to which he testified, yet the

same proof shows that these were about eight feet long, and there is no proof that the stone Tusek was cutting rested on a slab which extended under the adjoining stones which fell. That the two courses of the tier in question fell is clear; that the weight which caused them to fall was in part the leaning stone 11x11, which followed them and caught Tusek, was equally clear. If we add the facts that the ground was solid and the frost out, that heavy stones stood on end against the last unbound tier of a pile sloping down hill, and other large stones leaned against another side of this pile, we have every factor tending to show that the inherent instability of the pile, affected by no extraneous force, was the direct cause of Tusek losing his arm. Manifestly, the trial court would have erred had it held as a matter of law that from these facts no inference of negligence could be drawn. It will be observed that the negligence charged was not in failing to put binders across the stones. That was but one element of the negligence charged, proved, and to which the attention of the jury was called by the judge. To that was superadded the leaning on end of long stones 11 inches square against a tier of unbound stones and this upon sloping ground. In that regard the court, after referring to the piling without strips, said:

"That is the negligence asserted by the plaintiff, and that not only were they piled in that way without a binder, but that large stones (you have heard them described) were put against the ends of the pile, and that the absence of the stocks, the weight of the large stones against the ends, and that the incline of the ground, altogether tended to finally push this pile over upon the plaintiff while he was at work."

[2] The next question concerns contributory negligence. This is based on the court's denial of defendant's point that:

"If the jury find from the evidence that a trestle was provided for plaintiff's use in cutting the stone, and he was injured while cutting on the boards at stones in or near the pile, he is guilty of contributory negligence, and the verdict must be for the defendant."

This point does not correctly state the real situation; its affirmance would have been misleading, and the court was justified in refusing to so charge. It was based on the theory, wholly at variance with the proofs, that the plaintiff, instead of cutting stones at his bench, was cutting stones on boards in or near the pile when he was injured. This ignores the fact that he was not cutting stone. On the contrary, he was, as was customary and as his employer directed, at the stone pile to split off a section of the last stone in the pile to take to his bench to there cut it. That this was no evidence of contributory negligence, under the facts proved, is clear to us, unless the danger of the pile itself was so patent as in itself made one negligent who worked beside it. But that such was not the case has been determined by the verdict of the jury under the instruction of the court that:

"The man assumes the risks of the dangers of that employment, either that are pointed out to him or that he knows or are so obvious that he ought to have known, and therefore in this case you take into consideration all the evidence bearing upon that. Was this place so obviously dangerous to this plaintiff in working there that he ought to have seen the danger? Was it so imminently dangerous, so obviously dangerous, that he ought not to have continued work? If it was, then he would not be entitled to recover. He assumes

the risk of the employment. That is, he assumes the risk of those dangers which he sees or ought to have seen."

[3] It is also alleged the court erred in its instructions as to the bearing of the testimony that was given as to the alleged customary way of piling stones without strips. This subject of the relevancy of such testimony had the careful consideration of this court in *American Locomotive Co. v. White*, 205 Fed. 260, 123 C. C. A. 464, to which reference is made. We have carefully examined the proofs and the charge and are satisfied the court substantially observed these principles. As we stated before, the case, under the evidence or the pleadings, did not turn, nor did the court's charge make it turn, on whether or not it was customary to use binders. That fact was only an element in connection with the slope of the ground and the weighting of the pile with heavy leaning stones, in determining whether the stones were negligently piled. Had there been no testimony of any custom, the mere fact of the absence of any binders for a tier of comparatively narrow stones, standing on sloping ground and subjected to the weight of a heavy stone placed on end, would have, without any evidence of custom, been a proper factor for proof and consideration on the question of negligence.

[4] It is complained that the court refused defendant's point:

"If the jury are unable to find from the evidence definite proof of specific negligence, without depending upon probable theories or inferences as to the cause, the verdict must be for the defendant."

Was there error in refusing it? As bearing on the proofs in the case and the course of the trial, we are unable to understand what this point means. The court had already affirmed defendant's point that:

"If the jury find from the evidence that the stone fell upon the plaintiff for some reason other than faulty construction by the defendant, the verdict of the jury must be for the defendant."

If the two points in substance meant the same thing, it was a needless duplication. The point affirmed restricted the jury from basing their verdict on any other cause than negligent piling. We are not satisfied the defendant by the refusal of this point was or could have been wronged.

The foregoing and all other contentions have been carefully considered, and we find no grounds to justify our setting aside the judgment below. It is accordingly affirmed.

ASSETS REALIZATION CO. v. SOVEREIGN BANK OF CANADA et al.

(Circuit Court of Appeals, Third Circuit. January 19, 1914.)

No. 1776.

1. BANKRUPTCY (§ 308*) — CLAIM—IMPORTED GOODS—BANKER'S TRUST RECEIPTS.

A bank, having furnished money or credit with which wool was imported from Russia, taking bills of lading in its own name and the usual trust receipts, continued to be the owner when the wool was sold by the importer until title passed to the purchaser, who thereafter became a bankrupt, and then was the owner of the account for the purchase price. *Held*, that the bank alone was entitled to prove the claim for the price against the estate of the bankrupt purchaser, of which right it was not deprived by the fact that a claim was filed by the importer, and after payment of a dividend thereon was assigned to another whose claim would be expunged.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496-507; Dec. Dig. § 308.*]

2. BANKRUPTCY (§ 457*)—RIGHT TO APPEAL—CONTROVERSY.

Where an importer of wool, the title to which was in a bank that had advanced moneys and credit to purchase the same, sold it to a buyer who became a bankrupt, and the importer, after proving the claim against the bankrupt's estate, assigned it to another, after which the bank was held to be the owner and the only one entitled to prove the same, whereupon the claim of the importer was expunged, there was a sufficient controversy between the bank and the assignee to entitle the latter to appeal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 917; Dec. Dig. § 457.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Appeal from District Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Circuit Judge.

In the bankruptcy proceedings of the James Dunlap Carpet Company an order (206 Fed. 726) was entered permitting the Sovereign Bank of Canada to prove a claim for wool sold to the bankrupt by one Joseph Reichardt, and the Assets Realization Company, as assignee of Reichardt for a balance of the claim unpaid, appeals. Affirmed.

William Ewin Bonn, of Baltimore, Md., for appellant.

Rounds, Hatch, Dillingham & Debevoise, of New York City (Ralph S. Rounds, of New York City, of counsel), for appellees.

Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

GRAY, Circuit Judge. The James Dunlap Carpet Company was adjudicated a bankrupt on March 30, 1907. On April 5, 1907, Joseph Reichardt, who was in the wool business in New York City, filed a claim on the bankrupt estate for \$11,212.11, for wool sold by him to the bankrupt in December, 1906, and January, 1907.

The claim of Reichardt was allowed by the referee, one dividend thereon was paid to Reichardt, and in September, 1907, the claim was sold and assigned by him to the Assets Realization Company.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On February 27, 1908, the Sovereign Bank of Canada presented a claim to the referee for \$11,212.11, for the identical wool mentioned and referred to in the claim of Joseph Reichardt. Objections were filed to this latter claim by the trustees of the bankrupt's estate and by the Assets Realization Company, Reichardt's assignee. The District Court allowed the claim of the Sovereign Bank and expunged the claim theretofore allowed to Reichardt. The appeal now before us was taken by the Assets Realization Company and allowed by the court below against the Sovereign Bank of Canada and the trustees in bankruptcy of the Carpet Company.

[1] The facts as to the dealings between Reichardt and the Sovereign Bank of Canada, upon which the title claimed by the bank to the wool in question was founded, are not in dispute, and we avail ourselves of the statement of the same made by the counsel for the bank.

Joseph Reichardt, trading under the name of Reichardt Bros., was engaged in the wool business during 1906 and previously. In order to make importations of wool, large capital is required, as the cost of the wool has to be paid to the wool growers and small dealers in Siberia, Afghanistan and other foreign lands, long before the wool reaches this country, and, in order to finance his importations, Reichardt made arrangements with the Sovereign Bank of Canada to issue to him many letters of credit, extending over long periods. The course of this business was that Reichardt applied to the Sovereign Bank of Canada for a letter of credit and the bank issued such letter in the form that had become customary in transactions of this kind between importing merchants who need banking credits, and the bank furnishing the same. Reichardt executed a letter of obligation in respect to the credit thus issued, on the usual form in such cases, whereby title to the property purchased and to be imported is vested, in compliance with the terms of the letter of credit, in the bank issuing the same. Reichardt's agent in Russia then drew drafts for the purchase price of wool upon the correspondent whom the bank had authorized to accept bills drawn in accordance with the letter of credit. Original invoices of the wool to be so paid for were made out by Reichardt Bros.'s agent in Russia, in favor of the Sovereign Bank of Canada, and attached to each draft drawn upon the bank's correspondent. The bank's correspondent, on receipt of each draft and the documents attached, sent notice to the Sovereign Bank of Canada that it had accepted a draft for so much money under such and such a letter of credit, and charged the bank's account with the amount of the acceptance; and it forwarded to the bank, with this notice, the original invoice which Reichardt's Russian agent had attached to his draft. The goods were then shipped to New York through shipping agents, to whom the bank's correspondent delivered the receipts that had been given by the original carrier when the wool was forwarded from the indorser. The bills of lading obtained by these shipping agents were made out either to their own order and indorsed by them, or to the order of the Sovereign Bank of Canada, as required by the terms of the letter of credit, and sent to the bank. When the bills of lading reached the bank, it delivered them to Reichardt Bros., upon their giving a trust receipt, as is the custom in these transactions. The goods would then be warehoused in the bank's name

and warehouse receipts delivered to the bank. When Reichardt made a sale, he would apply to the bank for a delivery order on the warehouse, get the wool, forward it, and send the invoice to the bank, which forwarded it to the purchaser with instructions to remit to the bank in payment of the same.

Such was the general course of business in a letter of credit transaction, and the testimony on the subject is undisputed.

This well established custom, by which importers may so avail themselves of a bank's credit as to enable them to transact an importing business to a larger extent than would be possible upon private credit, and with such entire safety to the bank as enables the bank to charge only a small commission for the service rendered, has been recently considered by this court in the case of *Century Throwing Co. v. Muller, Schall & Co.*, 197 Fed. 252, 116 C. C. A. 614, and the legal protection secured to the bank by the methods adopted in accordance with that custom recognized.

[2] The defendant in error has moved to dismiss the present appeal, on the ground that no controversy properly exists between the Sovereign Bank of Canada and the Assets Realization Company, assignee of the claim proved by Reichardt Bros., on account of the sale of this wool. Much ingenious argument has been indulged in by the learned counsel in support of this motion. The argument, however, is largely technical, and does not appeal to a court exercising the equitable powers with which a bankruptcy court is vested. Although the underlying merits of this motion is discussed in an opinion of the learned judge of the court below, to which we have referred, we will here observe that that portion of the order which allows the claim of the Sovereign Bank, does directly and particularly affect the appellant. By that order, appellant's claim was practically disallowed, and this appeal involves the question as to which of two claimants is entitled to the benefit of the claim for certain wool sold to the bankrupt. The real question is, to whom do the dividends on the claim belong? The appellant, therefore, in respect to the claim growing out of the sale of this wool, occupies a position very different and distinct from that of all other creditors, and for reasons stated in the opinion of the court below, the motion to dismiss is formally refused, however unimportant that refusal may be in the view taken by this court upon the merits of the case, as raised by the appeal.

The title of the bank to the goods in question and to the indebtedness arising upon the sale thereof to the bankrupt, down to the assignment of the bankrupt's claim by Reichardt Bros. to the appellant, is not seriously, if at all, disputed. The only question, therefore, remaining for determination is, whether that title has been divested by any conduct of the bank amounting to a private estoppel. This and all other subsidiary questions relating thereto have been so clearly and satisfactorily dealt with by the court below, that it is unnecessary for us to add anything to the opinion which it has delivered. In *re Dunlap Carpet Co.* (D. C.) 206 Fed. 726.

We therefore affirm its judgment.

LATHAM v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 8, 1913. On Application for Rehearing, January 20, 1914.)

No. 2462.

1. CRIMINAL LAW (§ 595*)—RIGHT OF ACCUSED TO CONTINUANCE—DISCRETION OF COURT.

The denial of a motion for continuance in a criminal case, based on the absence of a witness whose testimony, as stated in the affidavit, would not bear directly on the question of defendant's guilt but could be used only contingently to contradict expected testimony for the prosecution, *held* not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 1323-1327; Dec. Dig. § 595.*]

2. CRIMINAL LAW (§ 422*)—TRIAL—EVIDENCE.

The admission in evidence in a criminal trial of conversations between a witness and an alleged confederate of defendant, as guarded by the instructions of the court, *held* not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988; Dec. Dig. § 422.*]

3. PROSTITUTION (§ 4*)—WHITE SLAVE TRAFFIC ACT—PROSECUTION FOR VIOLATION—EVIDENCE.

The admission of evidence in a prosecution under the White Slave Traffic Act June 25, 1910, c. 395, 36 Stat. 825 (U. S. Comp. St. Supp. 1911, p. 1343), *held* not error and the evidence not prejudicial to defendant if not pertinent.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. § 4.*]

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Criminal prosecution by the United States against Henry Latham. Judgment of conviction, and defendant brings error. Affirmed. Application for rehearing denied.

J. W. Ownby, U. S. Atty., and J. B. Dailey, Asst. U. S. Atty., both of Paris, Tex.

Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

PARDEE, Circuit Judge. The plaintiff in error was indicted in the court below for violation of the act of Congress approved June 25, 1910, commonly known as the "Mann White Slave Traffic Act."

The indictment contained four counts, each charging in slightly varying terms that the plaintiff in error carried and persuaded, induced, and enticed one Bessie Pettite, a girl of about the age of 15 years, to be transported by railroad engaged in interstate commerce from Grand Saline, in the state of Texas, to the city of New Orleans, state of Louisiana, there to engage and be engaged in prostitution. Upon arraignment and trial he was found guilty as charged in the indictment, and thereupon was sentenced to five years' imprisonment in the penitentiary. On and through his trial he was represented by counsel,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

who, after verdict, moved for a new trial and, failing in that, sued out and perfected writ of error to this court and procured the enlargement of the plaintiff in error upon bond pending the proceeding. It appears thereafter the plaintiff in error, upon his affidavit (whether therein assisted by counsel or not does not appear), obtained from the trial court an order under the act of Congress approved June 25, 1910, authorizing the further prosecution of the writ of error in forma pauperis. Thereupon the record was transmitted to this court in typewriting and has not been printed.

On the day set for hearing in this court, counsel, one of whom at least represented the plaintiff in error below, appeared and, suggesting to the court that they had just been employed to represent the plaintiff in error in this court, obtained a postponement of the hearing, with leave to withdraw the record and to file a brief in 10 days. Before the 10 days expired, counsel, on statement that plaintiff in error had failed to raise a sufficient sum of money to compensate them for services to be rendered, withdrew their appearance. The result is that we have not had the benefit of any presentation other than the assignments of error as to the contention of plaintiff in error on this writ. We have nevertheless given all possible consideration to the case and find that none of the assignments of error are well taken, and there is no reversible error patent on the face of the record; and, in addition, we have satisfied ourselves that the plaintiff in error had a fair trial and that the undisputed evidence in the case fully warranted his conviction.

Affirmed.

On Application for Rehearing.

PER CURIAM. The application for rehearing assigns grounds as follows:

I. The court erred in holding that a continuance in the court below had been properly denied.

[1] The record shows that the application for a continuance was supported by an affidavit of the defendant which stated, among other things, what the defendant expected to prove by the said witness, and that the witness was really sick and her absence was not a procurement of plaintiff in error and was not made for delay. There was no showing that the same nor similar evidence could not have been obtained from other witnesses present. The proposed evidence of the absent witness as recited does not bear directly upon the commission of the offense charged, and it was largely admissible only upon the contingency that Bessie Pettite, the main witness for the government, should deny the alleged conversations as expected to be proved by the absent witness.

"It is well settled that the action of the trial court upon an application for a continuance is a matter of discretion not subject to review unless such discretion has been abused." *Hardy v. U. S.*, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. Ed. 1137, and cases there cited.

And clearly there was no abuse of discretion in this case.

[2] II. The court erred in holding that the testimony of Bessie Pettite, relative to the conversations had by her with John Northcott and

the acts and sayings of John Northcott, admitted over the objections of plaintiff in error, were not prejudicial to him.

The court below held, and this court found held correctly, that the testimony referred to was admissible under the authority of *American Fur Co. v. United States*, 2 Pet. 365, 7 L. Ed. 450, and *Wiborg v. United States*, 163 U. S. 657, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289. In this connection we notice that the trial court instructed the jury that if they believed beyond reasonable doubt that there was a common purpose and design upon the part of John Northcott and Henry Latham that the witness Bessie Pettite should be transported from Grand Saline, Tex., to New Orleans, La., over the line of a common carrier in interstate journey for the purpose of prostitution, then the statements made by Northcott to the witness Bessie Pettite, bearing upon the common purpose and design, would be admissible as evidence against the defendant Latham; but, if no such common purpose or design was shown, the evidence should not be considered by them against the defendant Latham. There can be no doubt that the rights of the defendant with regard to this evidence were fully protected.

[3] III. That this court erred in holding that the plaintiff in error was not injured when the trial judge permitted the question to Bessie Pettite, "Who got you pregnant?" to which the answer was, "John Northcott, I reckon." This evidence was admissible for the purpose of showing the motive and common design between John Northcott and Henry Latham, and in addition to that was admissible because the question was asked on redirect examination in relation to matters called out in the cross-examination of the witness Bessie Pettite. If the evidence was not pertinent, its admission was not prejudicial to the plaintiff in error.

The petition for rehearing is denied.

WALTON v. TEPEL.

In re A. GAGLIONE & SON.

(Circuit Court of Appeals, Third Circuit. May 8, 1913.)

No. 1703.

SALES (§ 454*) — SALE OR BAILMENT — CONTRACT OF HIRING WITH OPTION TO PURCHASE.

The delivery of machinery by a manufacturer to a user under a contract providing for rental payments, and giving the user the option, after making the last rental payment, of purchasing the machinery by paying an additional sum, under the law of Pennsylvania creates a bailment, and the giving of notes at the time of delivery for the rental payments, and also for the final optional purchase payment, does not convert it into a conditional sale.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1324, 1325, 1333, 1334; Dec. Dig. § 454.*]

Appeal from the District Court of the United States for the Middle District of Pennsylvania.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—11

In the matter of A. Gaglione & Son, bankrupts. From an order denying his petition to recover certain property from Fred W. Tepel, trustee, Pearson M. Walton appeals. Reversed.

For opinion below, see 200 Fed. 81.

T. M. B. Hicks and Wister M. Elliot, both of Williamsport, Pa., for appellant.

A. R. Jackson and M. C. Rhone, both of Williamsport, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, sitting in bankruptcy, Walton, the appellant, alleging he was the owner of certain machinery in the possession of Tepel, trustee in bankruptcy of Gaglione & Son, petitioned it to be delivered to him. The trustee answered, alleging the title thereto was in the bankrupts. The referee, on reference, reported in favor of Walton. The court reversed the referee and dismissed Walton's petition. Thereupon the latter took this appeal.

Without entering into details, it suffices to say that the two lots of machinery in question were delivered by the plaintiff, a manufacturer, to the defendants, who were users of such machinery, under two contracts which provided for cash and certain rental payments. They further provided, in the one case for \$25, and in the other for \$75, additional payment by the following stipulation, viz.:

"If the said party of the second part shall faithfully keep and perform this agreement, and make all the payments herein stipulated when due, then and not otherwise the said party of the second part may at their option purchase the said machinery herein rented within thirty days from the expiration of the time for which the same is rented, and not afterwards, by paying to the said parties of the first part seventy-five dollars and no cents purchase money."

In pursuance of a previous verbal understanding, the contracts and notes covering the rental installments and also the payment referred to in the quoted clause, and payable at the dates provided in the contract, were given by the Gagliones to Walton. A part only of the installment notes were paid before bankruptcy. It is not denied that these contracts, under the decisions of the Supreme Court of Pennsylvania—*Ditman v. Cottrell*, 125 Pa. 606, 17 Atl. 504, and kindred cases—create bailments; but the court below felt constrained to hold that the giving and accepting of these notes, which, it will be observed, included one for the final payment in case the option to purchase provided by the section quoted was exercised, converted such bailment into a conditional sale. Standing alone, and without any evidence or facts showing the parties so intended, we cannot give this effect to the mere taking of notes. While no Pennsylvania state case involves the precise state of facts before us, namely, where one of the notes represents this final, optional, purchase payment, yet the general principle deducible from the adjudged cases is that the mere giving of notes does not turn a bailment into a sale. *Lippincott v. Scott*, 198 Pa. 283, 47 Atl. 1115, 82 Am. St. Rep. 801; *Lippincott v. Holden*, 11 Pa. Super.

Ct. 15; *Byers v. Risher*, 41 Pa. Super. Ct. 469. Manifestly, such notes are given, not to annul a contract of bailment, but to provide for its step by step fulfillment; or, as said in *Lippincott v. Scott*, *supra*:

"If he had not given any notes, there would have to be a credit and receipt for each payment; but when he lifted the note it was evidence of payment—evidence of the monthly payment according to the lease."

Taking as a single transaction its several details, viz., the delivery of machines, execution of the contracts, and the giving of the notes for the rental installments and the purchase option, it is clear to us that the payment of all the rental installments was an absolute prerequisite to the exercise of the option to purchase, and that the execution of a note for the option payment, at the time when the installment notes and the contracts of bailment were executed, cannot justly be given the evidential effect of thwarting the undoubted and lawful purpose of the parties to then and there create a bailment.

The case must therefore be reversed, and remanded to the court below, with instructions to confirm the report of the referee.

WOOD v. LEDGERWOOD.

(Circuit Court of Appeals, Fifth Circuit. December 1, 1913.)

No. 2,497.

BANKRUPTCY (§ 314*)—PROVABLE CLAIMS—NOTE BARRED BY LIMITATION.

A note extended after it was barred by limitation under the statute of Texas, unless the extension was in writing and signed by the maker and contains an acknowledgment of the debt, as required by Rev. Civ. St. Tex. 1911, art. 5705, is not provable against his estate in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469-473, 478, 483-487, 489, 490; Dec. Dig. § 314.*]

Appeal from the District Court of the United States for the Northern District of Texas; Edw. R. Meek, Judge.

In a bankruptcy proceeding, from a decree disallowing her claim, Mrs. Amelia E. Wood appeals. Affirmed.

John W. Wray, of Ft. Worth, Tex., for appellant.

R. W. Flournoy and Le Roy A. Smith, both of Ft. Worth, Tex., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

PER CURIAM. The note upon which the debt sought to be proved is founded is barred upon its face by the Texas statute of limitations of four years. The extensions relied upon to toll the statute having been made subsequent to the time the debt became due, and not being in writing and signed by the bankrupt, are not effective. See article 3370, R. S. Texas 1895; article 5705, R. S. Texas 1911.

The ruling of the court below rejecting the proof of debt was correct.

Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DANIEL GREEN FELT SHOE CO. v. DOLGEVILLE FELT SHOE CO.

(Circuit Court of Appeals, Second Circuit, December 9, 1913.)

No. 165.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SHOE AND PROCESS OF MAKING SAME.

The Green patent, No. 894,733, for a shoe and process of making the same, claims 1 and 6, which are process claims, are invalid as omitting the use of a hollow-bottomed last, which is an essential element of the combination process. Claim 11, which is for the product, is also void as too broad, its terms covering shoes not made by the process described. Claims 2, 3, 4, 5, 8, 9, and 10, all process claims, *held* valid and infringed.

Appeal from the District Court of the United States for the Northern District of New York.

This cause comes here upon appeal from a decree of the District Court, Northern District of New York, sustaining a patent and finding infringement thereof by defendant. This patent is No. 894,733, issued July 1, 1907, to William E. Green for a "shoe and process of making the same." The invention relates to an improvement in felt shoes, and more particularly to that class of shoe which is provided with a comparatively thin outer sole and with a cushioned insole, the object being to provide a shoe of this character which may be molded to perfect shape, and which will at the same time provide a soft and cushioned insole which will make the shoe exceedingly comfortable in wear. The patentee says: "My object is preferably accomplished by forming the shoe wrong side out, and after it is turned placing it, in a thoroughly wet condition, on a hollow-bottomed last and causing the felt upper to shrink in drying, thus giving it an absolutely perfect shape and at the same time compelling the soft insole to project upward, and forming a soft cushion for the foot." There are 11 claims; no charge of infringement was pressed under claim 7; all the others were held to be valid and infringed. All the claims are for the process of making, except the eleventh, which is for the product.

The opinion of the District Judge will be found in 205 Fed. 745.

Henry Schreiter, of New York City, for appellant.

P. C. Peck, of New York City (Edmonds & Peck, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and HUNT, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Judge Ray has discussed the prior art and the other facts in the case at great length. A presentation of the facts sufficiently full for an understanding of the following opinion will be found in his discussion; it will be sufficient to indicate our conclusions without rehearsing the facts. It may be noted that, in the patented process the soft padding which is to form the insole is placed on the sole, between the latter and the last. As the sole is stretched taut (by the shrinking of the upper) it presses the superimposed insole towards the last, which latter, being hollow-bottomed, receives the insole into its cavity; the outer sole lying flat across the cavity. This is well expressed in the eighth claim, which reads:

"8. The process of making shoes which consists in securing a shrinkable upper to an outer sole, both being wrong side out, placing a pad on said outer

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sole, securing an inner sole over said pad, turning the shoe right side out, and shrinking the same upon a hollow-bottomed last, thereby causing the upper to conform to the shape of the last and the soft filling and inner sole to project upward into the hollow of the last."

As to the prior art. The process of the patent involves the use of a hollow-bottomed last as it never was used before, viz.: so as to make it easier to *stretch* the sole, which does not necessarily mean increasing its dimension in the line of pull, but only drawing it taut as the sheep-skin head is drawn over a drum. Presumably a shrinking upper sewed to a sole and drying on a flat-bottomed last would exercise some stretching force, but not as effectually as it does over this hollow-bottomed last, because of friction, etc. Manifestly the other function, which accompanies the stretching, namely stowing away the padding into the cavity of the hollow-bottomed last, would be totally absent when a flat-bottomed last is used. The prior art shows, no doubt, the several elements of the patented process but not combined as the patentee combines them, producing the result he indicates.

As to all prior uses by complainant or by others. Giving full credit to the Wannamaker books and the facts they record, defendant has not satisfied us, any more than he did Judge Ray, "beyond all reasonable doubt," which was the burden he assumed, that "No. 457" was a shoe or "Comfy" slipper (of which there were several kinds) built strictly according to the teaching of that patent.

As to infringement. Judge Ray relied on the testimony of Ortleib, which he quotes in his opinion. Defendant says Judge Ray ignored the cross-examination of this witness. We have considered it carefully. The only statement in it, apparently relied on, is that when the upper and last are a pretty close fit as molded and cut, and the last is forced into the upper with the sole sewed on, it will stretch the wet felt. We assume that will always happen, when the fit is close and a last is to be inserted into the entire interior, through a hole which does not open up the entire interior. But we cannot see that such stretching is a matter of any importance. Afterwards, when the drying time comes, the upper shrinks onto the last, whether the clearance through which it shrinks is normal, being cut for a loose fit, or is a recapture of the space out of which part of it was forced when the last was inserted. In both cases it forms itself by shrinkage on the last, and at the same time exerts a pull on the sole which tends to flatten it, and in flattening it lifts up the padding laid on the sole into the cavity devised to receive it.

That defendant uses a mallet to strike the sole—either with the flat head or with the rounded head is immaterial. Possibly it may expedite the process of flattening the sole and stowing away the superimposed padding; possibly it may be an improvement in shop practice, but this does not negative the use of patentee's process, which, as it seems to us, defendant certainly uses, to the extent that the patentee claims it.

As to the claims. We are satisfied that the use of the old tool, a hollow-bottomed last, in a way to secure a new result from it, is an essential part of the patentee's invention. Most of the claims name it as an element of the combination process—three claims, Nos. 1, 6, and

and 7, No. 7 not being relied on, do not name it. Plaintiff insists that because these claims state that the sole is stretched, the hollow-bottomed last must be read in. If this contention is unsound then these claims cannot be sustained because they do not include an element which is essential, and do not cover any subcombination which is shown by the record to be efficient. We doubt if the typical shoe of the patent could be made without the use of the hollow-bottomed last; certainly the patent does not indicate that it could. If, however, the plaintiff's contention be sound and we are to read a hollow-bottomed last into claims 1 and 6, then these claims duplicate others which *do* include that element, so they must be struck out as superfluous.

Claim 11 is for the product. We think this claim too broad. It calls only for a shoe in which upper and sole are of different shrinkability, and in which the upper is shrunk and the sole is stretched. How the sole is stretched it does not indicate. It would cover a shoe made on a flat-bottomed last, when the sole was stretched, not merely by the pull of the shrinking upper over the edge of the last, but by any other means which stretched it.

It is also silent as to the shoe having a yielding surface for the foot, formed by forcing the padding into place by the stretching of the sole, however it be stretched. It is also silent as to turning the shoe "right side outside"; it would cover a shoe which was made without being turned. It claims too much, and cannot be sustained. Manifestly it was drawn to be very broad, for it does not use the familiar phrase "substantially as described." It cannot be sustained, for it would cover shoes produced by a process different from the process of the patent, when the novelty of that process was the patentee's sole contribution to the art.

That defendant has infringed this patent is abundantly proved. The decree is affirmed as to all claims included in it except numbers 1, 6, and 11. As to those it is reversed. Since neither side has prevailed on the whole case, there will be no costs to either side of this appeal. But since defendant is manifestly an infringer, and the patent is a valid one, the modification of the decree should produce no modification of the costs awarded in the District Court.

NEFF et al. v. COFFIELD MOTOR WASHER CO.

(Circuit Court of Appeals, Fourth Circuit. December 15, 1913.)

No. 1203.

PATENTS (§ 294*)—VALIDITY AND INFRINGEMENT—WATER MOTOR.

A preliminary injunction against infringement of the Coffield reissue patent, No. 12,719 (original No. 806,779), for a water motor, *held* not improvidently granted.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 473; Dec. Dig. § 294.*]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi; Alston G. Dayton, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by the Coffield Motor Washer Company against Edward W. S. Neff, S. K. Lapp, and R. D. Farmer, trading as the Neff Hardware Company. From an order granting a preliminary injunction, defendants appeal. Affirmed.

H. A. Toulmin, of Dayton, Ohio, for appellants.

R. J. McCarty, of Dayton, Ohio, for appellee.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. The appellee is the owner of reissued letters patent No. 12,719, dated November 12, 1907. The original patent was numbered 806,779, and was granted December 12, 1905. The validity of the reissue in suit has been upheld by the court below in *Peter T. Coffield & Son v. Spears & Riddle* (C. C.) 169 Fed. 641, and in *Coffield Motor Washer Co. v. A. D. Howe Co.* (C. C.) 172 Fed. 668, and by this court in *A. D. Howe Machine Co. v. Coffield Motor Washer Co.*, 197 Fed. 541, 117 C. C. A. 37. In the last-mentioned case the Supreme Court denied a petition for a writ of certiorari. 227 U. S. 677, 33 Sup. Ct. 405, 57 L. Ed. 700.

In the case at bar a preliminary injunction has been issued against the appellants, restraining them *pendente lite* from making, using, and selling a particular form of water motor alleged to infringe on the patent in suit. From the order granting such injunction this appeal has been taken.

We refrain from any discussion of the various assignments of error, in order that when, if ever, this cause shall again come before us on appeal from a final decree, neither this court nor the parties may be embarrassed by anything which may be now said. The sole question upon which we are now called upon to pass is whether the learned judge below, in granting this preliminary injunction, improvidently exercised the discretion committed to him by law. *Rahley v. Columbia Phonograph Company*, 122 Fed. 623, 58 C. C. A. 639. We do not think that he did.

Affirmed.

JOHN PELL & SON, Inc., v. PROTECTOR LAST REINFORCING CO.

(Circuit Court of Appeals, Third Circuit. January 5, 1914.)

No. 1767.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—REINFORCED SHOE LAST.

The Baker patent No. 870,760 for a reinforced shoe-last *held* valid and infringed.

Appeal from the District Court of the United States for the District of New Jersey; Joseph Cross, District Judge.

Suit in equity by the Protector Last Reinforcing Company against John Pell & Son, Incorporated. Decree for complainant, and defendant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

For opinion below, see 204 Fed. 453.

W. J. Ennisson, of New York City, for appellant.
George H. Maxwell, of Boston, Mass., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. The patent now in dispute—No. 870,760, for a reinforced shoe-last, issued November 12, 1907, to the inventor, Winthrop B. Baker—has been sustained, and infringement has been found, in a comprehensive opinion of the District Court reported in 204 Fed. 453. The opinion displays the painstaking care and the marked ability that characterized the work of the late Judge Cross, and we agree not only with his conclusions, but in the main with his reasoning also. He may perhaps have made one or two incorrect, or inadequate, statements of fact, but they are not important enough to vitiate his argument, or to require special notice.

The invention is not epoch-making, but we think it has patentable merit. In fact, the defendant's persistent attack is hard to understand, unless we suppose that such merit exists, and is really recognized by the defendant, although no doubt with much reluctance. Neither (unless we suppose that the combination of fiber and leather has genuine advantages) is it easy to understand why the defendant should use it—for we have no doubt that the defendant did use it—while the art was offering an unpatented device, made from strips of leather alone, that is vigorously asserted to be equal in all respects to the patented invention. Again and again the defendant insists upon the conspicuous merits of the leather strips, and attempts to demonstrate their admirable qualities in comparison with the fiber and leather of the patent in suit. The inevitable inquiry is at once presented, Why then did the defendant apparently prefer the patented combination?

Neither are we satisfied that the evidence establishes beyond reasonable doubt that Baker's strips were suggested to him by some other person before the patent was applied for. Upon this point the requisite quality of proof is well known, and in our opinion Judge Cross applied the rule correctly.

The argument that the specification is too vague to convey sufficient information to the public is not impressive. Exercising the expected skill of the calling, the defendant seems to have had no difficulty in choosing a satisfactory "fibrous substantially incompressible material"; and the facts of the present controversy do not call upon us to decide precisely how broad the true scope of the claims in this particular may be. They certainly include the strips used by the defendant.

The decree is affirmed.

FOUNTAIN ELECTRICAL FLOOR BOX CORPORATION v. TRUSTEES
MASONIC HALL AND ASYLUM FUND.

(District Court, S. D. New York. December 26, 1913.)

PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — FLOOR BOX FOR ELECTRIC
CONDUCTORS.

The questions of the validity and infringement of the Krantz patent, No. 738,688, for a floor box for electric conductors as against the defenses of lack of invention, abandonment, and noninfringement, *held* properly submitted to the jury, and a verdict for plaintiff *held* sustained by the evidence.

At Law. Action by the Fountain Electrical Floor Box Corporation against Trustees Masonic Hall and Asylum Fund. On motion by defendant to set aside verdict and for a new trial. Denied.

F. Warren Wright, of New York City (Fred Francis Weiss, of New York City, of counsel), for plaintiff.

Paul M. Goodrich, of New York City (John H. Roney, of Chicago, Ill., of counsel), for defendant.

RAY, District Judge. This is an action at law brought by the plaintiff, owner of the patent in suit, to recover damages for the infringement by defendant, a user, of letters patent No. 738,688, issued to Hubert Krantz, September 8, 1903. Claim 3 of the patent in suit is the only one in issue, and same reads as follows:

"3. A floor box for electric conductors, comprising an outlet box part adapted to be secured in place below the flooring, a sleeve secured thereto, lugs projecting inwardly from the wall of said sleeve, contacts carried by but insulated from said lugs, in combination with a plug carrying contacts adapted to connect with said first contacts, and a cover, substantially as described."

This floor box for electric conductors has: (1) The box part which may be secured to a floor or beams or any suitable support beneath the main floor; (2) the sleeve part "secured thereto," that is, to the box part; (3) the lugs, which project inwardly from the wall of the sleeve and which are or may be iron projections integral with the sleeve part or suitably attached thereto; (4) electrical contacts carried by but insulated by suitable insulating material from the lugs; (5) a plug carrying electrical contacts, which contacts are so placed on the plug as to connect with the contacts carried by the plug when the plug is inserted; and (6) and lastly, a cover for the whole. The floor box is placed in position beneath the main floor as stated, and the sleeve which, by means of the lugs thereof, carries one set of contacts, is secured thereto on the upper side or above the floor box proper, and then the cover is above that, and when all are in position is supposed to be even with the main floor. It is advisable to have this sleeve part adjustable; that is, so arranged and connected or secured to the box part that it can be raised or lowered more or less with reference to the box part and still be efficiently connected therewith. The drawings and specifications of the patent in suit show this sleeve part connected to the box part by means of a screw thread. This is one mode of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

securing the one part to the other, but the claim is not limited to this means or mode of securing the sleeve to the box. It was only necessary for the patentee to show one mode of attaching the one to the other, and the patentee was not limited by showing this mode of attachment to that mode, as he did not so limit himself in the claim. "Secured thereto" would permit any mode of securing the one to the other effectively.

The defendant has a structure with box part and sleeve and a cover and lugs projecting inwardly from the wall of the sleeve, and these sustain or carry the contacts, which are insulated therefrom, by means of a metal swing like structure on which is placed the contacts (insulated therefrom), but the swing insulation and contacts are supported and carried by the lugs. In defendant's structure the sleeve is not secured to the box part by any screw thread, but by means of a deep groove in the walls of the box into which the lower part of the walls of the sleeve slip, and then this groove is filled with cement, and when it hardens the sleeve is firmly secured to the box part. Or the groove may be first filled with cement, and then the lower edge of the wall of the sleeve may be pressed down into the cement, and when the cement hardens the one part is firmly secured to the other. This structure of the defendant has an advantage over the other, in that the groove is so large that the sleeve may be tipped when pushed down into the cement and so conform to a slope in the floor. It has the disadvantage that the sleeve part cannot be raised and lowered at will without breaking or digging out the cement, which can be done by means of the screw thread in the patent in suit. But this patent in suit was not granted on the screw thread or because of any advantage growing out of its presence. The patent in suit issued for the reason, mainly, that the sleeve part by means of its lugs carries the contacts and the insulating material. It was left to the jury to determine whether the one mode of attaching the sleeve to the box part was the equivalent of the other.

It is true that in the prior art we have similar devices and for a similar purpose and patent to Goehst & Wilkes, 681,416, of August 27, 1901, is pointed out as so limiting this claim of the patent in suit as to demonstrate that patentable invention is not disclosed. Goehst & Wilkes has a box part and a sleeve part, and these are attached by a screw thread; but the sleeve has no lugs, nor does the box part, and the contact carrying device is secured in the box part, and hence is not movable perpendicularly with the sleeve part. It is error to say that the only difference between Goehst & Wilkes and the patent in suit is that the sleeve of the patent in suit has lugs which carry the contacts. It makes a very material difference where the sleeve carries the contacts.

The case was submitted to the jury on all the issues presented by the pleadings and evidence, and the jury found for the plaintiff. There was no exception to the charge as made, but the defendant requested the court to charge:

"I. That under the pleadings and evidence in the case, the court is requested to direct that the verdict of the jury must be in favor of the defendant.

"II. The court is requested to instruct the jury to find a verdict for the de-

fendant upon the ground that the plaintiff has not proven infringement, and upon the further ground that the plaintiff had not shown any new invention covered by the claims of the patent in suit.

"III. The court is requested to instruct the jury that, in view of the proceedings in the Patent Office as exemplified in the file wrapper and contents in evidence, the claim of the patent in suit is limited to the specific construction shown and described in the said patent, and that, when so construed, the defendant's structure does not infringe the same.

"IV. The court is requested to instruct the jury to find a verdict for the defendant on the ground that the third claim is limited to a structure comprising, *inter alia*, a box part and a sleeve, the sleeve being threaded to engage a corresponding thread upon the box, and that, when so limited, the structure of the defendant does not infringe the same.

"V. The court is requested to charge the jury that it is incumbent upon the plaintiff to apportion the damages on the ground that the outlet box proper omitting contacts is the subject-matter of an earlier patent than the patent in suit.

"VI. On the pleadings and evidence in the case, the court is requested to instruct the jury to find a verdict for the defendant on the ground that the invention set forth in claim 3 of the patent in suit has been abandoned to the public.

"VII. The court is requested to charge the jury that the plaintiff, in the event of the jury finding for the plaintiff, is only entitled to nominal damages on the ground that defendant's construction is manufactured and licensed in so far as the adjustable sleeve and box portion is concerned under an earlier patent than the patent in suit, to wit, No. 699,381, dated May 6, 1902; the plaintiff not having apportioned the damages between the structure of the said earlier patent and the patent in suit."

Requests 1, 2, 3, 4, and 6 are in effect requests to the court to direct a verdict for the defendant on the ground of want of invention, no infringement, and abandonment. The court held these were questions of fact for the jury. The prior art and numerous models and structures were before the jury, and the whole matter was discussed by witnesses, counsel, and the court. I discover no ground for disturbing the verdict.

It is true that the claims of a patent are to be reasonably construed, and that they are to be construed in the light of the specifications; but this does not mean that when one form of construction is set forth in the specifications, and there are other forms equally good, and the language of the claim is broad and comprehensive enough to include either of these forms of construction, that the claim is limited to the form shown. Hence when the patentee in the specifications says, "I make the floor box in two parts, namely, the sleeve part and outlet-box part, threaded on to each other, and I am enabled to first approximately locate the outlet box and then accurately fit the sleeve to the level of the floor by turning it more or less on its threads," he is simply stating how the sleeve part in that form of construction is or may be adjusted to the level of the floor. When the sleeve part is attached or secured to the box part by allowing the one to engage the groove of the other filled with cement, we would say, "I am enabled to first approximately locate the outlet box and then accurately fit the sleeve to the level of the floor by turning or lifting it or pushing it downwardly in the groove of the box part filled with soft cement, which will then be allowed to harden." Here the jury found that the one form of securing the sleeve to the box was the equivalent of the screw thread

shown and an allowable equivalent in view of the prior art and the file wrapper and contents and the language of the claim, all of which was read and rehearsed to the jury. Can the court substitute its will and finding of fact for the finding of the jury, when that finding depends on the language and meaning and construction of a number of patents and the varying evidence of experts?

Abandonment.

This question was also submitted to the jury with the other questions in the case and found in favor of the plaintiff.

The defendant claims that Krantz in a prior application for a patent, which was granted (United States letters patent No. 726,945, dated May 5, 1903), fully described the invention of the patent in suit, but did not claim it, and that, not having claimed it, he must be deemed to have abandoned his said invention to the public. He cites *Underwood v. Gerber*, 149 U. S. 224, 13 Sup. Ct. 854, 37 L. Ed. 710. See, also, *Miller v. Brass Co.*, 104 U. S. 350, 352, 26 L. Ed. 783, and *Mahn v. Harwood*, 112 U. S. 354, 360, 361, 5 Sup. Ct. 174, 6 Sup. Ct. 451, 28 L. Ed. 665.

In *Underwood v. Gerber*, supra, the claim of the patent No. 348,073 sued on was for "a sheet of material or fabric coated with a composition composed of a precipitate of dye-matter obtained as described, in combination with oil wax, or oleaginous matter." The patent was issued August 24, 1886, on application filed March 22, 1886. On application filed the same day, March 22, 1886, and granted August 24, 1886, a patent had been granted to the same parties for the identical composition. This patent was not sued on or even alleged. The court said that it must be treated as outstanding, but did not hold it was invalid. It held that there was no patentable novelty in spreading a known composition on paper, and hence the patent sued on was invalid, and in view of the pleadings, so far as the patent sued on was concerned, the composition must be regarded as belonging to the public. See 149 U. S. page 228, 13 Sup. Ct. 854, 37 L. Ed. 710.

If a person makes two inventions, and he applies for a patent for one, and in that application describes the other, but does not claim it, but files another application for that other and gets a patent therefor, is it the law that his second patent for such other invention is invalid because he described but did not claim it in the first application? Cannot he divide his application even if he has described both inventions without claiming both in the application first filed? But this question of abandonment was left to the jury, and no exception was taken, and I do not see that the same invention was described in the first Krantz patent and not claimed that was described and claimed in the claim of the patent in issue here. There was evidence of a substantial difference, and the jury found in favor of the plaintiff on that issue. I think the question was properly left to the jury, and that its decision should not be disturbed.

In regard to the first Krantz patent (Exhibit G), Krantz testified that it was for substantially the same construction as the Stahley box, and that his patent in suit differed from it the same as the Stahley box

did, and Mr. Fullman substantially admitted that the contacts and plugs of the Krantz patent in suit were not present in the Stahley patent.

I think the evidence showed an established license fee and that the damages were proper.

There will be an order denying the motion for an order setting aside the verdict and for a new trial.

ALABAMA & N. O. TRANSP. CO. et al. v. DOYLE et al.

(District Court, E. D. Michigan, S. D. January 28, 1914.)

No. 33.

1. CONSTITUTIONAL LAW (§ 48*)—STATUTES—VALIDITY—DETERMINATION.

A federal court must not declare a state statute unconstitutional on evenly balanced or doubtful considerations, but, before doing so, must be clearly satisfied of its invalidity.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

2. BANKS AND BANKING (§ 311*)—SECURITIES—REGULATION—STATUTES—VALIDITY.

Pub. Acts Mich. 1913, No. 143, providing for the regulation and supervision of foreign and domestic investment companies, their agents and other persons, corporations, and associations selling stocks, bonds, or other securities, etc., cannot be sustained as a tax law or a mere license law, since it does not purport to be the former, and, while it carries some features of the latter, its dominant characteristics are prohibitory.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1215-1223; Dec. Dig. § 311.*]

3. CONSTITUTIONAL LAW (§ 277*)—DUE PROCESS OF LAW—"PROPERTY"—"LIBERTY"—RIGHT TO BUY AND SELL SECURITIES.

Corporate, partnership, and individual securities and obligations to pay money are property, and the right to issue and sell or buy and sell the same is liberty, within the due process clause of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 762, 766, 949; Dec. Dig. § 277.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770; vol. 5, pp. 4126-4130; vol. 8, pp. 7705, 7706.]

4. CONSTITUTIONAL LAW (§ 296*)—DUE PROCESS OF LAW—POLICE POWER—SALE OF STOCKS, BONDS, NOTES, AND EVIDENCES OF INDEBTEDNESS—REGULATION.

Pub. Acts Mich. 1913, No. 143, providing for the regulation of foreign and domestic investment companies in the sale of stocks, bonds, and evidences of indebtedness within the state, in so far as it authorized the Commission to prohibit a sale of securities in case it should find that the sale in all probability would result in loss to the purchasers, etc., regardless of whether the securities were based on sufficient property to be probably good, was not a proper exercise of the police power to conserve the public welfare, and was therefore unconstitutional as a deprivation of property or liberty without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 825-838, 840-846; Dec. Dig. § 296.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. CONSTITUTIONAL LAW (§ 295*)—DUE PROCESS OF LAW—SALE OF SECURITIES.

Pub. Acts Mich. 1913, No. 143, regulating the sale of securities in that state and providing that there can be no sale for a period of 30 days, after the dealer or issuing company has furnished to the public commission the required data, is not within the police power of the state and is invalid as a deprivation of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 841; Dec. Dig. § 295.*]

6. STATUTES (§ 64*)—PARTIAL INVALIDITY—PENALTIES.

Pub. Acts Mich. 1913, No. 143, attempting to regulate the sale of securities in that state, imposes various penalties for violations, including five years' imprisonment and \$5,000 fine. *Held* that, while such excessive penalties may afford a reason for temporarily enjoining the enforcement of the law until its validity can be determined, the penalties, being separable, do not furnish ground for pronouncing the whole law invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

7. COMMERCE (§ 57*)—INTERSTATE COMMERCE—INTERFERENCE—SALE OF SECURITIES—REGULATION.

Pub. Acts Mich. 1913, No. 143, providing for the regulation and supervision of foreign and domestic investment companies, their agents, and other persons selling securities in Michigan, constitutes a direct interference with interstate commerce in stocks, bonds, and commercial paper which constitute a part of interstate trade, and is therefore invalid.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 72-76, 88, 90, 92-102; Dec. Dig. § 57.*]

8. CONSTITUTIONAL LAW (§ 62*)—LEGISLATIVE POWER—DELEGATION.

Pub. Acts Mich. 1913, No. 143, providing for the regulation and supervision of securities to be sold in Michigan, in so far as it created the Michigan Securities Commission, an administrative board, to supervise business affected with a public interest, was not invalid as a delegation of legislative or judicial authority.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. § 62.*]

9. STATUTES (§ 64*)—PARTIAL INVALIDITY—EFFECT.

Pub. Acts Mich. 1913, No. 143, providing for the regulation and supervision of sales of securities in Michigan, having been held unconstitutional in so far as it gave the Securities Commission power to forbid the sale of securities at less than what they thought was a proper price, in so far as it directly and substantially burdened interstate commerce, and also in so far as it forbade sales within 30 days after information concerning the securities was requested, etc., such provisions affected the entire scheme of the act so that no part of it could be sustained.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

In Equity. Consolidated action by the Alabama & New Orleans Transportation Company, the Continental & Commercial Trust & Savings Bank, N. W. Halsey & Co., H. L. Higginson and others, and A. B. Leach and others, against Edward H. Doyle and others, members of the Michigan Securities Commission, to restrain the execution of Pub. Acts Mich. 1913, No. 143, known as the "Blue Sky Law." On motion for a preliminary injunction. *Granted.*

Hal H. Smith, of Detroit, Mich., and Robert R. Reed, of New York City (Beaumont, Smith & Harris, of Detroit, Mich., and Caldwell, Masslich & Reed, of New York City, of counsel), for plaintiffs.

Grant Fellows, Atty. Gen., of Lansing, Mich., for defendants.

Before DENISON, Circuit Judge, and SESSIONS and TUTTLE, District Judges, under section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]), as amended March 4, 1913 (chapter 160, 37 Stat. 1013).

PER CURIAM. We take judicial notice of the common understanding that this "Blue Sky Law" was intended, as is said by the Attorney General, "to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines and other like fraudulent exploitations." If just this intent had been carried into effect by the act as passed, these cases would not be here; but scrutiny of the law discloses additional and very different effects. It is not confined to corporations, but covers partnerships issuing, and individuals dealing in, securities; it does not relate alone to stocks, but as well to bonds, mortgages, and promissory notes; it is not limited to investment companies, as that term would ordinarily be defined, but extends the definition so that it may include most of the private corporations and partnerships in the United States; it does not cover fraudulent securities merely, but reaches and prohibits the sale of securities that are honest, valid, and safe; it does not simply protect the unwary citizen against fraudulent misleading, but it prevents the experienced investor from deliberately assisting an enterprise which he thinks gives sufficient promise of gain to offset the risk of loss, or which, from motives of pride, sympathy, or charity, he is willing to aid, notwithstanding a probability that his investment will prove unprofitable. Of course, not all of these results always follow; but some of them always may, and sometimes will. Take concrete instances. A merchandising partnership cannot borrow additional capital from its home bankers on long time notes (over nine months) unless the Commission approves. If a timber company is insolvent, no one can deal in its first mortgage or underlying bonds, though these bonds are perfectly good, are not in default and not likely to be, nor can the Commission permit such dealing if it would. A successful automobile or furniture company may not increase and sell its capital stock, save by the Commission's approval, and, if such a company has not been successful and the Commission thinks it is not likely to be, the company must liquidate; it will not be permitted to get new capital. If a company is organized to make and sell a new invention, and if the Commission thinks the enterprise will not succeed, the stock may not be sold, even to skilled bankers who have investigated thoroughly and still desire to buy. If, through local pride or in the effort to save an existing investment or for any indirect benefit to come, the citizens of a town wish to take stock or bonds in a local company, though knowing they are likely to lose their investment and being willing to take the chance, yet they may not; this law forbids.

With the economic wisdom of such a law, this court has nothing to do; all such considerations are for the Legislature. *McLean v. Arkansas*, 211 U. S. 539, 547, 29 Sup. Ct. 206, 53 L. Ed. 315; *C. B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 569, 31 Sup. Ct. 259, 55 L. Ed. 328. The generally laudable and remedial purposes of the act are to be granted; but, in endeavoring to make it so all-embracing as they thought wise, its draftsmen, as we are forced to conclude, disregarded fundamental limitations imposed by the federal Constitution.

[1] We reach this result fully recognizing the rule¹ that a court must not make such a decision on any evenly balanced or doubtful considerations, but must be clearly satisfied of the law's invalidity; and we proceed to state the reasons which compel our conclusions.

It is necessary, first, to recite the substance of the law, which covers ten pages of the published statutes, and cannot be quoted at length. By its title it purports to—

“define and provide for the regulation and supervision of foreign and domestic investment companies, their agents and other persons, corporations and associations, selling the stocks, bonds or other securities issued by such investment companies; to protect the purchasers of the stocks, bonds or other securities issued by such investment companies; and to prevent fraud in the sale thereof; to create a commission to administer the provisions of this law; and to provide penalties for the violation thereof.”

It then defines an investment company, foreign or domestic, as including every corporation, copartnership, company, or association which shall, either by itself or through others, sell or negotiate for the sale, in Michigan, of any stocks, bonds, or other securities issued by it. Excepted from this definition of investment companies are: Municipal corporations, banks, trust companies, building and loan associations, and corporations not for profit. Exempted from the “stock, bonds or other securities” affected by the act are: commercial paper running less than nine months; the securities of quasi public corporations, the issue of which is regulated by any public service commission; and real estate mortgages where the entire mortgage is sold with the notes secured thereby (ordinary trust mortgage bonds remaining within the act). The State Banking Commissioner, the State Treasurer, and the Attorney General are constituted a “Securities Commission.” No investment company shall offer to sell any of its securities until more than 30 days after it has filed with the Commission full data regarding itself and its securities, and paid to the Commission one-tenth of 1 per cent. (with a maximum of \$100) upon the face value of the securities for the sale of which permission is sought. The Commission shall examine the data filed with it, and may require such further information as it desires. If the Commission finds that the investment company is not solvent, or that its organization or plan of business is not fair, or that its proposed contracts or other securities are fraudulent or of such a nature that their sale would, in all probability, work a fraud upon the purchaser, or finds that such securities are of such a nature and character as would, in all probability,

¹ This rule may not always govern motions for preliminary injunction; but we now assume its full application.

result in loss to the purchaser, then the sale thereof is to be permanently prohibited. Every investment company (probably meaning any company which has ever, since the passage of the act, issued and sold its securities) must file with the Commission annual and special reports, must keep its books according to a prescribed system, shall be subject to inspection by the examiners of the Commission whenever the Commission desires, and must pay the cost of such examinations. A "dealer" is defined as any person, firm, copartnership, corporation, or association, not the issuer, who shall sell or offer for sale any of the securities issued by any foreign or domestic investment company within the act, or who shall profess or engage in the business of such selling; but the definition does not include the owner of such securities who is not the issuer, but who, for his own account, sells them, but the owner so selling is excluded from the class of "dealers" only if "such sale is not made in the course of continued and successive transactions of a similar nature." Dealers must be registered with the Commission, pay a registration fee of \$50, furnish all requested information, and file and maintain lists of their authorized agents (at \$3 each). No dealer shall offer for sale any securities unless the issuing investment company has complied with the law, or unless the dealer himself furnishes the information which would have been required from the investment company. In no case can any issue or sale be made of the stocks, bonds, contracts, or commercial paper covered by the act until 30 days have elapsed after the application and data are filed with the Commission, after which time, lacking objection by the Commission," the prohibition expires, and the sale is (tacitly) approved. Some violations of the act are made felonies punishable by not more than \$5,000 fine and five years in the state prison; others are made misdemeanors punishable by not more than \$1,000 fine and 90 days' imprisonment. The only power of review conferred on any court is that "the Supreme Court may review by certiorari any final order of the Commission."

This law is now attacked in five cases which, for the purposes of this motion, have been consolidated. The defendants have filed a motion to dismiss, in the nature of a demurrer, without other showing, and therefore this motion for a temporary injunction must be decided upon the properly pleaded allegations of the bills and the accompanying affidavits, from which the following additional and essential facts appear: The Alabama & New Orleans Transportation Company is a New York corporation, engaged in the transportation business upon the Gulf of Mexico and between the city of New Orleans, La., and the city of Tuscaloosa, Ala., with principal offices in the city of New York, and operating offices at New Orleans and Tuscaloosa. It owns steamboats, wharves, and docks. A part of its authorized capital stock, both common and preferred, has been issued, and a part of its authorized first and second mortgage bonds have also been issued and sold. Through its agents, it has offered its first and second mortgage bonds and preferred stock for sale and desires to make further sales in Michigan. The purchaser of its first mortgage bonds, already issued, desires to sell them in Michigan. It is solvent, its property is ample

to discharge all its obligations, its bonds and stock are valuable and the security therefor is amply sufficient, its business is profitable, the representations, upon which the sale of its bonds have been made, are true, its bonds and stock are of such a nature that the sale thereof will not work a fraud upon, nor, in all probability, cause a loss to the purchaser, and the plan of the business is fair and promises a substantial profit from its operation. In the other cases, two of the plaintiffs are corporations and two are partnerships. All are nonresidents of Michigan, are engaged as "investment bankers" in buying and selling, through traveling agents and otherwise, stocks, bonds, and other securities affected by the act, have been so engaged for a considerable time, have invested large sums of money in, and have acquired a valuable good will connected with, their business, and have not misrepresented to their customers the character or value of the securities which they sell.

The objections urged against the act are: (1) That it deprives plaintiffs of their property in violation of the fourteenth amendment; (2) that it deprives plaintiffs of the equal protection of the laws in violation of the same amendment; (3) that it directly burdens interstate commerce; (4) that it delegates to the Commission legislative power and judicial power in violation of the Michigan Constitution; (5) that the title of the act is not confined to one object and does not express that object, as required by the Michigan Constitution.

[2] Before considering these questions, it is well to remember that this act is neither a tax law nor a mere license law. It does not purport to be the former; and, while it carries some of the nomenclature and some of the features of the latter, its dominant characteristics and effect are prohibitory. We may therefore disregard the principles and decisions which have sustained, as constitutional, various state tax laws and various state laws which merely licensed the carrying on of some business or occupation. With this elimination in mind, we proceed to the questions involved.

1. *Are plaintiffs deprived of their property or liberty without due process of law?*

[3] That this act does deprive plaintiffs of property, as well as of liberty, is clear. Their right to issue and sell, or to buy and sell, securities is "property" and "liberty" under the familiar definitions adopted by the Supreme Court of the United States as well as by the Supreme Court of Michigan.

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying to a successful conclusion the purposes above mentioned." *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 Sup. Ct. 427, 41 L. Ed. 832; *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133; *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764.

"The Legislature of the state is not empowered by the Constitution to regulate contracts between its citizens who are engaged in legitimate commercial

business, or to require any class of persons to pay a fee for the right to carry on business, or to give a bond to perform their contracts which other parties may choose to make with them." *People v. Berrien* Circuit Judge, 124 Mich. 664, 667, 83 N. W. 594, 595 (50 L. R. A. 493, 83 Am. St. Rep. 352).

Indeed, we do not understand the Attorney General to question that the statute does operate to deprive plaintiffs of their liberty and property. He relies, rather, upon the principles stated by the Circuit Court of Appeals of this Circuit, speaking by Judge Cochran, in this language:

"In the first place, it is to be noted that a statute or ordinance depriving one of his liberty or property is not in violation of said amendment merely because of such deprivation. Either of three things is essential to bring the deprivation within the amendment. It must have no real or substantial relation to the public welfare, or the deprivation it provides for must be a deprivation without due process of law, or it must amount to a denial of the equal protection of the laws. If the statute or ordinance has a real and substantial relation to the public welfare, if it provides for a deprivation by due process of law, and if it affords an equal protection of the laws, it is valid, notwithstanding its enforcement will deprive a person subject thereto of his liberty or property." *Grainger v. Douglass Park Club*, 148 Fed. 513, 523, 78 C. C. A. 199, 209 (8 Ann. Cas. 997).

[4] The first vital question, then, must be whether the provisions of the statute have "real or substantial relation to the public welfare." This form of words is capable of a construction broader than may ultimately be approved (*Noble Bank v. Haskell*, 219 U. S. 104, 111, 580, 31 Sup. Ct. 299, 55 L. Ed. 341), but we take it as intended to be definitive of the police power, and so the extent of that power is the real question. It would be profitless to undertake any review of the decisions on this subject, or to try to adopt or to formulate any comprehensive and accurate definition of this phrase. It is enough, now, to remember that the prohibition in question has to do with transactions predominantly private, and not with those which are affected by a public interest, which arise from public grant or which exist by public sufferance. This statute does not deal with common carriers, grain elevators, or other enterprises of that class, nor distinctly with corporations, nor at all with saloons, itinerant peddlers, and the like. The issuing of commercial paper, stocks, or bonds by a private company to get money for its own business no one can suppose is a public or quasi public enterprise; the business of buying and selling stocks and bonds and other securities is no more "affected by a public interest" than is the business of buying and selling groceries. When we thus recall that the prohibition applies to a private business, the question at once presents itself whether frauds and opportunities for fraud sufficiently characterize the business to justify its entire prohibition save under drastic restrictions. We cannot shut our eyes to the fact, which all men know, that, as compared with the total dealings in securities covered and contingently prohibited by this act, those which may fairly be suspected to be of a fraudulent character are a very trifling proportion; and there is no reason to suppose that the percentage of fraud is any greater than in each of the ordinary business and professional occupations. Applying the principle announced by the Supreme Court

of Michigan in the Commission Dealers' Case,² it is not clear that any scheme of modified prohibition can be applied at all to this entire business. We do not need to go so far. It is to be presumed that this question was considered by the Legislature; it has (theoretically) been decided by the legislators; and we may not unnecessarily overrule that decision.

However, there are some features of the statute which are not even within the shadow of the police power. The first of these is the provision that no promissory note, bond, stock, contract, or other security shall be sold within the state unless the Commission thinks it is worth the price which is asked. The act does not put it quite so baldly, but the language can mean nothing else. If the Commission finds that the "sale will, in all probability, result in loss to the purchasers," the sale is prohibited. Unless the security is worth the price asked, the "sale will, in all probability, result in loss to the purchaser." This is the plain meaning of the words. In that event, the Commission has no power to permit the sale; and if, after such a finding, the property is sold to a careful purchaser, who is in no way misled, but buys just what he wants and pays what he thinks it is worth, the seller may be imprisoned for five years; and it would be quite immaterial that the Commission was wrong and that the security sold was in fact worth the price. The element of fraud is wholly eliminated from this part of the statute, and all the dependent police power to protect the citizen against fraud must concurrently disappear. No definition of the police power, which we have seen or which the industry of counsel has found, is broad enough to cover such a prohibition, and we are aware of no consideration which even plausibly supports its validity.

² "The business of buying and selling on commission has existed ever since commerce began. There are and always have been dishonest men engaged in it, as there are and always have been in every other branch of business. There are and always have been dishonest sellers, who will pack their produce in such a manner as to deceive. It would be as reasonable to require the latter to give bond to properly pack their produce. In every such case the common law provides an ample remedy for redress to the injured party for breach of contract. There is no more reason why a commission merchant should pay a license fee and execute a bond to pay his debts and to do his business honestly than there is that any other merchant should pay a like fee and file a like bond to properly do his business and pay his debts. The business requires no regulation, any more than any other mercantile pursuit. There is nothing in it hostile to the comfort, health, morals, or even convenience, of a community. It is carried on by private persons in private buildings, and in a manner no different from that in which the merchant selling hardware or groceries or dry goods carries on his business. The law can find no support in the police power inherent in the state. It is not like the liquor traffic, which, under the decisions of every court, is subject to the police power, because of the injury it does to the health, morals, and peace of the community, and may be prohibited altogether. Neither is there anything in it requiring regulation, as do hack drivers, peddlers, keepers of pawn shops, and the like. The Legislature of this state is not empowered by the Constitution to regulate contracts between its citizens who are engaged in a legitimate commercial business, or to require any class of persons to pay a fee for the right to carry on business, or to give a bond to perform their contracts which other parties may choose to make with them." *People v. Berrien* Circuit Judge, 124 Mich. 664, 667, 83 N. W. 594, 595 (50 L. R. A. 493, 83 Am. St. Rep. 352).

Of like effect and subject to like infirmity is the provision forbidding the sale of securities, if the Commission thinks that the company's organization or proposed plan of business is not "fair." Broader and vaguer language could not be chosen. It subjects to the practically uncontrolled discretion of the Commission every issue or general sale of stocks, bonds, or securities hereafter to be made in Michigan. For this and the provision regarding probable loss, we heard upon the argument and we find in the briefs no claim of justification on grounds of public welfare; and we know of none. They deprive plaintiffs of property, and they do not carry the semblance of "due process of law." It may be assumed that the officials who constitute the Commission are more experienced and wiser than two citizens who desire to buy and sell property, with which they are familiar, at the price they have agreed upon; it may be assumed that these officials can foresee the coming events which will bring loss or profit on a proposed investment; but it has never yet been supposed by any court or any text-writer that it was within the police power of a state to decide for its citizens the financial advisability of their investments, so long as the investors were not misled or deceived.³

[5] Still another limitation which we think wholly beyond the authority of the police power is this: During the period of 30 days after the application is made and data filed with the Commission, there can be no sale of the securities. The Commission is powerless to permit; any company which issues and sells or any dealer who sells is guilty of felony. This is the law, without regard to the character of the securities. They may be of the highest quality in every respect; the emergency requiring immediate sale may be extreme; these considerations cut no figure; the law proclaims a 30-day paralysis. If a company, perfectly solvent but in need immediately of ready money, arranges a bond issue and has people ready to purchase the bonds, nothing can be done for 30 days; in the meantime things must stop and the company, perhaps, must lose its credit and fail. Such a provision is an arbitrary and oppressive interference with the right of contract; it bears no "reasonable relation" to the public health or the public morals, or even to the "public welfare," in the broadest conceivable sense of that phrase.

The decisions on the Bulk Sales Laws (*Lemieux v. Young*, 211 U. S. 489, 29 Sup. Ct. 174, 53 L. Ed. 295; *Kidd v. Musselman*, 217 U. S. 461, 30 Sup. Ct. 606, 54 L. Ed. 839) are neither controlling nor closely analogous. For a retail dealer, who is seriously indebted, to sell his stock in bulk suddenly and without the general knowledge of his cred-

³ We were told, upon the argument, that the Commission was not enforcing the law as it is written, but only so far as the Commission thought wise. It was said that all so-called standard securities might be sold without requiring full data and without waiting 30 days, and it was intimated that the provisions regarding "fairness" and "probability of loss" were only to be resorted to when the Commission thought the securities were fraudulent but did not wish to put its finding on that ground. In so far as these statements or intimations may be true, they only emphasize the inherently unlawful character of the Act and the temptation and opportunity for a rule of individual discretion and not of law.

itors is an unusual and abnormal thing. It is almost, perhaps quite, a badge of fraud in itself; and to provide that such sales shall be delayed a very brief time, perhaps five days, in order that notice may be given to individuals directly interested distinctly tends to protect the business community from fraud. Such a theory of the police power furnishes no support for thinking that the regular and normal course of dealings in one great branch of business may be suspended for 30 days.

2. *Does the act deprive plaintiffs of the equal protection of the laws?*

This is the second question stated by Judge Cochran; and the answer depends on whether the classifications adopted by the statute are justified by the rules of classification which have been considered in many cases by the Supreme Court of the United States. Plaintiffs, under this head, urge many detailed objections. They say that such distinctions as are attempted cannot lawfully be made between partnerships and individuals, between long-time and short-time paper, between ordinary mortgages and trust mortgages securing a bond issue, between the owner and the dealer, between stock subscriptions and stock sales, and in other particulars which we need not specify. We have not recited the statute fully enough to make all of these objections intelligible, because we do not decide them. Some are hypercritical; some are at least serious. For example, it is difficult to see why one rule should be applied to an individual who gives a trust mortgage upon his property securing a series of his notes and bonds, and a different rule to a partnership which does the same thing. However, we pass these objections by, as other grounds are clearer.

[6] Another reason urged why plaintiffs are deprived of equal protection of the laws is that the statutory penalties are so excessive that persons interested dare not make a test case in the ordinary way. Such terrorizing penalties furnish a reason why a court of equity may have jurisdiction to enjoin the enforcement of the law, temporarily, till its validity can be determined (*Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. [N. S.] 932, 14 Ann. Cas. 764); but where the penalties are separable, as they are here, their possible invalidity may be a defense against their direct enforcement, but does not furnish ground for pronouncing the whole law invalid (*Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 395, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *L. & N. R. Co. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. —; *Grand T. Ry. Co. v. Mich. Ry. Com.*, 231 U. S. 457, 34 Sup. Ct. 152, 58 L. Ed. —).

3. *Do the provisions of the act constitute a direct and substantial burden on interstate commerce?*

[7] It must be conceded that, if such burden is created, the act is, so far, void. We cannot doubt that stocks and bonds are now the subject of interstate commerce, and that shipments and sales of them, between the states, are interstate commerce. We do not find that this has been expressly held in any authoritative decision, but, in the present development of commerce, it would be regarded as obvious, save for the argument based upon *Nathan v. Louisiana*, 8 How. 73, 12 L.

Ed. 992 (involving foreign bills of exchange), and *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357 (involving insurance contracts).⁴ The former case really involved only the question whether a state tax or license fee could be imposed upon a citizen dealing in foreign bills of exchange. Such a tax, under the rules now familiar, and even if made an incident attendant on interstate commerce, would often be only an indirect burden upon such commerce, and so would be valid. The special insurance contract involved in the latter case is essentially different from stocks, bonds, and commercial paper. However, if either of these cases might otherwise be thought now controlling, we think the opinion in the *Lottery Cases* (188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492) requires the contrary result. As to stocks, some distinctions from *Lottery Cases* can be drawn, because the certificates, in part, represent rights of membership; but we cannot appreciate the force of any considerations whereby it might follow that, although lottery tickets are the subject of interstate commerce, bonds and commercial paper are not. They pass freely from hand to hand, title to many of them passing by delivery; they are subject to state taxation; they are protected by state statutes against larceny; in an increasing volume from year to year, they have come to take a most important place in the business and commerce of the country. They satisfy, in every respect, the essentials of the definition in the *Lottery Cases*; indeed, they satisfy the more limited definition contended for in the minority opinion in that case.

If bonds and commercial paper and (probably) stocks are the subject of interstate commerce, are interstate dealings in them directly burdened by this law? Dealings wholly by mail, in which the nonresident vendor only sends letters into the state, and, upon the end of the negotiations, sends the securities into the state to be there paid for, might escape the statute, not because its general language does not cover them, but because its operation might be limited to avoid the clear invalidity which would otherwise result. However, we know that the great mass of business of this kind is done by traveling agents or solicitors for foreign investment bankers, brokers, and issuing corporations. These solicitors and salesmen travel through the state and negotiate and close sales. They may carry with them the stock certificates or bonds, or they may, on closing a sale, telegraph or write to the home office and have the securities sent over, either directly to the purchaser or to themselves, for delivery by them. If the home office is at (e. g.) Chicago, the delay is for only a few hours. The distinctions between these two methods (personal carrying by salesmen and sending home) are shadowy in principle and often negligible in practice. We think the statute is clearly intended to be applied to this kind of business, by either method. The law says, in section 18:

"It shall be unlawful for any corporation, copartnership, association, company, firm, person or agent to sell or offer for sale, or attempt to sell at any place within this state or to any person within this state, stocks, bonds, or other securities, * * * unless, etc. * * * No investment company or

⁴ See the latest application and review of these and their dependent cases in *N. Y. Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. —, Dec. 15, 1913.

dealer shall sell or offer for sale at any place or to any person within this state any stocks, bonds, or other securities issued to any investment company, unless, etc."

Indeed, upon the argument, the Attorney General frankly admitted that the statute must be interpreted to cover these methods of business by nonresidents, and it is this very feature for the protection of which at least four of the consolidated bills are filed.

This brings us to the inquiry whether the burden is direct and so forbidden, or indirect and so permitted. It is established by many familiar cases, some of the more recent of which are cited in the margin,⁵ that, although certain exercises of the police power (of which ordinary licensing laws and food inspection laws are the most familiar examples) do burden interstate traffic in legitimate articles of commerce, yet, because the law is within the police power, the burden is considered not sufficiently substantial and direct to make the law invalid. Whether there may be a field for exercise of police power, which exercise is legitimate from all other points of view and yet forbidden as against interstate commerce under the rule which has its latest development in *Crenshaw v. Arkansas*, 227 U. S. 389, 399, 33 Sup. Ct. 294, 57 L. Ed. 565, *Rogers v. Arkansas*, 227 U. S. 401, 409, 33 Sup. Ct. 298, 57 L. Ed. 569, and *Adams Express Co. v. City of N. Y.*, 232 U. S. 14, 34 Sup. Ct. 203, 58 L. Ed. —, we need not consider. We may assume, for the purposes of this opinion, that this inquiry, whether the burden is "direct," is only another form of the question whether the act is within the police power.

Is this a mere licensing law? So far as it affects the investment company, we see no similitude. Engaging in a business is not regulated or permitted; it is the proposed individual transaction which is the subject of scrutiny. The investment company receives no license in substance or in form. If it fully complies with the law, and the issue and sale of stocks and bonds are approved, and if the next year or the next month it wishes to make another issue which may be substantially similar, it is forbidden to do so until there is another submission and another tacit approval. To call such provisions the licensing of an occupation or business is a misnomer.

As to dealers, there is more of the form of license. They are required to register and to pay a registration fee and are subject to some general provisions and regulations. For this reason we said above that some parts of the act used the nomenclature of a license law. However, if this is a license to the dealers, it avails them nothing. They cannot do one item of business, until that item has passed scrutiny; hence it is clear that the dominant purpose is not to license and supervise individuals in the following of an occupation or business, but to regulate, to the point of prohibition, the business itself.

Is the act, although affecting interstate commerce, sustainable as an inspection statute, upon the same principle on which food inspection

⁵ *C., B. & Q. R. R. v. McGuire*, 219 U. S. 549, 568, 31 Sup. Ct. 259, 55 L. Ed. 328; *Chicago, etc., Co. v. Fraley*, 228 U. S. 680, 33 Sup. Ct. 715, 57 L. Ed. 1022; *Barrett v. Indiana*, 229 U. S. 26, 33 Sup. Ct. 692, 57 L. Ed. 1050; *U. S. Fidelity & Guaranty Co. v. Kentucky*, 231 U. S. 394, 34 Sup. Ct. 122, 58 L. Ed. —.

laws have been held valid? This question may be answered by considering the case of *Savage v. Jones*, 225 U. S. 501, 525, 32 Sup. Ct. 715, 56 L. Ed. 1182, in which many of the decisions are collated. The Indiana act required certain food products offered for sale to display a statement of their ingredients. This was thought to be a provision wholly appropriate to the protection of the purchasing public, and not to go beyond the reasonable occasion for such protection, and was said to be "appropriate means for accomplishing the legitimate purpose of the act." To the argument that the statute permitted the officials to set up arbitrary standards, the court replied, "That it does not appear that any arbitrary standard has been set up." In the present case, the statute itself sets up the arbitrary standard, viz., the Commission's opinion as to the probability of loss. If the Indiana statute had provided that the food product should not be sold in the state, if the state chemist concluded that in all probability it was not of much nutritive value, the case would be parallel. An examination of numerous other cases cited indicates that in each one, where a regulation somewhat affecting interstate commerce has been sustained, it has been found that the regulation and prohibition involved had immediate and direct relation to the legitimate object of the statute, and so were within the police power.

We rest our conclusion here on the proposition that this statute, in the respects which we have pointed out, finds no support in the police power, and accordingly that its restraint of interstate commerce is not merely indirect or incidental.

Another reason, if it were necessary, for holding that the restraint upon this interstate commerce is direct is found in the fact, already discussed, that for 30 days there is an absolute prohibition of any dealings on any terms. When we observe that a nonresident, owning stocks or bonds of the highest quality and upon which no criticism has been or can be made, and who desires to sell them in Michigan to some one who there desires to buy, is totally forbidden to do so for a period of 30 days on penalty of being guilty of a felony, and that there is no machinery of the law by which he can get permission or approval until the thirty-first day, it is clear enough that the restraint is substantial and direct.

4. *Does the act delegate legislative or judicial power?*

[8] So far as this objection is directed against the creation of an administrative board supervising business affected with a public interest, it is, of course, untenable. So far as it is directed to the power of the Commission to determine the value of the securities and their fraudulent character, it is, in part, covered by what we have said. Whether the right to determine finally what is and what is not fraudulent, and under a statute which creates no standards, can be vested nowhere save in a court, we will not now consider. So, with the questions whether the failure to provide for notice and hearing is a fatal defect, and whether it is necessary, considering all the provisions of the act, that there should be some judicial review beyond a mere writ of certiorari, under which the Commission's improvident finding of fact would be unassailable.

5. *Is the title of the act sufficient?*

It is doubtful whether one reading the title of the act would suppose that it prohibited the sale of securities which were not fraudulent but merely not worth the selling price; but the broad language of the title is capable of a construction which will cover all the provisions of the act, and, in advance of any decision by the Supreme Court of the state, we should hesitate to make a conclusion of general invalidity depend upon this ground.

[9] 6. There remains only one question. We have found that the power given to the Commissioners to forbid the sale of securities at less than what they think the proper price is a taking of property and is not within the police power, and that the act directly and substantially burdens interstate commerce. Can it be said that these features can be eliminated and still that the law generally may stand? This question is put in concrete form by section 24 of the act, which is:

"Sec. 24. Should the courts of this state declare any section or provision of this act unconstitutional or unauthorized, or in conflict with any other section or provision of this act, then such decision shall affect only the section or provision so declared to be unconstitutional or unauthorized and shall not affect any other section or part of this act."

While this provision in terms refers only to the state courts, such limitation may well be overlooked, for we think the whole section is only declaratory of the existing and well-settled judicial rule. It has long been established that the presence, in an act, of an unconstitutional section or provision would not make the whole act invalid if that part could be cut out and leave a workable act which it might be presumed the Legislature would have passed. We cannot see that section 24 has any force beyond this, except, perhaps, to accentuate the existing presumption that the Legislature would have adopted the remaining, primarily valid, portion of this act. It cannot be that, if the unconstitutional portions are so interwoven with the whole purpose and operation of the statute that they are not fairly separable, the act may nevertheless be enforced in a form in which it was not passed and in which it might not be recognized by its framers. The provisions that the Commission shall pass on the probability of loss (as distinct from fraud) and on the "fairness" of the plan form an integral part of each section creating the Commission's powers. They are bound to modify and characterize the Commission's whole action. It is not improbable that these provisions were inserted in the belief that without them the statute would be practically unworkable. They form an inherent part of the unitary statutory scheme to save citizens from probable financial loss. Certainly the difference between a fraudulent enterprise and an unprofitable one is vital. The criterion of "probable loss" is broader and more inclusive than the criterion of "fraud"; it is not consistent to destroy the inclusive and preserve the included. We cannot, even with the aid of section 24, presume that the law would have been passed if it had prohibited only fraudulent transactions.

So, too, the direct restraint on interstate commerce is an inherent part of many different sections. To enforce the law against the citi-

zens of Michigan and not enforce it against nonresidents would doubtless be a result most surprising to the Legislature. It is an essential part of the scheme of the law that all persons, residents, and nonresidents shall be prohibited from selling, in Michigan, securities which will probably result in loss to the purchaser; and the excision of this feature leaves the law without vitality.

Further, after the 30-day provision is eliminated, nothing operative remains.

Another branch of what we have called the only remaining question is this: May all the statutory restrictions be enforced against corporations, foreign or domestic, upon the principle that the state may attach any conditions to what it creates or voluntarily permits? ^a This act does not purport to regulate corporations. There are no separate sections relating to corporations, which can be preserved and enforced. Particularly as relates to dealers, every restriction is carefully applied to corporations and partnerships and individuals. If only corporate dealers were affected, the statute would be evaded so easily as to make it worthless. It is clear to us that, if we undertook to preserve this act to affect corporations only, we would be making a law in violation of the legislative intent.

Furthermore, as regards foreign corporate dealers, like two of the present plaintiffs, whose business constitutes partly, if not mainly, interstate commerce, the act, to be sustained, must be separable with reference to their interstate and intrastate transactions; and this is upon the well-established principle that states have no power to prohibit or to fetter by conditions the right of corporations to carry on interstate trade in legitimate articles of commerce. *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

We are aware that in the *Berea College Case*, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81, the Supreme Court enforced against a corporation a statute which was drawn to apply to corporations and individuals, and did so without deciding whether individuals must submit; but this may well have been upon the theory that the particular statute justified a presumption that it would have been passed as to corporations alone. It did not appear that there was any person within the state to be affected by the law at the time it passed, except the corporation which complained. There can be no such presumption where it was known that the law would affect partnerships and individuals in great number, and where equality of treatment between corporations and individuals was clearly intended. Further, in the *Berea College Case*, the state court had decided that the statute was to be construed as if it had been amendatory of the college charter, and that construction of the statute was controlling.

The preliminary injunction must be granted. The District Judge for the Eastern District of Michigan will settle the terms of the order and will allow an appeal, if one is desired. The court, as now constituted, has no jurisdiction beyond the motion for injunction.

^a This is a moot question, as to two of the consolidated cases.

HARTMAN v. ACKOURY.

(District Court, E. D. Louisiana. January 17, 1914.)

No. 14,681.

BANKRUPTCY (§ 293*)—COURTS—ANCILLARY JURISDICTION.

A bankruptcy court in Louisiana had ancillary jurisdiction of a bill to subject property in Louisiana to bankruptcy proceedings against the alleged owner in Mississippi under a bill alleging that the property had been omitted from the bankrupt's schedules, and that after adjudication the bankrupt had conveyed the property to defendant, and this, though it was of less value than \$3,000.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.*]

Action by M. M. Hartman, as trustee in bankruptcy of George Salloum, against Tony Ackoury, to recover certain property as belonging to the bankrupt's estate. On demurrer to appeal. Overruled.

J. Hirsh and R. L. Dent, both of Vicksburg, Miss., Nelson S. Wooddy, of Los Angeles, Cal., and Foster, Milling, Brian & Saal, of New Orleans, La., for plaintiff.

Johnson & Fernandez, of New Orleans, La., for defendant.

FOSTER, District Judge. In this case the plaintiff, the trustee of George Salloum, who was adjudicated a bankrupt in the Southern district of Mississippi, sets up that the bankrupt prior to adjudication was the owner of certain real estate in the parish of Washington, La., but failed to list it on his schedules, and he had no knowledge until recently of its existence; that after adjudication in bankruptcy the bankrupt made a deed of the said property to the defendant Ackoury. It is admitted that the property is worth less than \$3,000 and defendant demurs to the jurisdiction of the court.

Conceding, for the sake of argument, that the suit will not lie under sections 67e and 70e, Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564, 565 [U. S. Comp. St. 1901, pp. 3449, 3451]), the allegations of the petition are to be taken for true, and therefore full title vests in the trustee by the adjudication, and the property was constructively in the custody of the court. This court undoubtedly has ancillary jurisdiction to aid any other United States court to reduce to possession property of a bankrupt estate situate within its territorial limits.

The demurrer will be overruled.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WEST v. EDWARD RUTLEDGE TIMBER CO. et al.

(District Court, D. Idaho, N. D. July 22, 1913.)

1. PUBLIC LANDS (§ 106*)—DECISIONS OF LAND OFFICE—REVIEW BY COURTS.

In the absence of fraud or gross mistake, decisions of the officers of the Land Department, made within the scope of their authority upon questions of fact, or where questions of law and of fact are inseparably commingled, cannot be reviewed by the courts; but if by manifest mistake of law these officers deprive a man of his rights a court of equity will grant appropriate relief.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. § 106.*]

2. PUBLIC LANDS (§ 35*)—HOMESTEAD—QUALIFICATION OF ENTRYMAN.

If a settler is qualified when he takes up his residence and files on public land which is subject to homestead entry, he is not disqualified from making final proof because he afterwards acquires and holds more than 160 acres of other land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72-77; Dec. Dig. § 35.*]

3. PUBLIC LANDS (§ 35*)—HOMESTEAD ENTRIES—GOOD FAITH OF ENTRYMAN.

That land sought to be entered as a homestead by a settler is covered with valuable timber, and that its value for agricultural purposes may be questionable, where it is, however, tillable when cleared and reasonably productive, does not warrant the inference that the application was not filed in good faith for the purpose of acquiring a home.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72-77; Dec. Dig. § 35.*]

4. PUBLIC LANDS (§ 81*)—GRANT IN EXCHANGE FOR PARK LANDS—ASSIGNABILITY.

By Act March 2, 1899, c. 377, 30 Stat. 993, creating Mt. Rainier National Park, it was provided that on conveyance by the Northern Pacific Railroad Company to the United States of its lands lying within the limits of the proposed park that company should be authorized to select in lieu thereof an equal quantity of nonmineral public lands elsewhere. At that time the Northern Pacific Railroad Company owned no lands, the same having passed through foreclosure sale to the Northern Pacific Railway Company. The latter company accepted the proposed exchange, conveyed its lands within the park to the United States, and selected other lands in lieu thereof, for which it received patents; the Interior Department expressly finding that the railway company was the lawful successor in interest of the railroad company. *Held* that, in view of such ruling and of the fact that otherwise the provision of the act would be wholly ineffective, the railway company must be deemed to have succeeded by assignment to the rights of the railroad company thereunder and its patents sustained.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 250-252; Dec. Dig. § 81.*]

5. PUBLIC LANDS (§ 29*)—SURVEYS—CLASSIFICATION OF MINERAL AND NON-MINERAL LANDS.

The act having limited the right of selection of lieu lands to "nonmineral public lands so classified as nonmineral at the time of actual government survey which has been or shall be made," a selection of land in fact nonmineral is not invalidated by the fact that the surveyors did not expressly classify it as such; it being the practice of the Department to re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

quire notation of evidences of mineral deposits and to treat all lands as to which no notation is made as nonmineral.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 41-47; Dec. Dig. § 29.*]

6. PUBLIC LANDS (§ 82*)—SELECTION OF LANDS GRANTED—DESCRIPTION OF UNSURVEYED LAND.

Where a grant of public lands to be selected by the grantee provided that in case the land selected should be at the time unsurveyed the list filed "should describe such tract in such manner as to designate the same with a reasonable degree of certainty" in the absence of any rule of the Land Department, and where an adjoining township had been officially surveyed, a description of the land by the legal subdivision by which it would be designated when surveyed in accordance with the established system of surveys was sufficient.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 236, 253-256; Dec. Dig. § 82.*]

7. PUBLIC LANDS (§ 81*)—GRANTS IN EXCHANGE FOR OTHER LANDS—CONSTRUCTION.

The rule that public grants are to be construed strictly against the grantee is not applicable to a grant of public lands in exchange for other lands conveyed to the United States, where the question is not one of the extent of the grant but of procedure in administration of the act.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 250-252; Dec. Dig. § 81.*]

In Equity. Suit by Andrew West against the Edward Rutledge Timber Company and the Northern Pacific Railway Company. Decree for defendants.

A. H. Kenyon and Merritt, Oswald & Merritt, all of Spokane, Wash., for plaintiff.

James B. Kerr, of Portland, Or., Stiles W. Burr, of St. Paul, Minn., E. J. Cannon, of Spokane, Wash., and Davis, Kellogg & Severance, of St. Paul, Minn., for defendants.

DIETRICH, District Judge. The plaintiff is seeking to compel the defendants to convey to him the title to the S. E. $\frac{1}{4}$ of section 20, in township 44 north of range 3 east of Boise meridian, timbered land in North Idaho. His theory is that, being a settler upon the tract at the time it was surveyed, and qualified to enter the same under the homestead laws of the United States, he was by the Interior Department unlawfully and without fault upon his part denied the right to make entry and procure patent thereto, and that, patent having been issued to the defendant railway company through a misapprehension of the law, it took the title in trust for him. The defendant timber company is the grantee of the railway company. The general rules and conditions under which courts of equity exercise jurisdiction in such cases are well understood, and do not require extended discussion.

[1] In the absence of fraud or gross mistake, decisions of the officers of the Land Department made within the scope of their authority upon questions of fact, or where questions of law and of fact are inseparably commingled, cannot be reviewed by the courts. But if by manifest mistake of law these officers deprive a man of his right, a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

court of equity will grant appropriate relief. *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Bishop of Nesqually v. Gibbon*, 158 U. S. 156, 15 Sup. Ct. 779, 39 L. Ed. 931; *Johnson v. Drew*, 171 U. S. 94, 18 Sup. Ct. 800, 43 L. Ed. 88. Where, as here, the plaintiff is a private individual, he must establish his personal qualifications and his right to receive the title in controversy, for, however erroneous the ruling of the Land Department, a private individual cannot be heard to challenge it unless he has been wronged thereby; the government alone can appear in behalf of the public interest.

[2] The first inquiry, therefore, is whether at the time he offered his filing the plaintiff was qualified to enter public land as a homestead, and whether in due time he substantially complied or tendered compliance with the requirements of the law. The only suggestion of a personal disqualification on the part of the plaintiff is that, not at the time he offered to file upon the land, but subsequently, after he had resided thereon for a considerable period of time, he acquired and held title to more than 160 acres. But it is thought that if a settler is qualified when he takes up his residence and files upon land which is subject to entry, it is immaterial that he thereafter acquires and holds title to more than 160 acres. *Clark v. Mansfield*, 24 Land Dec. Dept. Int. 343; *Smith v. Longpre*, 32 Land Dec. Dept. Int. 226; *Mathison v. Colquhoun*, 36 Land Dec. Dept. Int. 82. See, also, *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. 406, 39 L. Ed. 524.

As to settlement and improvement, evidence was adduced tending to show that the plaintiff paid a small consideration to a former occupant of the land for his improvements and his prior right of possession, and thereupon took up his residence thereon in May, 1903; and that he has maintained his home there ever since that date; and that he has added to the improvements and cleared and cultivated a small tract. In due form he applied to make homestead entry on July 17, 1905, shortly after the official survey was approved, but because of the supposed superior rights of the railway company his application was rejected. Substantially no evidence was offered by the defendants in rebuttal. While the amount cleared and brought under cultivation from year to year is pathetically small, I am inclined to the view that, assuming the defendants to be without right, the plaintiff would be entitled to make final proof and receive patent. It has long been the policy of the government to deal liberally with those who settle in good faith upon the public domain. *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. 406, 39 L. Ed. 524. In view of the controversy over the title, the refusal of the Land Department to recognize him as having any right, and the prolonged contest proceedings, it was not to be expected that the plaintiff would apply himself to the reclamation of the land with the courage and energy which would be reasonable under other circumstances. Moreover, the land is covered by a heavy growth of timber, which, because of the present want of transportation facilities, is not marketable, and therefore in clearing under the conditions which have prevailed, it has been necessary to destroy by fire timber products the proceeds of which, with a reasonable market, would, in a large

part, if not wholly, defray the expenses of reclamation. It is a policy of doubtful wisdom, to say the least, which would require the entryman vigorously to pursue a course attended with such great waste.

[3] The defendants urge that, in view of the inaccessibility of the land, its elevation above the sea level, the climatic conditions, the outlay required to remove the stumps and brush, and the great value of the timber, it is incredible that plaintiff has ever intended in good faith to make it his home, and that, upon the other hand, it must be inferred or presumed that he seeks title only that he may profit from the value of the timber. While I recognize that the possibilities of fraud in entering such lands under the homestead laws are great, I am unable to see how place can be given to this argument without indulging the conclusive presumption that ordinarily lands covered with a heavy growth of valuable timber are not enterable under the homestead laws—a view which would seem to be contrary to both the letter of the law and the practical construction placed thereon by the Land Department. The evidence abundantly shows that, if cleared, the land is tillable and reasonably productive. The winters are rigorous, but not more so than in many places where it is well known agricultural pursuits are carried on with entire success. So far as appears, transportation facilities will be provided here, as they have been elsewhere, in due course of time. Moreover, in adjudging the good faith of the average entryman it would be a mistake to assume that he exercises the same conservative judgment that we look for in the capable and experienced man of business. The financial wisdom of the homeless, land-hungry laboring man may be sheer folly to the successful captain of industry, and in rightly discerning the motives of either we must stand with him and feel the forces by which he, and not another, is moved. While it must be admitted that the argument for the defendants is not without cogency, in the absence of conduct upon the part of the plaintiff inconsistent with the theory of and tending to impeach his good faith, I do not feel justified in holding that, merely because there may be grave doubt whether the land, when divested of the timber, should, in the exercise of sound business judgment, be regarded as desirable for agricultural purposes, he has acted in bad faith and has had no purpose to till the soil, but seeks the title only in order that he may thereby secure the valuable growth of timber. While the question is not free from doubt, upon the whole I am inclined to the view that, had the claim of the defendants not intervened, the Land Department would have accepted plaintiff's proof and issued patent.

Now as to the right and title of the defendants: Briefly stated, the claim of the railway company is that, while the lands in question were unreserved public lands of the United States, and prior to the inception of any right on the part of the plaintiff, on June 21, 1901, it, as the successor in interest of the Northern Pacific Railroad Company, made selection thereof under the provisions of an act of Congress entitled "An act to set aside a portion of certain lands in the state of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," approved March 2, 1899 (chapter 377, 30 Stat. L. 993), by filing in the United

States Land Office at Cœur d'Alene, Idaho, a proper application and selection list covering this tract, together with others. The description in this list, in so far as it is pertinent here, is as follows: Land which when surveyed will be described as follows: All of section 20, township 44, range 3, in the Cœur d'Alene land district, in the state of Idaho. Conceding that such a selection list was filed upon the date mentioned, and that at that time the land was unsurveyed, nonmineral public land, the plaintiff contends that such filing was ineffective to withdraw the land from entry, for reasons which we proceed to consider.

[4] The first objection is that, the grant being to the Northern Pacific Railroad Company, and the Railway Company not being named in the granting act, the latter was not qualified to select the land or to receive a patent therefor. This is one of the questions which it was necessary for the Interior Department to decide and which it did decide. The patent contains an express recital to the effect that upon evidence adduced it was found that the railway company was "the lawful successor in interest" of the Railroad Company. In its administration of the public land laws, it is undoubtedly within the jurisdiction of the Interior Department to pass upon questions of succession, and in so far as such determination involves issues of fact, or issues of mixed law and fact, within the familiar principle already adverted to it is final and conclusive. But it is said that, contrary to the patent recital, the record shows that there was no evidence upon the point before the Department. Granting that we have before us a transcript of all the proceedings taken in the matter of the plaintiff's application to enter and receive a patent, we cannot assume that we have the entire record in the matter of the railway company's application for patent upon its lieu selections, and the presumption must therefore be indulged that the recital is true, in point of fact. It is, however, argued that as a matter of law it should be held that the railway company could not be an assignee under, or otherwise profit by, the act, for the grant is to the railroad company, and is not assignable. No decision is cited in support of the proposition, nor does plaintiff assign any reason, and apparently none is imaginable, why Congress should have intended to deny the right of assignment, or to confine the operation of the grant to the railroad company to the exclusion of its successors in interest. The grant was in no sense a gratuity. The government contemplated the creation of the Mt. Rainier National Park, and to carry out the purpose it was deemed desirable, if not absolutely necessary, to procure title to certain lands embraced in the land grant made to the railroad company by the Act of July 2, 1864, c. 217, 13 Stat. 365. For these it was willing to exchange other lands, which it owned, and by the act it proposed to make such exchange. The case is very different from one where the government is promoting a public enterprise by the donation of lands of great value, in which case it may not unreasonably be concerned in the character of the donee, and its qualifications and capacity to carry the enterprise to success. Here, upon the other hand, it was in need of certain privately owned lands, to carry out its own purposes, and in securing title thereto surely it was not greatly con-

cerned in the question to whom the consideration should be paid or what was done with it after it was paid.

In the light of conditions as they actually existed, and the manifest purpose of Congress to extinguish all private claims to the base lands required for the proposed park, we can do little more than speculate as to the reason why the railroad company rather than the railway company was named as grantee. It is unreasonable to infer that Congress intended thus to place itself upon record as opposed to the view that the railway company had succeeded to the property rights and franchises of the railroad company, for but a short time prior thereto, by a proviso in the Act of July 1, 1898 (chapter 546, 30 Stat. 621, 6 Fed. Stat. Ann. 457), it had expressly disclaimed any purpose to decide or prejudice this question, which was recognized as being of judicial rather than legislative cognizance. At the present time, the question appears to have been the subject of investigation, and it has been repeatedly held that, as a result of foreclosure proceedings consummated prior to the passage of the act of 1899, the railway company acquired all the property rights and franchises of the railroad company. 21 Ops. Atty. Gen. 486; 25 Ops. Atty. Gen. 401; *Ferguson v. Northern Pacific Ry. Co.*, 33 Land Dec. Dept. Int. 634. See, also, *Northern Pacific Ry. Co. v. United States*, 176 Fed. 706, 101 C. C. A. 117; *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931.

It therefore seems that the construction contended for by the plaintiff would render the act nugatory, for if this conclusion is correct, and admittedly it is not open to review upon the record here, it turns out that at the time the act of 1899 was passed the railroad company was not possessed of the lands desired by the government, but that its rights thereto had passed to the railway company, and unless we hold either that by inadvertence the railroad company was named while the railway company was intended, or that the privilege conferred upon the railroad company is assignable, plainly the act becomes wholly ineffectual for any purpose. It is a cardinal principle that of two possible constructions of a statute that one should be adopted which will give to it effect, in preference to that which would defeat the legislative intent. *M., K. & T. Ry. Co. v. Kansas Pacific Ry. Co.*, 97 U. S. 491, 497, 24 L. Ed. 1095. As a general rule of law, restraint upon the right of alienation is not favored, and such grants are assignable. *Webster v. Luther*, 163 U. S. 331, 16 Sup. Ct. 963, 41 L. Ed. 179; *Beley v. Naphtaly*, 169 U. S. 353, 18 Sup. Ct. 354, 42 L. Ed. 775. Accordingly it is held that the railway company could, as a matter of law, by assignment become the successor in interest of the railroad company to the rights and privileges conferred by the act of 1899, and, it having been found as a fact by the Department that it is such successor, the point must be ruled adversely to the plaintiff's contention.

[5] The next objection to the validity of the railway company's "selection" is based upon that provision of the act which limits the right of selection to "nonmineral public lands, so classified as nonmineral at the time of actual government survey, which has been or shall be made," etc. Precisely stated, it is that the land was not expressly

classified as nonmineral by the surveyors in the field; it is not claimed that it was returned as mineral, nor is there now any question that it was in fact nonmineral. The determination of the relation which it was contemplated by Congress the surveyor's return touching the mineral character of the land should sustain to the right of selection is not free from difficulties, but doubtless the actual character of the land rather than the report thereof was the dominating consideration. *Northern Pacific Ry. Co. v. United States*, 176 Fed. 706, 101 C. C. A. 117. Clearly a selection, valid for certain limited purposes at least, may be made of lands not yet classified as nonmineral, for the right of selection extends to unsurveyed lands, which, in the very nature of things, cannot be so classified. The classification called for, being modal, and therefore incidental rather than substantial, and the land in question being nonmineral in fact, it may be seriously questioned whether the plaintiff should, without showing consequent prejudice or injury to himself, be permitted to take advantage of the neglect of the administrative officers to require, in advance of the issuance of patent, a formal report of a fact about the existence of which there is no doubt. But assuming, without deciding, that under such circumstances relief may properly be granted, it must in the first place be held that the record here is insufficient to warrant a finding that the land was not returned as nonmineral; and in the second place, assuming, as contended by the plaintiff, that the return of survey contains no express classification, I am inclined to the view that, under the practice prevailing in the Land Department, the absence of a classification as "mineral" is equivalent to, and is to be understood as a classification of nonmineral.

Undoubtedly the required report from the surveyors in the field was intended for the information of the officers of the Land Department, to the end that they might act intelligently and promptly in approving or rejecting applications for patents upon lands selected by the grantee. It is quite unimportant, therefore, in what manner or by what system the facts are reported from the field, provided the communication is understood in the Land Department. If, when a surveyor is sent out, he is instructed to note in his return all lands found to be of a mineral character as "mineral" and to make no notation at all touching lands found to be nonmineral, it cannot be said that a return made strictly in compliance with such instructions, designating some lands as mineral, and containing no notation at all as to others, fails to classify the latter group as nonmineral. The silence of the return in the one case is quite as significant as the express notation in the other. Now while it is not shown that any special instructions to this effect were given to the surveyors in this case, it does appear that there is a well recognized custom governing the return of surveys, equivalent to such an instruction.

"It is the uniform custom in surveying public lands to make in the field notes and surveyor's return notation of mines, outcroppings, and evidences of valuable mineral deposits where found, and to say nothing upon the subject of minerals where no mines, outcroppings, or evidences of valuable mineral deposits are found. When, therefore, the field notes and surveyor's return make no notation whatever of minerals in the land being surveyed, such lands are considered and treated as given a nonmineral classification by the surveyor." *Davenport v. N. P. Ry. Co.*, 32 Land Dec. Dept. Int. 28.

See, also, *Bedal v. St. Paul, etc., Ry. Co.*, 29 Land Dec. Dept. Int. 254; *State of Idaho v. N. P. Ry. Co.*, 37 Land Dec. Dept. Int. 135; *In re St. Paul, M. & M. Ry. Co.*, 34 Land Dec. Dept. Int. 211; *In re N. P. Ry. Co.*, 40 Land Dec. Dept. Int. 64.

Accordingly, assuming the facts to be as stated by plaintiff's counsel, I must hold that the land was classified as nonmineral at the time of the survey.

[6] The remaining contention of the plaintiff is that the selection list filed in the local land office by the railway company on June 21, 1901, was ineffectual because of an insufficient description of the land. The pertinent provision of the act is:

"In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company in the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty."

It will be remembered that the description employed by the railway company was "land which when surveyed will be described as follows," and there follows a correct numbering of the section, township, and range. The real question therefore is whether, under any circumstances, a description of unsurveyed land by reference to the technical numbers which it will bear when surveyed designates it with "a reasonable degree of certainty." In general practice such a description is not uncommonly used, and, were the plaintiff's position not fortified by the opinion of Acting Secretary Adams in the *Hyde Case*, 40 Land Dec. Dept. Int. 284, I would be inclined to the view that it has little support either in reason or the reported decisions, and, with all due respect, I am unable either to follow the reasoning or to concur in the conclusion of that case. It is true unsurveyed land may never in fact be surveyed, and it is also true that the government may in the future adopt a system of surveys radically different from that now in vogue. But these considerations are aside from the point. The description before us is universally understood as being equivalent to a statement that if, under the present system of public surveys, the lines thereof were actually extended, it would appear that this land is the S. E. $\frac{1}{4}$ of section 20, in township 44 north, range 3 east of Boise meridian. So far as concerns the certainty of the description, therefore, it is quite unimportant whether the land is ever surveyed or not, or whether the government retains or abandons its present system of surveys. Assuming that there are in the immediate vicinity other lands to which the public survey has already been extended, a reasonably intelligent surveyor could, with the data furnished by such a description, go into the field and identify the designated tract, and with precision define its boundaries upon the ground. The description is in effect a description by metes and bounds, with a tie to a fixed monument. To find and identify the land the surveyor selected for such purpose would, in compliance with certain familiar rules governing the making of public surveys, start from an established monument in an adjacent survey already officially approved, and, in accordance with such rules, would run certain courses and distances to reach a certain corner of the designated tract, the boundaries of which could thereupon be run out and

defined upon the ground. An amplified description tying the land to such monument and giving in detail the courses and distances and the metes and bounds would have no greater precision than the one we are considering.

True, there may be some slight variation in public surveys, but that is a contingency which cannot be wholly obviated. All paper descriptions are in their application subject to a degree of uncertainty. Not infrequently doubt arises in the actual location of the lines called for by an official survey. Moreover, when it comes to patent it is necessary to conform the boundaries of the claim to the official survey, and surely, in adjusting to the official survey, boundary lines located upon the ground pursuant to such a description as we have here, less difficulty would be encountered than in adjusting those located without reference to the official survey and where the tie is to some natural object arbitrarily chosen. Indeed, it is a matter of common knowledge that settlers upon unsurveyed land as a rule endeavor as best they can do to conform their boundaries approximately to the projected lines of an adjacent official survey. There is an apparent assumption upon the part of the plaintiff that it was the duty of the railway company in some manner to mark the boundaries of its claim upon the ground; but no such duty is imposed by the act, either expressly or by reasonable implication. The requirement is that the "list" "shall describe" the land with "a reasonable degree of certainty." If to give notice of the claim it were necessary to mark the boundaries, an entirely different question would be presented. But evidently it was thought by Congress that when an application was filed in the local land office containing a reasonably definite description it would constitute notice to all the world of the pendency of the claim and the status of the land included therein. I am not to be understood as holding that in all cases the description employed by the railway company would be reasonably certain; in any given case the degree of certainty of such description depends largely upon the degree of adjacency of surveyed land. Here the official survey had extended to adjacent townships, and I am wholly unable to understand how a list containing a detailed description by metes and bounds would have any more clearly advised the plaintiff of the exact location of the land than did the list under consideration. But however that may be in this particular instance, it is apparent that unless the view be adopted that, as a matter of law, under no conditions can a description by reference to the lines of the official survey be held to be in compliance with the act, the question of the sufficiency of the description is in every case one of fact, and hence not subject to review by the courts; and I am wholly unable to assent to the proposition that such a description can under no circumstances be held to be reasonably certain.

By the plaintiff much significance is attached to the clause in the latter part of the act, which provides that:

"In case such tract (of unsurveyed land) as originally selected and described the list filed in the local land office shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

It is urged that such a method as was followed here admits of no variation or discrepancy requiring adjustment. The argument rests wholly upon the assumption that, if the method is authorized at all, it is exclusive; but such an assumption is plainly unwarranted. The act does not purport to require any given form of description, but upon the other hand gives the widest latitude. Its only requirement is that in the selection list the lands shall be designated with a "reasonable degree of certainty." The method of designation is immaterial provided it identifies the land. It was doubtless anticipated that different methods would be employed, and the provision above quoted was intended to point out the course to be pursued in cases where the original description is not tied to the lines of an official survey, as here. In the act of 1898 (30 Stat. 620, 621) this method of identification had been expressly sanctioned—indeed, it had been prescribed to the exclusion of all others—and it is not reasonable to believe that if, a few months later, Congress had intended to outlaw it altogether, the communication of such intention would have been left to inference or implication. The better view is thought to be that it was intended not to limit the description to any specific form, but to authorize any method which would identify the land with reasonable certainty, leaving to the Land Department the discretion to adopt such rules and regulations as, in the light of experience, might appear to be desirable. It is not doubted that, under the general language of the act, it is competent for the Department, by standing rules, to prescribe such a description as was used by the railway company, or a description by metes and bounds, or both. Whether such authority extends to the requirement that the boundaries be marked upon the ground is another question, which need not be decided. But when the railway company filed its list there were no rules or regulations upon the subject, and, as was said by Acting Secretary Pierce, in *Hanson v. Northern Pacific Ry. Co.* (38 Land Dec. Dept. Int. 491), where the sufficiency of this identical list was under consideration:

"The practice of allowing selections by the railway company as these selections were made had been of such long standing and such uniform practice that it would be unfair, if not illegal, to give retroactive effect to such regulations"

—that is, such regulations as were promulgated by circular of November 3, 1909 (38 Land Dec. Dept. Int. 287), requiring a description by metes and bounds, and a posting of notice upon the land, as well as a reference to the projected lines of the official survey.

In adopting such rules and at the same time sustaining prior selection lists not in compliance therewith, the Department was not necessarily acting inconsistently. The act does not require a perfect or the best possible description, but only one having a reasonable degree of certainty. It does not follow that one form of designation is wanting in a reasonable degree of certainty because, in the light of experience, another is adopted which for the time being is thought to be a better. Otherwise the future promulgation of still more stringent regulations would operate to invalidate selections made in strict compliance with

the rules now in force. The true view is thought to be that, within the range of sound discretion, the Land Department is clothed with the authority to determine as a question of fact whether, under the circumstances of the case, any given designation is reasonably certain, and when fairly made within such limits such determination should not be disturbed, even though the courts may be of the opinion that greater precision is both desirable and practicable. My conclusion is that it cannot be held that, as a matter of law, such form of description as was here employed is, under any and all conditions, insufficient to designate the land with a reasonable degree of certainty, and as a question of fact there is no showing warranting a finding that, under the circumstances of this case, the Department either acted fraudulently or abused its discretion in holding the designation to be sufficient.

[7] Much stress is laid upon the familiar rule that public grants are construed strictly against the grantee. In applying this rule, however, some consideration should be given to the fact that the grant here was not a mere gratuity, but that the act is in the nature of an offer upon the part of the government of an exchange of lands presumably beneficial to it. Besides, the question in controversy relates, not to the extent of the grant, but only to procedure in the administration of the act, a subject which is left largely to regulation by the Land Department. As was said by Assistant Secretary Pierce in *State of Idaho v. Northern Pacific Ry. Co.*, 37 Land Dec. Dept. Int. 135, 138:

"It was deemed necessary to the accomplishment of its purpose that the United States should own the land placed in reservation by the act (original land-grant act). A voluntary conveyance by the railway company was the most feasible method of reacquiring title to the granted land, and a right of exchange upon the terms and conditions set forth was the consideration offered to induce the company to transfer its title. An offer is made by one party of which acceptance by the other is invited. The act is contractual in character, and terms and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer."

But laying aside these considerations, and applying the rule with all possible rigor, how can we construe the act so as to exclude, as a matter of law, descriptions by reference to the official survey? Clearly no such inhibition is expressed, and if implied at all it must be found in the requirement that the land be designated "with a reasonable degree of certainty." But, as we have already seen, within certain limits what is a reasonable degree of certainty in any given case is a question, not of law, but of fact.

In conclusion it is to be noted that the railway company pursued a course which, if not at the time expressly prescribed by, received the later approval of, and all the time had the apparent sanction of usage in, the Land Department. The plaintiff was neither misled nor prejudiced thereby, for seemingly he had no knowledge of the existence of the list, and therefore, whatever may have been the form of the description, it could not have influenced his action. The claims of a pioneer settler always appeal strongly for sympathy, but upon the most earnest consideration I am unable to grant the relief prayed for and at the same time preserve the integrity of what I understand to be the law.

From what has been said, it necessarily follows that the bill must be dismissed, and such will be the decree; each party is to pay his own costs. The attorneys for the defendants may prepare form of decree.

HILL et al. v. WILSON et al.

(Circuit Court of Appeals, Fifth Circuit. December 1, 1913. On Application for Rehearing, January 20, 1914.)

No. 2488.

1. TRUSTS (§ 366*)—SUIT TO ESTABLISH RESULTING TRUST—INDISPENSABLE PARTIES DEFENDANT.

To a suit by the trustees in bankruptcy of a corporation to establish a trust in favor of the corporation in property standing in the name of the defendant but alleged to belong in equity to an officer of the corporation, on the ground that he had defrauded the corporation, such officer is an indispensable party defendant.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 574-583; Dec. Dig. § 366.*]

2. CORPORATIONS (§ 319*)—SUIT TO RECOVER PROPERTY ON THE GROUND OF FRAUD—SUFFICIENCY OF BILL.

A bill to recover property for a corporation on the ground that the alleged owner and others who were officers and stockholders obtained stock of the corporation by fraud must show that at the time there were other stockholders or creditors who were defrauded, and a general allegation that there were others is insufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1415, 1416-1425; Dec. Dig. § 319.*]

3. EQUITY (§ 149*)—JOINT SUIT—ORIGINAL AND INTERVENING BILLS.

A bill to establish a constructive or resulting trust in favor of a corporation and a bill by interveners to establish a trust in the same property in favor of another are necessarily adverse to each other and cannot be maintained in the same suit.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 368-370; Dec. Dig. § 149.*]

Appeal from the District Court of the United States for the Northern District of Texas; Edw. R. Meek, Judge.

Suit in equity by John Howard Hill and others, trustees in bankruptcy of the United Wireless Telegraph Company, and Jesse Watson, trustee in bankruptcy of Christopher C. Wilson, against Robert J. Wilson and others. Decree for defendants, and complainants appeal. Decree amended and affirmed.

Perry G. Dedmon and Wm. J. Berne, both of Ft. Worth, Tex., for appellants.

Maurice E. Locke, of Dallas, Tex., and Byrd E. White, of Lancaster, Tex., for appellees.

Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. The decrees appealed from in this case are amended so as to read "without prejudice," and as amended affirmed, with costs.

On Application for Rehearing.

The judge below gave no written reasons for his decree dismissing the bills in this case; but we gathered from the arguments at the bar that counsel understood that the reasons were want of equity, multifariousness, misjoinder of parties, and want of necessary parties, as well as conflict between the original complainants and the intervener-complainant.

[1] From our investigation we found that neither Christopher C. Wilson nor his trustee in bankruptcy is made a party defendant to the bill of complaint filed by the plaintiffs Hill and others, whereas the whole foundation of the claim set up in the said bill is based upon frauds practiced by Christopher C. Wilson upon the plaintiff's bankrupt, and the liability of Christopher C. Wilson must be established before any question can arise as to whether there was a trust, constructive or resulting in favor of the United Wireless Telegraph Company and growing out of Christopher C. Wilson's transactions with the said company. The after-appearance by intervention of the trustee of Christopher C. Wilson joining with the original complainant in the prosecution of the original bill does not eliminate this difficulty.

[2] It may be further noticed that the original bill supplemented by the intervention does not sufficiently establish that the bankrupt corporation was defrauded. The original bill charges that Christopher C. Wilson, the president and director and member of the executive committee of the United Wireless Telegraph Company, about February 15, 1907, obtained a large amount of the stock of the United Wireless Telegraph Company, to wit, 423,000 shares of common stock and 176,000 shares of preferred stock; the consideration being the surrender by the said Wilson to the United Wireless Telegraph Company of certificates of an equal amount of stock, common and preferred, of the American De Forest Wireless Telegraph Company, a corporation organized under the laws of Maine, and which it is said had no actual value, and other worthless securities which had no market or intrinsic value. But the bill does not contain any sufficient statement of fact that there was any one interested in the corporation except the said Wilson and his alleged co-conspirators.

A general allegation that there were others interested during all this time is more a conclusion of law than an allegation of fact on which the court could act, as the bill does not show that there were actual creditors or stockholders interested in the United Wireless Telegraph Company at the time of the doing of the acts complained of who were unaware of what Wilson and his associates were doing, and whose rights were adversely and injuriously affected by those acts.

[3] The case as a joint suit shows clearly an adverse interest between the original complainant in the case and the so-called complainant-intervener.

The original bill of Hill and others seeks to declare a constructive or resulting trust in favor of the United Wireless Telegraph Company

in the after-acquired property of Wilson by reason of the fraudulent acts of Wilson and his alleged co-conspirators.

The complainant-intervener, trustee of Wilson, proceeds under the entirely different theory that the conveyances of the property to the defendants in the case were made in Wilson's interest, bought with Wilson's money, and thereafter the different conveyances alleged in the intervening bill were made to hinder, delay, and defraud Wilson's creditors, and the bill seeks to impound the property on that ground.

The two bills cannot stand together, and it would appear that neither can be sustained separately as a part of a joint suit.

Taking this view of the case, we concluded, as we think properly, that the decree appealed from should be amended so as to read "without prejudice," and as amended affirmed, thus leaving the appellants to proceed by new and original bills, if by counsel so advised.

The petition for rehearing is denied.

BENTLEY v. YOUNG et al

(District Court, S. D. New York. January 6, 1914.)

1. BANKRUPTCY (§ 303*)—SALES—FRAUD AS TO CREDITORS—BONA FIDE PURCHASERS.

Where a bankrupt has made a fraudulent sale of his stock of goods, not in the ordinary course of business, the burden is on the purchaser, in order to sustain the same, under Bankruptcy Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), making void all sales in fraud of creditors except as against bona fide purchasers, to show that he is in fact a purchaser in good faith.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

2. BANKRUPTCY (§ 182*)—FRAUDULENT SALES—BONA FIDE PURCHASER.

Where a bankrupt has sold his stock of goods in fraud of creditors, mere personal good faith on the part of the purchaser is not enough to establish that he is a bona fide purchaser for value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 255-258; Dec. Dig. § 182.*]

3. BANKRUPTCY (§ 182*)—FRAUDULENT SALES—BONA FIDE PURCHASER.

An auctioneer, engaged in purchasing bankrupt stocks, during an illness furnished funds to his son who, ascertaining that the bankrupt, a small retail shoe dealer, desired to sell his stock and fixtures, worth about \$2,500, went to his store and purchased the same for \$1,200, taking a receipt in which the bankrupt stated that the property was his own and was sold free and clear of all claims and mortgages. The son testified that he examined some of the bankrupt's paid bills, and, finding them receipted, supposed he could take the word of the bankrupt for the rest that he was not indebted to creditors. The next morning the son hired a van, appeared at the bankrupt's store at 7:30 a. m., and in an hour's time emptied the store and took the stock to his father's auction rooms, where it was sold. *Held*, that such facts were sufficient to put the son on inquiry whether the bankrupt was making a sale in fraud of creditors, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that his failure to make further inquiry, which he could easily have done, was sufficient to show that he was not a bona fide purchaser.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 255-258; Dec. Dig. § 182.*]

4. PRINCIPAL AND AGENT (§ 171*)—ACTS OF AGENT—LIABILITY OF PRINCIPAL.

Where a father, who was an auctioneer, advanced money to his son with which the latter purchased the stock in trade of a bankrupt with notice that it was being sold to him in fraud of creditors, and on the stock being removed to the father's auction rooms, he took charge of it, acted as the principal, and treated with the representatives of creditors who subsequently appeared and claimed that the goods had been fraudulently sold, such acts were a ratification of the son's acts, and hence the father, when sued for the value of the stock, could not successfully claim that the son made the purchase on his own account.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 644-655; Dec. Dig. § 171.*]

5. EVIDENCE (§ 571*)—OPINIONS OF EXPERTS—VALUE—EFFECT.

Where a purchaser of a bankrupt's stock, at a sale in fraud of creditors, refused to permit the representatives of creditors to examine the goods after they had been removed to the purchaser's auction rooms, so that the actual value of the goods could be ascertained, he was not entitled to complain that evidence of estimates by experts was insufficient to show the value of such goods.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1580; Dec. Dig. § 571.*]

6. BANKRUPTCY (§ 303*)—BANKRUPT STOCK—FRAUDULENT SALE—VALUE.

In an action against a fraudulent purchaser of the stock of a bankrupt, evidence held to warrant a finding that the value of the goods purchased was \$2,500.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

In Equity. Bill by George F. Bentley, as trustee in bankruptcy of Israel Kruger, against John Young and another. Judgment for plaintiff.

This is a bill in equity to set aside a sale of the bankrupt's stock of goods made to the defendant Henry Young, and to recover their value. The defendant John Young is joined as the principal in the transaction. The bankrupt, Israel Kruger, had a small retail shoe shop at 2073 Third avenue in the borough of Manhattan, and on Monday, October 30th, went to the auction rooms occupied by the defendant John Young, and there found his son Henry, to whom he offered to sell the whole of his stock and fixtures. Henry went with him to the shop, looked over the stock, made an inventory, which he put down in a notebook, and offered to buy him out for \$1,200. Kruger after higgling agreed, and Young put a custodian in charge and continued the business that afternoon and evening. Very early next morning, not later than 7:30, Young hired a van with three men, in about an hour's time emptied the shop, and took the goods down to his father's auction rooms. It is not certain just what happened to them then. Henry Young says that he sold the greater part on Tuesday afternoon to two strangers for \$1,000, and that none were delivered to buyers at an auction sale at which they were sold on Wednesday. That auction had certainly been advertised on Tuesday and Wednesday in the New York American, and Henry Young says it was likewise advertised on Sunday and Monday, but while the files were in court no suggestion was made to prove the earlier publications. Whether any goods were in fact delivered on Wednesday there is no means of knowing.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Young got no bill of sale or other evidence of his purchase, except a receipt signed by the bankrupt for \$1,200 "for my entire stock of shoes, rubbers, fixtures in store No. 2073 Third avenue. The same is my own personal property and sold to me free and clear of all claims and mortgages." On Wednesday Taylor, representing an association of wholesale shoe dealers in New York, filed a petition in bankruptcy against him and got a receiver and an injunction and with a copy of the injunction went to the auction rooms of John Young at about noon of that day, found him selling the goods, and had an interview with him, demanding that he stop the sale in compliance with the injunction. Later in the day he came again with a number of salesmen, and John Young at that time allowed the outsides of the cartons to be examined, but refused to permit them to look inside. He says that he inquired of Kruger whether he had any indebtedness, and was told that he had not, except \$200, which he owed to a cousin, and which he paid while Young was there. Upon the trial he swore that Kruger had shown him receipted bills of several jobbing houses, mentioning three or four, but on his examination two days after the failure, he could not remember the names of any one of the persons whose receipted bills he had seen. The memorandum or inventory in his notebook showed 1,761 pairs of boots, shoes, rubbers and slippers, and a total value of the stock of \$1,429.85, which is the amount that he thought he could get for the goods, and was the basis of bargain. He says that the bankrupt first asked \$1,500 and later took \$1,200, that being 60 per cent. of the value of \$2,000 taken at cost, as Young estimated it. The bankrupt's excuse for selling out was that he wished to set up in the furniture business on Second or Third avenue. Young is a speculator in secondhand stocks of merchandise and had often bought shoes.

The money with which this stock was bought came from John Young. He swore that three weeks previously he was taken to the hospital for a severe operation, and that he at that time gave some blank checks to Henry with the understanding that he might fill them in for such sums as were necessary, and use them on his own account for his own business transactions. He further swore that, although up to three or four years before the time of these occurrences he had been engaged in the business of buying and selling stocks of goods, sometimes of shoes, he had abandoned that business and confined himself strictly to that of auctioneer. He had, however, he said, from time to time advanced to his son money for the sake of buying stocks of merchandise on his own account. He swore that he knew nothing whatever of these transactions until he came to the auction rooms on Wednesday, when he learned that there was a large stock of shoes to be sold, including more than Kruger's; that he began selling these goods, but stopped after Taylor showed him the injunction. Taylor says that when the injunction was shown, John Young said to him that he would go ahead and sell the stock, but make no deliveries and that some of the goods might be Kruger's. Taylor then told him that he could easily demonstrate whose goods they were, to which John Young objected. In the afternoon, too, Taylor says that Young admitted to him that part of the stock, or all of the stock to be sold, had been purchased from Kruger, and that when the salesmen came up to identify the goods, he said that he was willing to let them go through the stock and look at it. Later, however, he came out and ordered everybody to take their hands off the goods. Thereupon Taylor instructed the salesmen to look inside the cartons, which would have enabled them exactly to identify Kruger's stock, but John Young said he had instructions from his attorney not to let anybody touch the boxes, and he ordered them to go outside the counter. Before they left, however, he said that he did not want to have any trouble over the matter, and asked if there were not some way in which it could be fixed up. About five or six months later, Taylor says, Young came to see him and said, "I know I have not got this stock. The stock has been all disposed of. All I have got down in the cellar is a desk or a show case, and I want to get rid of that. I want to know if you will tell me if there is not some way to settle the matter." At that time Taylor says he offered him a couple of hundred dollars to settle. On the other hand, all the salesmen swore that they were allowed only to see the outside of the cartons from which they could tell the make and kind of shoe, but could not trace them to Kruger's stock.

William Lesser, of New York City, for trustee.
Albert H. Gleason, of New York City, for defendants.

HAND, District Judge (after stating the facts as above). I have not the least doubt that a decree should go in this case against Henry Young for the value of these goods. The only doubtful questions are whether John Young was a party to the transaction, and what was the value of the goods.

[1] That Henry Young was chargeable with the duty to investigate further before buying the goods seems to me pretty obvious. Following *Truck v. Christy*, 152 Fed. 612, 81 C. C. A. 602, I will not say that the rule in *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489, applies to section 67e of the present act. Any language in *Dokken v. Page*, 147 Fed. 438, 77 C. C. A. 674, to that effect must be regarded as overruled. It will not do to say that as matter of law and under all circumstances a sale of goods out of due course is *prima facie* evidence of a sale in fraud of creditors. That was explicitly so provided in the thirty-fifth section of the old act; there is nothing of the sort in the present act. However, I think substantially the same result follows from the present form of 67e, for that section makes void all sales in fraud of creditors except as against bona fide purchasers. The defense of a bona fide purchase for value has always been an affirmative defense in the law, and there is no reason to adopt a different procedural rule in this case. Indeed I understood Mr. Gleason to assent to the proposition that a transfer by a bankrupt in fraud of creditors puts upon the transferee the burden of an affirmative defense of good faith.

[2] Now, of course, there is no room for argument that the sale was not in fraud of creditors, so far as Kruger was concerned, and therefore the case comes down only to this: Whether the defendants have established their defense of bona fides. I think it quite clear that Henry Young has failed to do this. It must be remembered that his personal good faith is not enough; the question is, not what he individually believed, but whether the circumstances would have put a reasonable man in his situation upon inquiry, and whether that inquiry would have led to sufficient knowledge of the facts to prevent the sale.

[3] In the first place, a sale by a retailer of his whole stock of goods, including his fixtures, so that his place is entirely cleaned out, is an unusual thing; it ought at once to suggest to a man who is in the business of speculating in stocks of goods, as Henry Young was, that the purpose might have been to abscond with the proceeds and leave his creditors. Furthermore the very form of the receipt suggests that Henry, not only ought to have been, but actually was, suspicious, for the words are: "The same is my own personal property and sold to me free and clear of all claims and mortgage."

That is the kind of language one uses to assure oneself. Indeed he says that he found it necessary to inquire whether there were any creditors, showing that he knew that there might be, and that if there were, the sale might be void. It is quite clear that he was put on inquiry. Did he make all reasonable inquiry? He says that he examined some of the paid bills, and, finding them receipted, supposed he

could take the word of the bankrupt for the rest. I doubt the truth of this explanation; it seems to me too suspicious that, upon the trial, two years after, he could give the names of a number of wholesalers whose bills Kruger had shown him, and yet, two or three days after the event, when examined before the commissioner, he failed to remember any of the names. That discrepancy corroborates an unpleasant impression which I got from his appearance, and leads me to the question whether he ever did see any such bills. But I think his duty hardly stopped there, even if he had seen the bills, which must have been at least one month old. The names of the sellers of these goods were upon the cartons, easily accessible; they all lived in the city of New York, or at least many did, and it was a very simple thing to call up one or more of them and learn whether Kruger was speaking truly. It is at least the more usual thing for such a small retailer to be always somewhat in debt; he generally gets all the credit he can. A single telephone call would have been sufficient to disclose the whole scheme. Furthermore, I believe the price at which he bought was wholly inadequate, as I shall show when I come to consider the amount of the decree; if inadequate, it was a strong additional proof of fraud, nearly conclusive. Again, the removal was most suspicious. There was no occasion for taking the goods out so early in the morning, except to conceal their whereabouts, and there was good reason to do it if that was the purpose, for the salesmen of these wholesalers constantly make their rounds in this city, and the best time to elude them was the early morning. I am, indeed, disposed to believe Mrs. O'Hearn when she says that the removal was well under way at a quarter to 7. I decidedly prefer her as a witness to Coulon, who puts the time later. Finally, the story of the sale of \$1,000 worth of the goods on Tuesday to two anonymous persons, who came in to the auction rooms and bought and carried it off on that day, seems to me improbable.

In short, I have no doubt that the transaction was the common one between bankrupts and their abettors; that is to say, that the bankrupt, finding that he had come to the end of his rope, looked out for a facile purchaser who would ask no questions and give him something for his goods; that such a purchaser he found in Henry Young. A decree, under these circumstances, must be entered against Young for the value of the goods. It would, of course, be preposterous, under the circumstances, to require the estate to restore the consideration which Young must have known was likely to be carried off by the absconding bankrupt, just as happened.

[4] The next question is of the complicity of John Young. My conclusion is that, whether or not John was sick, as he says, he advanced the money to Henry to use for John himself, and not for Henry. It may well be that he knew nothing about this particular transaction until Wednesday, when he came back, and that he did not in advance authorize this kind of purchase. I think it absurd to suppose, however, that he did not at that time learn of the circumstances from Henry. My reason for thinking this is that when Taylor, whose testimony I accept absolutely, came to the auction rooms on Wednes-

day, he had all his dealings with John, who at once assumed responsibility and kept it throughout. It was John who first gave the permission for the salesmen to inspect the goods, and later refused to let them go further; it was John who afterwards attempted to settle matters; it was John who said that the goods would be sold, but would not be delivered, and it was John who called up the attorney to see how the order of the court should be treated. All this seems to me absolutely inconsistent with the idea that John was acting only as Henry's auctioneer. Had that been so, he would at once have called in Henry and said: "Here's a man who says you have no right to these goods; you will have to settle this matter with him. I have nothing to do with it. This is your bargain, and you must settle with him."

Every circumstance points to the inference that John used Henry to buy such stocks of goods for him, and so continue the business exactly as John had done it in the past with Klinger; perhaps he used him for this very kind of event. It was perfectly apparent that the father was much the superior in intelligence and the more masterful in disposition, and it seems improbable that he should simply have advanced to the son large sums of money for his own independent business in which the father had nothing to do but get his auctioneer's fees. Whatever that may have been in other cases, the father's own conduct when the matter was questioned should remove any doubt. I may say incidentally that the bearing of John Young upon the witness stand did not impress me with the value of his testimony. I think, therefore, that the judgment must go against him as well as Henry.

[5] The remaining question is of value. It is quite true that the testimony of the salesmen was not based upon the most accurate foundation. None of them had looked through all the cartons as they lay upon Kruger's shelves, and their estimates must be taken with some allowance, as they themselves realized. It is nevertheless true that three of them gave figures the lower limits of which they were absolutely ready to stand on; and it is also true that each had been in the habit of making such estimates in his business every day and turning them into his principal, and that the principal had been in the habit of acting upon those estimates in allowing credit to retailers. Under these circumstances, I think that the estimates are better than mere guesses, as Mr. Gleason would have me hold. It is quite true that perhaps there were no shoes in some of the cartons, but that objection does not lie in the mouth of the Youngs, who made it impossible for us now to find how many cartons were empty and how many were not. In hastily removing and disposing of this stock, they have effectually prevented any accurate finding upon its value; and, while in this suit I cannot penalize them for that, yet when there is a fair doubt, they who have destroyed the evidence must be content if it is resolved against them. The story about the sale on Tuesday to two strangers of the greater part of the shoes for \$1,000 has every earmark of an invention to cover a disregard of the injunction.

[6] On the other hand, I am disposed to believe that the figures

of the number of shoes upon Henry Young's memorandum were correct, and that the total number of pairs was 1,761. That does not, however, much help to get a valuation, for I do not believe that the prices per pair which he set down in any sense actually represented the value of the stock. They were probably put down as a basis of trading with Kruger. Young himself says that Kruger first put the value of his stock at \$1,500, and it was only after some higgling that he beat him down. Now a bankrupt, under these circumstances, does not ask the full value of his goods, for he knows he cannot get it. While I believe that memorandum stated the amount of the stock accurately, I refuse to consider it as the value of the stock. Taking the lowest limits of the three estimates of the salesmen, and having in mind that Henry Young himself concedes that the cost value of the stock was \$2,000, I think I shall do as well as the circumstances permit if I direct a decree against both the defendants for \$2,500, with interest from the 1st of November, 1911, and costs.

I do not think that the stock which defendants say is still in John Young's auction rooms need be taken back at its proportionate value. It may be sold and the proceeds credited upon the judgment if the defendants so desire. Their reason for claiming proportionate reduction is that the injunction tied their hands. It did prevent their selling the goods, but it did not forbid their returning them to the receiver or the trustee; and their continued withholding remained just as wrongful after as before the injunction was served. It always was within their power to turn back what they had, and because they persisted in their wrong, they cannot charge the deterioration upon the estate. They took their chances when they insisted upon a possession which the court has now found to be illegal, and the loss must fall upon their own heads.

Let a decree be submitted upon notice.

OWL CREEK COAL CO. v. GOLEB.

(Circuit Court of Appeals, Eighth Circuit. January 5, 1914.)

No. 3937.

1. MASTER AND SERVANT (§ 103*)—STATUTES—CONSTRUCTION—EMPLOYMENT OF MINING BOSS—DUTY OF MASTER.

A Wyoming statute regulating mines and providing that a mining boss or foreman shall be licensed by the mining department of the state, and charging him with certain duties of inspection prescribed by law, does not relieve an operator, who is employed by the boss or foreman, of the duty to use reasonable care to provide a safe place in which the miners may perform their duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

2. PLEADING (§ 258*)—ANSWER—DEFENSES—AMENDMENT.

Where pleas of assumed risk and contributory negligence, in an action for injuries to a servant, were not attacked by special demurrer or appropriate motion before trial, but only by oral demurrers during the trial, they being entitled under state laws to liberal construction with a view to substantial justice between the parties, it was error, if they were insufficient, to refuse to permit their amendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 765-782; Dec. Dig. § 258.*]

3. MASTER AND SERVANT (§ 262*)—ANSWER—DEFENSES.

Pleas of assumed risk and contributory negligence, in an action for injuries to a servant, were not destroyed because coupled with a denial of negligence; such defense being tendered by general denial.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 855-859; Dec. Dig. § 262.*]

4. MASTER AND SERVANT (§ 262*)—INJURIES TO SERVANT—ASSUMED RISK—PLEADING.

Where assumed risk is incident to a servant's contract of employment and arises out of it, it need not be specially pleaded, in order to be available as a defense in an action for injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 855-859; Dec. Dig. § 262.*]

5. MASTER AND SERVANT (§§ 206, 217, 226*)—INJURIES TO SERVANT—ASSUMED RISK.

A servant, by entering or continuing in the employment of a master without complaint, assumes the risks and dangers of the service which he knows and appreciates, including those incident to the employment contemplated in the contract of hiring, and those which arise from the master's failure fully to discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work and reasonably safe appliances. He is not, however, required to make an investigation or inspection to ascertain whether or not the master's duty has been performed, but only to have due regard for what he actually knows, and for what is so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence, and experience.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 550, 574-600, 659-687; Dec. Dig. §§ 206, 217, 226.*]

6. MASTER AND SERVANT (§ 235*)—INJURIES TO SERVANT—SAFE PLACE—INSPECTION—DELEGATION OF DUTY.

While it is the duty of a master to provide a reasonably safe place, and he is liable for negligent performance of such duty, whether he undertakes that performance personally or delegates it to another, it is nevertheless competent for the master to impose and the servant to ac-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 210 F.—14

cept, by contract or mutual understanding, the burden of inspecting or examining the appliances or places he is required to use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

7. MASTER AND SERVANT (§ 235*)—INJURIES TO SERVANT—APPLIANCES—PLACES TO WORK—INSPECTION.

Where it was a servant's duty by the terms of his employment, or by reason of the nature of the work, to inspect, or to inspect and keep in order, the machinery, appliances, or places to work, he could not recover for injuries because of defects which it was his duty to remedy, and, if he assumed the duty of removing a known danger, he was guilty of contributory negligence if he failed to do so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

8. MASTER AND SERVANT (§§ 213, 238*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMED RISK.

Where the work in which a servant is engaged is dangerous in itself, or where he knows that the method of work adopted involves danger, he is bound to exercise ordinary care to avoid injury therefrom and assumes the usual risks incident thereto.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 559-564, 681, 743-748; Dec. Dig. §§ 213, 238.*]

9. MASTER AND SERVANT (§ 262*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—PLEADING.

Where plaintiff's evidence, in an action for injuries to a servant, discloses that he himself is guilty of contributory negligence, defendant may take advantage of such defense without specially pleading it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 855-859; Dec. Dig. § 262.*]

10. NEGLIGENCE (§ 124*)—EVIDENCE—CUSTOM.

On the issue of negligence and the performance or omission of an act, evidence of the ordinary practice or usual custom, if any, of ordinarily prudent and intelligent persons, in the performance under the same or like circumstances of the same or like acts, is competent.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 235-238; Dec. Dig. § 124.*]

11. MASTER AND SERVANT (§ 274*)—INJURIES TO SERVANT—COAL MINERS.

Where, in an action for injuries to the operator of a coal cutting machine in the mine by certain loosened material falling on him after he began using his machine before the place had been made safe after blasting operations, defendant claimed that it was part of plaintiff's duty to assist in cleaning the stope of loosened coal and to make the place safe, evidence as to the nature of plaintiff's employment, what duties were required by and were incident to it, what plaintiff knew and appreciated, whether from his own experience, prevailing usages, or warnings of others, was admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.*]

12. APPEAL AND ERROR (§ 1056*)—RULINGS ON EVIDENCE—PRESENTATION OF ERROR.

Where it clearly appears from the record on a writ of error that evidence offered and excluded was competent and of such materiality and weight that its exclusion might have caused injury to the party offering it, nothing further or more formal is required to show reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.*]

13. MASTER AND SERVANT (§ 296*)—INJURIES TO SERVANT—ASSUMED RISK—INSTRUCTION.

In an action for injuries to a coal miner, an instruction that plaintiff would be bound to notice such dangers as were obvious, and which could have been readily seen by the exercise of ordinary care, did not constitute a charge that plaintiff assumed the risk of such dangers as inhered in the very nature of the employment against which defendant claimed it was plaintiff's duty to provide, and the existence of which he might have been presumed to know and appreciate.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

14. MASTER AND SERVANT (§ 103*)—INJURIES TO SERVANT—SAFE PLACE—DUTY OF SERVANT.

Evidence that it was the duty of the operator of a coal cutting machine in a mine after a blast to assist in clearing up the coal and taking down such as had been loosened about the place where he was to continue his work did not show an attempted unlawful delegation of the master's duty to use reasonable care to provide a safe place, but involved only the right of the master to impose and the servant to accept by contract or by mutual understanding the burden of making such inspection or examination of the place he was required to use and such as he was competent to make.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

In Error to the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Action by Peter Goleb against the Owl Creek Coal Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

Plaintiff in error, hereinafter called defendant, is a South Dakota corporation engaged in operating a coal mine at Gebo, in the state of Wyoming. Defendant in error, hereinafter referred to as plaintiff, was an employé of said defendant, and brought suit to recover damages for personal injuries sustained while operating a machine undercutting coal in defendant's mine. The injury occurred on the morning of January 4, 1912. The plaintiff was what is known as a machine runner, working by the day. He was 28 years old, and had had seven years' experience in coal mining. During the evening of January 3d, the plaintiff with his machine undercut a wall of coal at a certain manhole or crosscut in the mine, completing this work at midnight. After him came employés known as shooters, who drilled holes at various points in the ledge thus undercut, which holes were charged with explosives and the same discharged, bringing down many tons of coal upon the floor and against the wall of the mine at the point referred to. The next morning at 7 o'clock plaintiff returned to the mine. He found the bottom of the slope where he had worked the night before full of unloaded coal. Half an hour later Kirby, the pit boss, appeared and told plaintiff that he desired him that day to continue cutting at the manhole. Plaintiff replied that he could not cut there because the place was full of coal. He states that after inspection the pit boss told him "to get two loaders and tell them to go and make room for one board, and also my helper should help, and as soon as they make room for your board, then you go and start to cut." The board referred to is one upon which the cutting machine rests when in operation. About 16 or 17 car loads of coal were lying displaced upon the floor and against the walls of the slope at this point. Plaintiff states that he himself took no part in clearing the place of coal; that in about an hour he and his helper adjusted the board, and the pit boss, Kirby, having returned, as-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sisted them to place the machine upon it and directed plaintiff to begin cutting; that in obedience to this direction he started his machine, which delivers a blow of between 700 and 800 pounds. About 15 minutes afterwards a mass of coal fell upon him, resulting in the injuries complained of.

The pit boss, Kirby, states that plaintiff was working by the day and was required to perform about the mine any work that the foreman asked him to do, which included shoveling, drilling holes, picking down coal that had been loosened by blasts, or anything of that kind. On the morning in question he testifies that he told plaintiff "to send his helper down to the bottom of the slope and for him to help the shooter shoot down some coal and get this place ready to cut. * * * Q. What was it you told him? A. I told him to help the shooter and for them to get that place ready. Q. Who was the helper you referred to? A. Drago Yonich, a Montenegrin. Q. Who were the loaders you spoke of? A. Nick Siemes and Tommy Siemes. Q. What followed that conversation? A. I left. Q. Where did you go? A. I went to another part of the mine. Q. Do you know whether or not he carried out your instructions? A. I believe he did, started to. Q. Did you see him again later that morning? A. After he was hurt I did." He testifies further that at the time the place was lying full of coal; that coal was lying against the face as if it had just been shot down, and was also hanging on the face of the wall. It had been broken up, but was largely in place and extended pretty well up toward the top. In the ordinary course of mining it was necessary to take a pick, pull down the loose coal, and load it out.

The petition charged defendant with negligently permitting the place where plaintiff was working to become unsafe and dangerous. In other words, the cause of action is based upon the alleged failure of the master to exercise reasonable care to provide a reasonably safe place for work. The answer interposed a general denial and then set out four specific affirmative defenses. These are quoted in full:

"Defendant denies that it was negligent as alleged in the amended petition or at all, and alleges that each and all of the conditions, risks, and dangers in and about defendant's mine, and in and about the place where plaintiff was at and before the time of said alleged accident and injury to plaintiff, if any, including the conditions, risks, and danger resulting in said accident and injury, were open and obvious and readily observable to the plaintiff; that each and all of the said conditions, risks, and dangers were known to the plaintiff or should have been known to him in the exercise of ordinary care, and that, notwithstanding said knowledge and means of knowledge on the part of plaintiff as aforesaid, the plaintiff continued in said employment, and went into said place prior to said accident and remained in said place until the happening of said accident and injury; that each and all of said conditions, risks, and dangers, except in so far as they were caused by the negligence of the plaintiff himself, were incident to the work plaintiff was employed to do; and that the plaintiff assumed each and all of said conditions, risks, and dangers."

"And for a second, further, and affirmative defense to said amended petition defendant alleges: Defendant denies that it was negligent as alleged in the amended petition or at all, and alleges that the accident and injury to the plaintiff were proximately caused by negligence, omissions, and want of care and caution on the part of the plaintiff himself."

"And for a third, further, and affirmative defense to said amended petition defendant alleges: Defendant denies that it was negligent as alleged in the amended petition or at all, and alleges that the accident and injury to the plaintiff were contributed to by negligence, omissions, and want of care and caution on the part of the plaintiff himself."

"And for a fourth, further, and affirmative defense to said amended petition defendant alleges: Defendant denies that it was negligent as alleged in said amended petition or at all, and alleges that, if the accident and injury to the plaintiff alleged therein were caused by any negligence other than the negligence of plaintiff himself, such negligence was negligence on the part of a fellow servant or fellow servants of the plaintiff, for which the defendant is not in law responsible in damages to the plaintiff."

At the trial defendant offered testimony in support of these defenses to

the effect that it was a part of the duty of the plaintiff, as a machine runner, to look after the roof and walls of the place at which his machine was to be operated, and particularly so soon after blasting had taken place; that it was a part of plaintiff's business, in conjunction with other employes, to clean the place, which included removing loose coal and picking and pulling down that which had been shattered and was hanging and threatening to fall; that this duty not only inhered in the contract of employment, and the directions given in the instant case, but was also a well-known custom and practice in mining; that plaintiff knew the condition of the place, since he himself had taken part the night before in preparing for the blast; that the situation was obvious to any one making even a casual inspection; that other employes had warned plaintiff of the dangerous condition, advising him to test the walls carefully with his pick; that plaintiff, after the accident, admitted having done so on this occasion; and that he did so in many instances. There was also testimony to the effect that such work was the obvious duty of miners and machine runners, particularly when the place bore unmistakable evidences of being unsafe. Much testimony of this nature, which need not be considered in detail, was tendered; practically all of it was ruled out by the trial judge, who proceeded upon the theory that the obligation of the defendant to provide a reasonably safe place in which plaintiff might work excluded the defenses of contributory negligence and assumption of risk; also that the affirmative defenses were not sufficiently pleaded, even though such defenses might otherwise be entertained. Defendant's offer to amend its pleadings was refused, and its defense was limited to that tendered by its general denial.

At the close of the testimony defendant requested a number of instructions, which, in general, submitted to the consideration of the jury the questions raised by the affirmative defenses pleaded and the offers of evidence to which reference has been made. These requests were likewise refused. The charge of the court was very brief. All that conditioned the right of recovery is embraced within the following language: "In cases like this it is the duty of the employer, or master, to use ordinary care to furnish reasonably safe machinery and instrumentalities with which his servants may perform their work and a reasonably safe place in which they may render their service, and this duty may not be so delegated by the employer, or master, that he, or it, may escape liability for its breach. So in this case it was the duty of the defendant company to use ordinary care to provide a reasonably safe working place within which the plaintiff might operate his machine. The limit of the defendant's duty in this respect is to exercise ordinary care, having regard for the hazards of the service, to provide the plaintiff with a reasonably safe working place, and whether it exercised this reasonable care you are to determine from the evidence. Even under the pleadings as submitted to you (that is, upon the amended complaint and the general denial in the answer), the plaintiff would be bound to take notice of such dangers as were obvious and could and would have been readily seen by the exercise of ordinary care for his own safety, and if he failed in this respect he cannot recover."

The jury returned a verdict assessing plaintiff's damages in the sum of \$21,000.

William E. Hutton, of Denver, Colo. (Bruce B. McCay, of Denver, Colo., on the brief), for plaintiff in error.

E. E. Enterline, of Sheridan, Wyo. (Enterline & La Fleiche, of Sheridan, Wyo., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge (after stating the facts as above). [1] With respect to the fourth affirmative defense, that the

negligence, if any, which occasioned the injury was that of a fellow servant or fellow servants of the plaintiff, the ruling of the trial court is approved. Kirby was the only representative of the defendant corporation upon whom devolved the duties imposed by law upon the master. It is further urged that the Wyoming coal mining statute provides that a mining boss or foreman shall be licensed by the mining department of the state of Wyoming, who in that capacity is charged with certain duties of inspection prescribed by law; that the operator of a coal mine fulfills the measure of his duty to his employes if he commits his work to licensed superintendents, and is not, in any event, responsible for their acts or omissions in carrying out or failing to carry out the provisions of the statutes of the state of Wyoming. We think it unwarranted to place upon this statute, obviously intended to insure a greater degree of safety to mining employes, a construction that would in effect withdraw from them the protection of that reasonable care which the law imposes upon the master.

[2] The first, second, and third affirmative defenses were improperly excluded. Whether they completely satisfied all requirements for pleading assumption of risk and contributory negligence need not be decided. Under the statutes of Wyoming they were entitled to a liberal construction, "with a view to substantial justice between the parties" (*Travelers' Ins. Co. v. Great Lakes Engineering Works Co.* [C. C. A.] 184 Fed. 426, 107 C. C. A. 20, 36 L. R. A. [N. S.] 60); they were not attacked by special demurrer or appropriate motion before the trial (*Kirkpatrick v. St. Louis & S. F. R. Co.* [C. C. A.] 159 Fed. 855-860, 87 C. C. A. 35).

[3] Plaintiff interposed oral demurrers during the progress of the trial. If the pleas were in themselves insufficient, which we do not concede, the same sound discretion which entertained this dilatory attack should likewise have permitted, upon appropriate terms, the amendment offered; nor can we agree that the pleas were self-destructing because coupled with the denial of negligence on the part of defendant. That positive defense was obviously tendered by the general denial. In such case, its formal reiteration later should not operate to bar affirmative defenses tendered in good faith under a code framed with a view to substantial justice between litigants.

[4] Furthermore, it is conceded in the briefs that, where the assumption of risk is incident to the employment and arises out of the contract of hiring, it need not be specially pleaded. In *Chicago, Burlington & Quincy Railroad Co. v. Shalstrom*, 195 Fed. 725, 115 C. C. A. 515, this court said:

"The agreement of a servant to assume the ordinary risks of his employment and the extraordinary risks thereof that are known * * * inheres in and is an inextricable part of his contract of employment, and, when the latter is proved or admitted, the assumption of these risks is proved, and no pleading or proof on the part of the defendant is necessary to establish it."

There can be no doubt that the duty of exercising reasonable care to provide a reasonably safe place to work, as applied to the particular nature of the work in hand, devolves in all cases upon the master; but it is equally true that the servant may and does assume certain risks,

and may be bound, in proper degree, by his own negligence contributing to the injury.

[5] This court has repeatedly held that a servant by entering or continuing in the employment of a master, without complaint, assumes the risks and dangers of the service which he knows and appreciates, including those which are incident to the employment and are contemplated in the contract of hiring, and those which arise from the failure of a master fully to discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work and reasonably safe appliances to use. *United States Smelting Co. v. Parry* (C. C. A.) 166 Fed. 407, 92 C. C. A. 159; *Chicago, B. & Q. R. Co. v. Shalstrom* (C. C. A.) 195 Fed. 725, 115 C. C. A. 515; *Glenmont Lumber Co. v. Roy* (C. C. A.) 126 Fed. 524, 61 C. C. A. 506; *St. Louis Cordage Co. v. Miller* (C. C. A.) 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551; *Burke v. Union Coal & Coke Co.* (C. C. A.) 157 Fed. 178, 84 C. C. A. 626; *Lake v. Shenango Furnace Co.* (C. C. A.) 160 Fed. 887, 88 C. C. A. 69; *Maki v. Union Pac. Coal Co.* (C. C. A.) 187 Fed. 389, 109 C. C. A. 221; *Browne v. King* (C. C. A.) 100 Fed. 561, 40 C. C. A. 545; *Mississippi River Logging Co. v. Schneider* (C. C. A.) 74 Fed. 195, 20 C. C. A. 390; *Choctaw, O., etc., R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96.

In *United States Smelting Co. v. Parry*, supra, the rule is thus comprehensively stated:

"It is the duty of a master to exercise reasonable care to provide a reasonably safe working place for his servant, and the latter is entitled to act upon the assumption that that duty has been performed, unless the contrary be known to him, or be so patent as to be readily observed by him. He is not required to make an investigation or inspection to ascertain whether or not that duty has been performed, but only to have due regard for what he actually knows and for what is so patent as to be readily observed by him, by the reasonable use of his senses, having in view his age, intelligence, and experience."

[6] Thus the duty of the master to provide a reasonably safe place is a positive obligation resting upon him, and he is liable for the negligent performance of such duty, whether he undertakes that performance personally or delegates it to another. Nevertheless, it is competent for the master to impose and for the servant to accept, by contract or mutual understanding, the burden of inspection or examination of the appliances or places he is required to use, such as he is competent to make. 26 Cyc. 1104-1106, and cases cited.

[7] Where it is the servant's duty, by the terms of his employment, or by reason of the nature of the work, to inspect, or to inspect and keep in order, the machinery, appliances, or places for work, he cannot recover for injuries caused by defects which it was his duty to remedy; and, where a servant assumes the duty of removing a known danger, he is guilty of contributory negligence if he fails to do so. 26 Cyc. 1252-1255; *Baltimore & O. R. Co. v. Burris* (C. C. A.) 111 Fed. 882, 50 C. C. A. 48.

[8] Where the work in which a servant is engaged is in itself dangerous, or where the servant knows that the method of work adopted involves danger, he is bound to exercise ordinary care to avoid injury

therefrom; accordingly a servant assumes the ordinary and usual risks incident to his employment, such as mining or excavating, the existence of which are known to him. *Choctaw, O. & G. R. Co. v. Holloway* (C. C. A.) 114 Fed. 458, 52 C. C. A. 260. In *Baltimore & O. R. Co. v. Burris*, *supra*, the Circuit Court of Appeals for the Sixth Circuit held that the question of whether, under the circumstances, the servant assumed the risk or suffered from his own failure to provide against danger was properly for the jury and not to be declared as matter of law. In view of the primary duty of the master to exercise reasonable care to provide a reasonably safe working place for his servant, where it is claimed that the burden of inspection or examination of the appliances or places to work has been imposed upon the servant, it must satisfactorily appear that this was done by contract or mutual understanding, or inhered in the very nature of the employment and of the work which the servant undertook to perform.

[9] It is, of course, conceded that, where the plaintiff's evidence discloses that he was guilty of contributory negligence, the defendant has a right to take advantage of such defense without specially pleading the same. *Chicago, B. & Q. Ry. Co. v. Cook*, 18 Wyo. 43-48, 102 Pac. 657; *Chicago, G. W. Ry. Co. v. Price* (C. C. A.) 97 Fed. 423-430, 38 C. C. A. 239; *Lake v. Shenango Furnace Co.* (C. C. A.) 160 Fed. 887, 88 C. C. A. 69.

[10] It is equally well settled that, upon the issue of negligence in the performance or omission of an act, evidence of the ordinary practice and the usual custom, if any, of ordinarily prudent and intelligent persons in the performance, under the same or like circumstances, of the same, or like acts, is competent. *Lake v. Shenango Furnace Co.*, *supra*; *Canadian Northern Ry. Co. v. Senške* (C. C. A.) 201 Fed. 637, 120 C. C. A. 65; *Mississippi River Logging Co. v. Schneider* (C. C. A.) 74 Fed. 195, 20 C. C. A. 390.

In the case at bar, from the testimony of the plaintiff, of Kirby, the pit boss, and of the witness Morgan, the secretary-treasurer of the Miners' Organization, an issue of fact was raised, which, under the foregoing principles, should have been submitted to the jury, whether, either as an incident of his employment or by virtue of the orders issued to him, it was or was not the duty of the plaintiff, in conjunction with others, to clean and make safe the place in which he was to work, and whether, if he proceeded with his work before the proper conditions of safety were established, he did not assume the risks involved, and was not at the same time guilty of contributory negligence.

[11] All evidence which would bear upon the question of the nature of plaintiff's employment, what inhered in it and was incident to it, what plaintiff himself knew and appreciated, whether from his own experience, prevailing usages, or the warnings of others, was competent. Much evidence of this nature was tendered by the defendant and rejected by the court.

[12] Where it clearly appears from the record that the evidence offered and excluded was competent and of such materiality and weight that its exclusion might have caused injury to the party offering the same, nothing further or more formal is required. *Atchison, T. & S. F.*

Ry. Co. v. Phipps (C. C. A.) 125 Fed. 478-480, 60 C. C. A. 314; Briggs v. Chicago & N. W. Ry. Co. (C. C. A.) 125 Fed. 745, 60 C. C. A. 513. By instructions, requested and refused, the court was asked to submit the substance of these questions for the consideration of the jury.

[13] The charge, as given, did not cover fully the issues thus tendered. It is true the jury was told that plaintiff would be bound to take notice of such dangers as were obvious and could and would have been readily seen by the exercise of ordinary care, but this does not include such as inhered in the very nature of the employment, against which defendant claimed it was plaintiff's duty to provide, and the existence of which he might well have been presumed to know and appreciate. He himself but a few hours previously had prepared the place for blasting. In the morning he found it in the condition to be expected. It had not been cleared of the coal that had been shattered and loosened, some of which was still hanging and ready to fall. This was the usual condition at this stage of coal-mining operations.

[14] There was ample evidence tendered to the effect that in such cases it was a part of plaintiff's duty to clear and make safe, from such incidental dangers, the place in which he was to work; and it was the testimony of defendant's foreman that such were the orders issued to him. This does not amount to a delegation of the duty of the master in the sense in which such delegation of duty is prohibited. It involves the right of the master "to impose and for the servant to accept, by contract or mutual understanding, the burden of inspection or examination of the appliances or places he is required to use, such as he is competent to make." Notwithstanding his complete familiarity with such situations, and his full knowledge and appreciation of the dangers which attend such operations, his own testimony discloses that he went to work without looking about and without making any examination or test of roof or walls. Under such circumstances, it might well be held that he assumed the risks there present and contributed to his injury by his own negligence; at least such matters should have been considered by the jury under appropriate instructions.

Because, in our opinion, defendant was denied a full and complete presentation and submission of its defenses, the judgment below is reversed, and the case remanded, with directions that a new trial be granted.

HOOK, Circuit Judge, concurs in the result.

C. W. RAYMOND CO. v. BALL

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)

No. 1992.

FIXTURES (§ 20*)—BETWEEN CLAIMANT OF CHATTELS AND PRIOR MORTGAGEE—MACHINERY REMOVABLY ATTACHED TO REALTY—INTENTION.

Bankrupt, a corporation engaged in the manufacture of brick, and owning the real estate and building constituting its plant, purchased from claimant two brick machines weighing 26,000 pounds each, to replace oth-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

ers in its building, under a conditional sale contract which reserved title in claimant until the machines were fully paid for. They were installed in the building by being bolted to foundations built in the earth floor, but could be removed without injury to themselves or to the building. The old machines were also stored and preserved on the premises, and could be re-installed. *Held*, under the rule established by decision in Illinois that, as against a prior mortgagee of the realty, such machines, not having been paid for, remained personal property and the property of claimant, in accordance with the evident intention of the parties to the contract of sale.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 44-46; Dec. Dig. § 20.*]

Appeal from the District Court of the United States for the Southern Division of the Southern District of Illinois; J. Otis Humphrey, Judge.

Suit in equity by the C. W. Raymond Company against Grace Ball. Decree for defendant, and complainant appeals. Reversed.

This appeal is from a decree whereby the appellant's bill for enforcement of its claim of title to property—alleged to be reserved as personal property, although attached to real estate owned by the conditional vendee thereof—is dismissed for want of equity. The property involved in the suit consists of two brick presses—each about 26,000 pounds in mass and installed in a building—which were furnished by the appellant to take the place of other presses used in a plant owned by McNeil Pressed Brick Company, and a written contract with such owner reserving title in the appellant to the presses until the purchase price was paid. They were thus substituted, placed, and used in the manufacturing plant, but \$4,140 of the purchase money thereof was unpaid when the vendee corporation became bankrupt within the ensuing year; and the present controversy over the title and right of removal arises between the appellant, under such reservation, and the appellee, as prior mortgagee of the real estate so owned and used by the bankrupt, in Jersey County, Ill. Although the trustee in bankruptcy was made defendant in the bill, his answer raises no issue, and disclaims interest in subject-matter and controversy.

Logan Hay and Clayton Barber, both of Springfield, Ill., for appellant.

Walter B. Douglas, of St. Louis, Mo., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The issue of title to the two brick presses in controversy arises between the party who furnished them for installation in the mortgagor's plant and the prior mortgagee of the real estate, with all material facts either stipulated or undisputed. Thus the appeal from the decree in favor of such mortgagee presents the simple question of law: Were the chattels so furnished by the appellant converted into real estate, as irremovable fixtures, through their erection and use in the manufacturing plant, notwithstanding its attempted reservation of title thereto as personal property?

For solution of this inquiry the material facts as to the annexation and status of the brick presses in the plant may be briefly summarized: They were supplied by the appellant as "entirely self-contained" machines, to take the place of other presses operating in the brick-making plant, under stipulation in writing that "deferred payments" were "to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be protected by retention of title to the above equipment until paid for in full." Each weighed about 26,000 pounds and was delivered bolted to timber pieces, to be installed in the building by bolting such timbers to "brick foundations placed in the dirt floor of the building," and each was so installed and used by the bankrupt in the plant. Both can be removed from such foundations and from the building as well, through an ample doorway, without injury to the building, other machinery or freehold, aside from detachment of the foundation bolts. Moreover, the original brick presses, which were removed for such installation, were stored on the premises "under cover," and so remain intact for restoration in the plant, and are "claimed by the" mortgagee.

The record contains no opinion to indicate the theory on which relief was denied—whether the decree was granted on the view that title to the presses passed to the mortgagee under a rule adopted in Illinois, or under a general doctrine (federal or state) assumed to be applicable thereto—but no doubt is entertainable that the *lex loci* must govern the Illinois property rights (real or personal) involved in this issue to the full extent of any rule there established in respect of such rights, either statutory or through judicial decisions. So, if the inquiry above stated is fairly met by a rule of decisions in Illinois, it must be solved in conformity therewith, irrespective of the lines of general authorities, federal and state, cited and discussed in the arguments of counsel respectively. It may well be remarked, however, by way of premise for consideration of the Illinois decisions, that the general authorities referred to have not been harmonious in their interpretations of the modern law of fixtures, resulting in diversity of lines upon the tests applied to ascertain whether fixtures are removable. As stated by Kent (2 Kent's Com. 343):

"The law of fixtures is in derogation of the original rule of the common law, which subjected everything affixed to the freehold to the law governing the freehold; and it has grown up into a system of judicial legislation so as almost to render the right of removal of fixtures a general rule, instead of being an exception."

While departure from the ancient rule has thus received judicial sanction in England and in this country, the courts of the several states have differed in the extent of such departure, ranging the states substantially into two lines of ruling upon the present inquiry: In one line (exemplified in *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889, and *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33), the intention of the parties to the transaction that annexation to the realty shall not deprive the chattel of its character as personalty prevails to that end, as against a prior mortgagee of the realty and allied interests, whenever it appears that it can be removed without material injury to the freehold or to its usefulness as a chattel. The other line (exemplified in *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. Rep. 867, cited in support of the decree) not only rejects the above-mentioned test of removability, but adopts the doctrine generally referred to as the "Massachusetts rule," in substance, that an agreement between the mortgagor and his vendor of chattels to be attached to the freehold, for retention of title in the vendor, cannot "bind or affect the mortgagee of the

realty," and that annexation of the chattel passes title "to the mortgagee as a part of the realty." Thus the last-mentioned line of authorities excludes, in favor of a prior mortgagee of the realty, both of the tests of severability upheld and applied against the mortgagee by the other line, and their divergence in doctrine is plainly marked.

The import, therefore, of the adjudications in Illinois, relied upon for reversal of the decree, must be ascertained in the light of the above-mentioned conflict in other jurisdictions over the rule to be applied in reference to a mortgagee of the realty, under the modern law of fixtures—well recognized as a question for judicial determination in the states, respectively, in the absence of statute.

Taking up the earlier (1867) and leading decision of the Supreme Court directly in point, in *Kelly v. Austin*, 46 Ill. 156, 158 (92 Am. Dec. 243), we believe it to be unmistakable that the court of ultimate authority in the state thereby adopted and enforced the rule and tests of severability of fixtures, as against a prior mortgagee of the realty, upheld in the first above-mentioned line of authorities. As stated at the outset of the opinion, the question there presented was this:

"Whether the building erected upon the lot, which was sold under the mortgage, was permanent and fixed in its character, and formed a part of and passed with the ground when it was sold; or was it temporary, and so far detached as not to form a part of the realty?"

It further states that the building "was placed on the lot several months after the mortgage was given by the mortgagor and his partner in the housejoiner business," and that it was so placed "by the firm for the use of their business," while the lot was owned by the mortgagor alone. The bill was filed by the purchaser of the lot, under foreclosure of the mortgage, to restrain the mortgagor from removal of the building, and the decree below enjoined such removal. On the mortgagor's appeal this decree was reversed by the Supreme Court, speaking unanimously through the opinion by Mr. Justice Walker. While no review or citation of authorities appears therein, the fact of the other copartner's interest in the building, together with the "temporary use" for which it was erected and placed upon blocks "not sinking in the soil," are recited in the opinion as sufficient evidence of intention that it was not "to become fixed as a part of the real estate." Its conclusions are thus stated: The mortgagor—

"being the owner of an undivided half [of the building], we have no doubt that it might be removed against the wishes of the mortgagee. It is the same as if the mortgagor had licensed a stranger to place it there, with the right of removal. It then follows that the court below erred in rendering a decree restraining its removal."

That this ruling is plainly inconsistent with the entire doctrine of the so-called "Massachusetts rule" is not only obvious, but well exemplified in *Thompson v. Vinton*, 121 Mass. 139, 142, holding thereunder that title passed to the mortgagee under like conditions.

The later case of *Sword v. Low*, 122 Ill. 487, 493, 13 N. E. 826, presents an instructive opinion—reviewing numerous general authorities upon the issue of removability of fixtures, and citing *Kelly v. Austin*, *supra*, for the force which may be given the intention of the parties—

stating "great unanimity in the authorities" upon the following proposition:

"Things personal in their nature may retain their character of personalty by the express agreement of the parties, although attached to the realty in such manner as that, without such agreement, they would lose that character, provided they are so attached that they may be removed without material injury to the article itself, or to the freehold. It is not held that parties may, by contract, make personal property real or personal at will, but that where an article personal in its nature is so attached to the realty that it can be removed without material injury to it or to the realty, the intention with which it is attached will govern; and, if there is an express agreement that it shall remain personal property, or if, from the circumstances attending, it is evident or may be presumed that such was the intention of the parties, it will be held to have retained its personal character."

Moreover, that articles such as—

"portable mills, engines, boilers, and the like, must, in the nature of things, be more or less firmly fixed to the soil, or some appurtenant thereto, before they can be put to the use for which they are designed. It may be conceded that such articles, even slightly affixed to the realty, will, in the absence of circumstances raising a contrary presumption, or evidence showing a contrary intention, be presumed to have been attached as permanent accessions to the soil, yet it is apparent, from the authorities that, however permanently attached, if removable without material injury, the intention, to be inferred from the circumstances, and the relation of the parties to each other and to the realty, or as shown by evidence, will be of controlling and decisive importance."

The subject-matter of the controversy was an engine and boiler which had become attached to the realty, with chattel mortgages preserved thereon in favor of the vendor to secure the purchase money, and the right of removal was upheld in favor of such claimant as against a subsequent mortgagee of the realty, who had obtained from the mortgagor conveyance of his equities in the realty. Various pertinent circumstances are recited in the opinion as proving the constant understanding between the vendor and the vendee mortgagor that the engine and boiler were to remain personalty until the purchase money was paid up, although they were ultimately affixed to the realty by foundations seemingly permanent; and it is further stated, as apparent at the date of the mortgage given upon the realty, that the engine and boiler "had not become a part of the realty, but, by virtue of the agreement and chattel mortgage mentioned, had retained their character as chattels," and that such mortgagee of the realty was chargeable with notice thereof; also that he had actual notice of the vendor's claim and gave it recognition by his conduct, immediately prior to his purchase of the land.

Thus the case is distinguishable from the issue involved in *Kelly v. Austin*, *supra*, both because the real estate mortgage was subsequent to the furnishing of the engine and boiler, and because of the finding of notice to and conduct on the part of the mortgagee, upon which the agreement with the mortgagor for removability may have been enforced. We do not understand, however, that either or both of these distinctions of fact render the doctrine of the decision entirely inapplicable to the present issue, as counsel for the appellee contends. In reference to a prior mortgagee, enforcement of title reserved in favor of a sub-

sequent vendor of fixtures may reasonably be authorized, because they formed no part of the realty when accepted as security by the mortgagee, so that neither notice nor consent on his part is required for severability, under the authorities supporting such right. On the other hand a subsequent mortgagee taking the real estate as he finds it may not be bound without notice or consent, although the authorities do not concur in that view, as referred to in the above-mentioned opinion. Nevertheless, the case plainly involved the question whether the engine and boiler became realty per se in favor of the mortgagee, through their ultimate annexation on foundations as described, so that it became necessary to ascertain the modern rule of law applicable thereto. We believe the doctrine and line of authorities there approved and applied to be consistent with the rule upheld in *Kelly v. Austin*, and persuasive, to say the least, by way of reaffirmance thereof.

Furthermore, the doctrine of the above-mentioned decisions has become well recognized in the Appellate Courts of Illinois as the established rule for removability of fixtures as against a prior mortgagee, either with or without actual notice of the intention. *Andrews & Co. v. Chandler*, 27 Ill. App. 103, 109; *Ellison v. Salem Coal & Min. Co.*, 43 Ill. App. 120, 124; *Hercules Iron Works v. Hummer*, 49 Ill. App. 598, 601; *Schumacher v. Edward P. Allis Co.*, 70 Ill. App. 556, 559.

On behalf of the appellee, however, various other cases in Illinois are cited as tending to disapprove the doctrine of the foregoing authorities, and it is contended thereupon, in effect, that the rule applicable to the case in Illinois is unsettled, to say the least, so that the issue remains open for determination under the general authorities. On examination of these cases we are satisfied that neither of these decisions tends to overrule or disapprove the doctrine in question. General expressions are called to our attention in several opinions—notably, in *Dobschuetz v. Holliday*, 82 Ill. 371, 374; *Baird v. Jackson*, 98 Ill. 78, 88; *Fifield v. Farmers' Nat. Bk.*, 148 Ill. 163, 168, 35 N. E. 802, 39 Am. St. Rep. 166; *Williams v. Chicago Exhibition Co.*, 188 Ill. 19, 29, 58 N. E. 611—which appear to be inconsistent with the rulings in *Kelly v. Austin* and *Sword v. Low*, when so taken apart from their context in the opinions, although no purpose to overrule or modify either thereof is suggested in any of these citations. Such remarks, however, are plainly without force to that end, as neither of these cases presented the issue of removability, nor the doctrine thereof involved in the last-mentioned decisions. While the rights of a mortgagee to enjoin the commission of waste by the mortgagor and parties claiming under him were involved in *Williams v. Chicago Exhibition Co.*, the buildings and structures in controversy were permanent in character, plainly not within the rule of *Kelly v. Austin*, and the decision in favor of the mortgagee was in no sense inconsistent therewith. In the absence of an issue requiring decision thereupon, these excerpts from the opinions referred to cannot disturb a rule otherwise judicially upheld.

We are of opinion, therefore, that the rule for which appellant contends is settled in Illinois, and authorizes the relief sought in its bill. The decree of the District Court is reversed accordingly, with direction to grant such relief.

GERSTELL et al. v. SHIRK.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)

No. 1963.

1. VENDOR AND PURCHASER (§ 337*)—REMEDIES OF PURCHASER—LIEN.

Where a vendee is entitled to a lien on real estate for the amount of an advance payment on failure of the vendor to complete the sale in accordance with the contract, it is not defeated by the fact that he might collect the amount at law, or that the vendor has not a marketable title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 985-990; Dec. Dig. § 337.*]

2. VENDOR AND PURCHASER (§ 67*) — CONTRACT — CONSTRUCTION — APPURTENANCES.

As between vendor and purchaser, the determining element in the constructive annexation to the realty of articles not physically annexed is the intention of the parties, and where a contract for the sale of cement works included the land containing the stone deposits and all machinery, tools, empty bags, stock on hand, etc., and provided that the personal property should be conveyed by bill of sale, it was evidently not the intention of the parties that it should be considered as constructively annexed to the realty, and the contract must be construed as covering both real and personal property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 100; Dec. Dig. § 67.*]

3. VENDOR AND PURCHASER (§ 337*)—REMEDIES OF PURCHASER—LIEN FOR PURCHASE MONEY PAID.

A purchaser of both real and personal property, included in a single contract, for a gross sum, where the contract is not executed because of default of the vendor, may enforce an equitable lien against the land for earnest money paid, where such lien is recognized by the law of the state, if it is clearly shown, either by the contract itself, or by evidence aliunde that the payment made was much less than any honest valuation which could have been placed on the land when the contract was made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 985-990; Dec. Dig. § 337.*]

4. EVIDENCE (§ 419*)—PAROL TESTIMONY AFFECTING WRITING—EXPLANATION OF CONSIDERATION.

Where a contract for the sale of both real and personal property states the gross consideration only, extrinsic evidence to show that the parties in fact placed separate valuations on the real and personal property is not inadmissible as contradictory of the contract, but is only explanatory of the consideration stated therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.*]

5. VENDOR AND PURCHASER (§ 337*)—REMEDIES OF PURCHASER—LIEN FOR PURCHASE MONEY PAID AND EXPENSES INCURRED.

Where a contract for the sale of mineral land expressly provided that the purchaser should have the right to test the land by borings, and that in case of default by the vendor he should pay the reasonable expense of the tests, such expense may properly be added to earnest money paid in a suit by the purchaser to enforce an equitable lien therefor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 985-990; Dec. Dig. § 337.*]

Appeal from the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by Arnold F. Gerstell and the Alpha Portland Cement Company against Elbert Walker Shirk. Decree for defendant, and complainants appeal. Reversed.

In December, 1911, appellants entered into a written contract for the purchase of certain property from appellee. In outline the contract was this:

In consideration of \$450,000, of which \$25,000 was paid when the contract was signed and the balance to be due on delivery of the property and sufficient conveyances, appellee agreed to sell and convey to appellants property described as follows:

(1) 312 acres of limestone land in Lawrence county, Ind., with quarry, mill, office, store buildings, tenement houses, and other structures thereon.

(2) 30 acres of shale land in Jackson County, Indiana.

(3) All the personal property, including all machinery, boilers, stock on hand, engines, turbines, generators, motors, electrical machinery, tools, fixtures, appliances, empty bags, machine shop, and carpenter shop, now on said tracts of land.

(4) All of appellee's unfilled contracts for the sale of Portland cement.

Land to be conveyed in fee simple clear of all claims. Appellee to furnish abstract showing good and merchantable title. Personalty to be conveyed by bill of sale.

Unless the shale land shall contain a deposit suitable for cement making and sufficient to supply a 2,000 barrels per day mill for 50 years, and unless the limestone deposit shall average at least 90 per cent. carbonate of lime and be free from strata of dolomite exceeding an average thickness of 3 feet, appellants may decline to take the property bargained for, and appellee shall thereupon return the \$25,000. Character and extent of limestone to be determined by drilling. Appellants to have the right to enter for that purpose.

If defects in title are found, appellee is to have 60 days in which to cure them. If not cured, appellants may elect to take the title as it is, or require appellee to repay the \$25,000 and all reasonable expenses incurred in testing the property and examining the title.

Appellants filed their bill to enforce a vendee's lien as security for the repayment of the \$25,000 and expenses. They set forth the contract, and alleged that the \$25,000 was paid to appellee on account of the purchase price of the land; that there were no unfilled orders for cement when the contract of purchase was made, or afterwards; that all the property described in paragraph 3 had theretofore been used and was contemplated by the parties to be used by the purchaser and owner of the plant, when title should be acquired, in the operation thereof as a manufactory of Portland cement, and as incidental and appurtenant to the quarry; that appellee did not furnish an abstract showing good and merchantable title; that appellee's title is in fact unmerchantable by reason of various defects (specifically set forth); that the limestone deposit is not of the character and extent called for in the contract; that the strata of dolomite greatly exceed 3 feet in average thickness, average in fact over 30 feet, and make the quarry worthless for the purposes of cement manufacture; and that they demanded the return of the \$25,000 and payment of expenses, and appellee refused.

A demurrer to this bill was sustained, and the appeal is from the decree of dismissal for want of equity.

Addison C. Harris, of Indianapolis, Ind., and Louis H. Porter, of New York City, for appellants.

Ferdinand Winter, of Indianapolis, Ind., for appellee.

Before BAKER and KOHLSAAT, Circuit Judges, and WRIGHT, District Judge.

BAKER, Circuit Judge (after stating the facts as above). [1] If a lien exists in this case, the fact, if such it be, that appellants might ultimately collect the money confessedly due them from appellee by judg-

ment and execution at law does not militate against this equitable proceeding. Nor does the unmerchantability of appellee's title bar the way. Mere incumbrances surely do not. One of the objections set forth in the bill is a ground of escheat to the state. But the question is undetermined, and appellee might defeat the claim, if asserted. Appellants, entitled to a merchantable title, are not compelled to accept one of doubtful validity, to be settled in a subsequent lawsuit. Further, the state has not declared nor sought to enforce such a claim; it may never be asserted; remedial legislation may be passed; and in the meantime appellee is enjoying the land as owner. He has a standing to claim the right of removing incumbrances and clearing away clouds, and therefore an equitable interest that may be subjected to decree and sale. *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937, 127 Am. St. Rep. 862, 15 Ann. Cas. 819. In short, the bill states a good case for equitable relief unless the commingling of real and personal property in the written contract of purchase for a consideration in gross precludes the lien.

[2] Appellants advance a contention that this case in fact involves only real estate. To this end the allegations were made that there were no unfilled orders as described in paragraph 4, and that all the articles mentioned in paragraph 3 were fixtures, used and intended to be used in the operation of a cement manufactory. Bags, tools, and the like, are articles that manifestly were not physically annexed to the soil. We think all of the articles in paragraph 3 are susceptible of "constructive annexation." But the determining element in constructive annexation of articles not physically annexed is the intention of the parties. *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; *C. W. Raymond Co. v. Ball*, 210 Fed. 217 (at this term). And here the written contract unmistakably discloses the intention of the parties that the articles in paragraph 3 shall stand as personal property. Not only are the articles separately described as objects of sale, but they are to be conveyed by bill of sale; they are not to pass under the deed of realty, as fixtures either physically or constructively annexed would pass. So the question is whether there can be a vendee's lien when real and personal property are included in one contract of sale for a gross sum.

"No" is the general answer of the numerous authorities cited by appellee,¹ if it be assumed that everything said respecting a vendor's lien applies equally and in the same terms to a vendee's lien. For nearly all the cases have reference to vendors' liens.

¹ 2 Jones on Liens, § 1072; 3 Pomeroy, Equity Jurisprudence, § 1251; 39 Cyc. 1830; 29 Am. & Eng. Encyl. of Law (2d Ed.) 745; *Wabash, etc., R. R. Co. v. Ham*, 114 U. S. 597, 5 Sup. Ct. 1081, 29 L. Ed. 235; *Welch v. Farmers' Loan & Trust Co.* (C. C. A. 6th Cir.) 165 Fed. 561, 91 C. C. A. 399; *Koch v. Roth*, 150 Ill. 212, 37 N. E. 317; *Warner v. Bliven*, 127 Mich. 665, 87 N. W. 49; *Suddeth v. Knight* (Ala.) 14 South. 475; *Bridgeport, etc., Co. v. American Fire Proof, etc., Co.*, 94 Ala. 592, 10 South. 704; *Sykes v. Betts*, 87 Ala. 537, 6 South. 428; *Betts v. Sykes*, 82 Ala. 378, 2 South. 648; *Alexander v. Hooks*, 84 Ala. 605, 4 South. 417; *Stringfellow v. Ivie*, 73 Ala. 209; *Peters v. Tunell*, 43 Minn. 473, 45 N. W. 867, 19 Am. St. Rep. 252; *Griffin v. Byrd*, 74 Miss. 32, 19 South. 717; *Snyder v. Snyder* (Sup.) 115 N. Y. Supp. 993; *Erickson v. Smith*, 79 Iowa, 374, 44 N. W. 681; *Sutton v. Sutton*, 39 Tex. 549; *Wilson*

A contrary answer, appellants say, is supported by *Clarke v. Curtis*, 11 Leigh (Va.) 559, 37 Am. Dec. 625, *Shelton v. Jones*, 4 Wash. 693, 30 Pac. 1061, and *Doty v. Deposit Bldg. Ass'n*, 103 Ky. 710, 46 S. W. 219, 47 S. W. 433. In the Virginia case *Clarke*, the vendee, entered into possession of the real and personal property under an executory contract by which *Curtis*, the vendor, retained title to the whole until the purchase price should be fully paid. No equitable vendor's lien was involved, for the suit was for the specific performance of the contract, in which title was reserved to the complainant vendor. And in a later case (*McCandlish v. Keen*, 13 Grat. 615) the Virginia court recognizes the general rule contended for by appellee. *Shelton v. Jones* was a case, as the opening sentences of the opinion show, not of establishing an implied vendor's lien, but of foreclosing an express lien reserved in the executory contract. Washington had already decided in *Smith v. Allen*, 18 Wash. 1, 50 Pac. 783, 39 L. R. A. 82, 63 Am. St. Rep. 864, that the equitably implied vendor's lien had no existence in that state. In regard to the *Doty* Case we note that the Kentucky court in *Grownning v. Behn*, 10 B. Mon. 383, had denied an equitable vendor's lien where real and personal property had been conveyed jointly for a gross consideration, and that afterwards a statute was enacted that a grantor should not have a lien for unpaid purchase money "against bona fide creditors and purchasers unless it is stated in the deed what part of the consideration remains unpaid." Appellee insists that the *Doty* Case was governed by this statute. And in the opinion the following appears:

"By clear implication of the statute, as between vendor and vendee, a lien exists upon the land sold for the purchase price of the land; and it does not seem to be seriously contended that if it appeared, either from the contract or extrinsic evidence, what price in the trade was put upon the realty and what upon the personalty, a lien would not exist upon the land for that proportion of the unpaid purchase money which was applicable to the sale of the land."

But the statute plainly does not cover a case of the joint sale of realty and personalty for a gross sum, and the court resorted to equitable considerations in reaching its conclusion:

"We think it proper to treat this transaction as one sale; and, assuming, for the purpose of argument, that no lien exists upon the personalty, even as between vendor and vendee, after possession has been parted with, we see nothing inequitable in subjecting that part of the property which the court can reach to a vendor's lien for the unpaid purchase money due upon all the property sold in the same transaction."

However, the preponderance of the authorities, certainly in number, support the general proposition that no vendor's lien exists where realty and personalty are sold jointly for a sum in gross. But do these cases mean that whenever such a contract is exhibited the vendor is inevitably remediless in equity, and must necessarily be remitted to his action at law? We think not. Whether the vendor's lien historically

v. Daniels, 9 Grant Ch. (U. C.) 491; *Cole v. Smith*, 24 W. Va. 290; *Gard v. Gard*, 108 Cal. 19, 40 Pac. 1059; *Fostoria Coal Mining Co. v. Hazard*, 44 Colo. 495, 99 Pac. 758; *Grownning v. Behn*, 10 B. Mon. (Ky.) 383; *McCandlish v. Keen*, 13 Grat. (Va.) 615.

was an original creation or an adaptation of the civil law, the fiction was used by the chancellor to compel the defendant to do what he ought in fairness and good conscience to do in his relation with the complainant. If land alone was involved, the solution was easy. Complainant has fully performed his part of the bargain by giving a deed and possession. Defendant ought not in fairness and good conscience to have the land and the money too. Very well, hold him as trustee of the land until the money is paid. And if land and chattels are included in one contract for a sum in gross, the equity of the matter, the question of righteous dealing between man and man, is the same. If a different result is reached, it is not because the chancellor has changed his standards and now views with favor the unconscionable conduct of the defendant, but on account of the unwillingness to frame decrees that are uncertain of execution, or cannot be executed without doing the defendant an injustice. [3] As to chattels, the trouble with attempting to declare an equitable attachment (without manual seizure in advance) is that before the decree is entered the goods may be beyond the jurisdiction. Such a decree would be *brutum fulmen*, just as the chancellor will not undertake to force the *prima donna* to sing for the *impresario* who engaged her, though he may prevent her from singing for others. But if a single contract covers both land and chattels, and the consideration is stated as a single sum, why should not the conduct of the defendant meet its merited decree, if the chancellor is able definitely and certainly to apportion the sum between the land and the chattels? In essence the land transaction would then stand apart from the other. If in another part of the contract there was a recital that the parties valued the land at one-half the consideration named, a clear basis for apportionment would be furnished. And such a recital would not dispute the statement of the gross consideration, for that statement does not necessarily mean that the land and chattels were lumped without any estimate of their separate values. The supposititious recital, therefore, would explain, but not contradict, the stated consideration. And if the basis of apportionment, found in one part of the writing, is not in conflict with the contractual part of the writing, such basis, if found dehors the writing, would not be repugnant to the contract. In the Doty Case, *supra*, extrinsic evidence was deemed admissible for such a purpose. In *Russell v. McCormick*, 45 Ala. 587, 6 Am. Rep. 707, the syllabus states that:

"A vendor's lien upon land for its purchase money is not impaired because the obligation taken for its payment includes the price of personal property sold at the same time, when the amount to be paid for the land can be ascertained by proof"

—and the proof there consisted of a statement in the contract of the price per acre. *Bergman v. Blackwell* (Tex. Civ. App.) 23 S. W. 243, was a case where the vendor sold real and personal property for the gross sum of \$3,000. The deed of the land was for an undivided interest, and recited that the purchase money was not fully paid. The vendee paid \$1,500 of the \$3,000, and gave for the remaining \$1,500 his note in which a contract lien for \$1,500 was created on the land in favor of the vendor. In partition proceedings the tract on which a

vendor's lien was sought was set off to the vendee at a valuation of \$625. The suit was by the vendor's assignee of the \$1,500 note against the vendee's grantee of the tract set off in partition, who had notice of the recital in the deed, but not of the contract lien, and resulted in the declaration of a vendor's lien against that tract for \$625. We now quote from the opinion:

"The note itself creates a lien on the land, to secure it, and as a contract lien it is good against Means and purchasers from him with notice of it. Whether the recital in the deed would affect appellants with notice of such a lien—that is, with notice of any lien except a vendor's lien for the purchase money—is a question which we need not decide. Notwithstanding the fact that both land and chattels were embraced in the sale to Means, such portion of the consideration, at least, as represents the value of the land sold, is secured by a vendor's lien on the land, and it was competent to ascertain, by any legitimate evidence, what that was. There being no agreement between the parties at the time of the sale, fixing the value of the land (unless the note is to be treated as such), equity will ascertain the part of the consideration which it formed by fixing the proportion which its value bore to the whole value of the property."

In *McCauley v. Holtz*, 62 Ind. 205, the suit was upon a note and to enforce a vendor's lien upon land, in part payment for which it was alleged the note was given. The facts are stated in the opinion as follows:

"The maker of the note purchased of the payee the real estate, a lien upon which is in question, and also a stock of liquors, two billiard tables, bar fixtures, furniture, etc., for the gross sum of \$2,526, \$1,900 of which was paid at the time the deed of conveyance was made, and the note of \$600, now in suit, was given for the balance, less \$26, which was paid after the note was executed. The real estate at the time of the sale was estimated at the value of \$1,600, and the personal property at \$926. At the time the payments were made, nothing was said by either party whether they should be applied to the payment of the real or personal property; and no such application was made by either party. The money was paid upon the whole debt."

On these facts the court applied the payments upon the personalty, and held that the unpaid \$600 was a lien on the land, inasmuch as the parties at the time of the sale had recognized that the land had a much higher value than \$600. How the estimate of value was proved, whether by recital in the contract or by extrinsic evidence, neither the reported case nor the record discloses. But that is immaterial. The case is valuable as showing how a court of equity will hold a conscienceless vendee if possible, first, by applying his payments upon the personalty, and, secondly, by fixing a lien on the land for the unpaid part of the gross consideration if that balance does not exceed the value of the land as recognized by the vendee at the time of purchase. The New York Court of Appeals, in *Zeiser v. Cohn*, 207 N. Y. 407, 101 N. E. 184, met the contention that there can be no vendor's lien if lands and chattels are jointly sold for a gross sum by saying that that is a generalization which must be answered by considering the particular facts of the case. To conclude this part of the discussion, we have found no authority that the mere fact of joinder of land and chattels in one contract for a gross sum inevitably bars the door of equity against the vendor, and that permits the vendee to hold both land and money against the power of the chancellor if the vendor is able to show, by

Intrinsic or extrinsic evidence, that to grant the lien will not put upon the land any part of the purchase price of the chattels. Cases denying a vendor's lien, like *Wabash Ry. Co. v. Ham*, 114 U. S. 587, 5 Sup. Ct. 1081, 29 L. Ed. 235, *Welch v. Farmers' L. & T. Co.*, 165 Fed. 561, 91 C. C. A. 399, and others cited by appellee, are where the court was unable to find that an allowance of the lien would put no charge upon the land beyond a valuation recognized by the vendee at the time of the purchase.

Thus far the question has been considered from the viewpoint of a vendor. This case, however, is one of an asserted vendee's lien. In many respects the two equitable fictions are identical. They both grow out of the transaction of the sale and purchase of land. They both originated (though not at the same period, *Mackreth v. Symmons*, 15 Ves. Jr. 329) from the same motive, from the desire of the chancellor to compel righteous dealing between vendor and vendee. But when the two cases reach the court, we believe certain distinctions, which should be given effect, may justifiably be drawn. When the vendor sues, the transfer of title has been made, and he is seeking a lien for the unpaid balance of the gross consideration. Therefore the whole of the consideration necessarily has to be viewed and weighed. It may be that, unless means are afforded for apportioning the whole consideration between land and chattels with accuracy down to the last dollar, the chancellor would be constrained to withhold a charge upon the land on account of the uncertainty. But when the vendee sues in equity for the return of the earnest money, no transfer of the property has taken place, and he is not seeking a lien for the balance of the gross sum. Therefore the whole of the consideration does not necessarily have to be viewed and weighed. That is, from the standpoint of the vendee, the court, applying the doctrine of application of payments, would apply the earnest money upon the land (the converse of what was done in *McCauley v. Holtz*, 62 Ind. 205); and then, if it clearly appeared that the earnest money was but a very small part of the value of the land according to any valuation that the vendor could have honestly asserted at the time of the sale, the court would not need to apportion the total consideration between land and chattels with accuracy down to the last dollar, the court, without regarding the value of the chattels or determining to a nicety the excess of value in the land, could decide with certainty that no charge was being put upon the land beyond the money the vendee had invested in the land, and therefore equitably owned to that extent.

[4] In their bill appellants averred that they paid the \$25,000 upon the land. This allegation, as we have already stated, is not contradictory, but only explanatory, of the consideration as set forth in the exhibited contract. (Consideration may always be explained.) This allegation, therefore, made the bill good. If the vendee's lien rule is no more flexible than the vendor's, the allegation would be supported by proof of an estimate of the land value in excess of \$25,000, made by the parties at the time of the sale or in connection therewith. Under the vendee's lien rule, as we have given it, the allegation would be supported, even if the parties made no application of the \$25,000, and no

definite apportionment of value between land and chattels, by proof that the chattels in paragraph 3 were relatively of small value, and that of the total valuation of \$450,000 the land value, on any possible basis, clearly exceeded the \$25,000 earnest money many times over.

This is an Indiana case; and of course the federal court in Indiana cannot properly declare a vendor's or a vendee's lien unless the Supreme Court of the state recognizes the existence of such liens. *Fisher v. Shropshire*, 147 U. S. 133, 13 Sup. Ct. 201, 37 L. Ed. 109; *Slide & Spur Gold Mines v. Seymour*, 155 U. S. 509, 14 Sup. Ct. 842, 38 L. Ed. 802. Both liens have frequently been upheld in that jurisdiction. *Shirley v. Shirley*, 7 Blackf. (Ind.) 452; *Dart v. McQuilty*, 6 Ind. 391; *McCauley v. Holtz*, 62 Ind. 205; *Stults v. Brown*, 112 Ind. 370, 14 N. E. 230, 2 Am. St. Rep. 190; *Coleman v. Floyd*, 131 Ind. 331, 31 N. E. 75. Indeed, we have found in our investigation of this subject no court more zealous to uphold a high standard of righteous conduct between vendor and vendee of land through the compulsive power of equity than the Indiana court.

[5] Appellants claim a lien to cover their expenses for testing the deposits and examining the title as well as their earnest money. Against this, appellee cites *Klim v. Sachs*, 102 App. Div. 44, 92 N. Y. Supp. 107; *Occidental Realty Co. v. Palmer*, 117 App. Div. 505, 102 N. Y. Supp. 648; *Ungrich v. Shaff*, 119 App. Div. 843, 105 N. Y. Supp. 1013. The contrary has also been declared by the Supreme Court in Special Term. *Reid v. Johnson* (Sup.) 121 N. Y. Supp. 750. But however the case may be where the vendor has not undertaken in the land contract to repay such expenses and the recovery must be for damages, we believe that where, as in the present case, the vendor has promised in the contract to pay such expenses along with the earnest money, a lien should be held to exist for the expenses if it does for the down payment.

The decree is reversed and the cause remanded for further proceedings.

CALLAHAM v. MARSHALL, U. S. Com'r for Juneau Precinct.

SAME v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1914.)

Nos. 2305, 2308.

1. OFFICERS (§ 30*)—UNITED STATES COMMISSIONER—POLL TAX COLLECTOR.

Alaska Poll Tax Act May 1, 1913 (Laws 1913, c. 54), provided for the collection of such taxes by the United States Commissioner of the particular precinct, who is given a commission for his services and required, before entering on the performance of such duties, to execute a bond to the territory, conditioned that he shall faithfully discharge the duties of his office, etc. *Held*, that the position so created makes the collector an officer of the territory within Act Cong. Aug. 24, 1912, c. 387, 37 Stat. 512, creating a legislative assembly in the territory of Alaska and conferring legislative power thereon, but providing that no person, holding a commission

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or appointment under the United States, shall hold any office under the government of the territory.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 37–43; Dec. Dig. § 30.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4933–4951; vol. 8, p. 7737.]

2. TAXATION (§ 106*)—POLL TAXES—STATUTES—CONSTRUCTION.

Alaska Territorial Act May 1, 1913 (Laws 1913, c. 54), providing for the imposition and collection of poll taxes, provides that each precinct commissioner, on or before March 1st in each year, shall set down on blanks received from the territorial treasurer the names of the person residing in his precinct subject to the tax, and section 3 declares that the tax shall be paid between the first Monday in April and the first Monday in August in each year. Section 8 declares that the territorial treasurer, before the first Monday in March of each year, shall deliver to such commissioners blank poll tax receipts, the form of which shall be prescribed by him and approved by the Governor. *Held* that, since there was no territorial treasurer in Alaska prior to July 1, 1913, the act did not impose or provide for the collection of poll taxes for that year.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 204; Dec. Dig. § 106.*]

Appeal from and Error to the District Court of the United States for the District of Alaska, Division No. 1; Fred M. Brown, Judge.

Suit by Arthur B. Callaham, for himself and certain others, against John B. Marshall, as United States Commissioner for Juneau Precinct, Territory of Alaska, and ex officio Collector of Poll Tax, to demand the collection of a poll tax assessed against complainant and others for 1913. From a judgment dismissing the complaint, plaintiff appeals, and brings error from a judgment convicting and sentencing him to pay a fine for willfully and feloniously refusing to pay the tax. Reversed, with directions on both the appeal and writ of error.

Lewis P. Shackelford, Z. R. Cheney, and W. S. Bayless, all of Juneau, Alaska, for plaintiff in error and appellant.

Arthur B. Callaham, of Juneau, Alaska, in pro. per.

J. H. Cobb, of Juneau, Alaska, for defendant in error and appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. These cases have been argued and submitted together and depend upon the question whether or not the appellant and plaintiff in error was liable to pay a poll tax for the year 1913 under and by virtue of an act of the Legislature of Alaska, passed, approved, and effective May 1, 1913 (chapter 54 of the Laws of 1913). That legislative body was created by act of Congress of August 24, 1912, c. 387, 37 St. Lg. 512, entitled "An act to create a legislative assembly in the territory of Alaska, to confer legislative power thereon, and for other purposes," the third section of which is as follows:

"Sec. 3. Constitution and Laws of United States Extended.—That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

shall continue in full force and effect until amended or repealed by act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature: Provided, that the authority herein granted to the Legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States or to the game, fish, and fur seal laws and laws relating to furbearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the act entitled 'An act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the district of Alaska, and for other purposes,' approved January twenty-seventh, nineteen hundred and five, and the several acts amendatory thereof: Provided, further, that this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses. And the Legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States."

This act of Congress provided that the legislative power and authority of the territory shall be vested in a Legislature, which shall consist of a Senate and a House of Representatives, provided for the membership of each House, prescribed various limitations and restrictions upon the legislative power, etc., and by section 11 provided as follows:

"Sec. 11. Legislator Shall Not Hold Other Office.—That no member of the Legislature shall hold or be appointed to any office which has been created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected and for one year after the expiration of such term; and no person holding a commission or appointment under the United States shall be a member of the Legislature or shall hold any office under the government of said territory."

The act of the legislative assembly bearing upon the present case is as follows:

"Be it enacted by the Legislature of the territory of Alaska:

"Section 1. That there is hereby made, imposed and levied upon each male person, except soldiers, sailors in the United States navy or revenue cutter service, volunteer firemen, paupers, insane persons, or territorial charges, within the territory of Alaska or the waters thereof, over the age of twenty-one years, and under the age of fifty years, an annual tax in the sum of four dollars to be paid and collected in the manner provided in the following sections of this act.

"Sec. 2. That the commissioner of each precinct in the territory of Alaska, shall, on or before the first day of March in each year, set down upon such blanks as the treasurer of the territory of Alaska may prescribe, the names of all persons residing within his precinct subject to the tax herein provided for; one of such blanks shall be transmitted by the commissioner to the treasurer of the territory and the other shall be retained by him. At the time of transmitting one copy of said duplicate list of names of the persons subject to the tax herein provided for within his precinct, the commissioner shall cause to be published in at least one newspaper of general circulation published within his precinct or if there be no newspaper then by posting in five public places within his precinct a notice setting forth that the poll tax provided for in this act is due and payable between certain dates and that the payment thereof will become delinquent as provided in this act, and warning all persons to pay the same, and that in case of failure to pay the same, penalties, as herein provided for, will be imposed and it shall be the duty of every person liable to pay such tax, to pay the same to the commissioner within the time in which such notice specifies.

"Sec. 3. The tax herein provided for shall be paid between the first Monday in the month of April and the first Monday in the month of August in each year.

"Sec. 4. It shall be the duty of the commissioner to receipt to each person upon payment of the poll tax herein provided for and the receipt so delivered shall be the only evidence of payment.

"Sec. 5. Every person indebted to one who neglects or refuses, after demand, to pay a poll tax becomes liable therefor and must pay the same for such other person after service upon him by the commissioner of a notice in writing stating the name of such person.

"Sec. 6. Every person paying the poll tax of another may deduct the same from any indebtedness to such other person. The commissioner must demand payment of poll tax from every person liable therefor and on the neglect or refusal of such person to pay the same, he must collect by seizure and sale of any personal property owned by such person, and any property thus seized shall be sold as provided by law for the sale of personal property on execution except that three days' notice of the time and place of the sale shall be sufficient.

"Sec. 7. It shall be the duty of the commissioner to collect and enforce the collection of all unpaid taxes by giving notice in writing to such delinquent, personally or by mail, and such delinquent shall pay a penalty of one dollar in addition to such tax.

"Sec. 8. The territorial treasurer must, before the first Monday in March in each year, deliver to each commissioner in the territory of Alaska blank poll tax receipts, in book form with stubs numbered the same as the receipts, of one hundred in each book a sufficient number for each commissioner. The form of such receipts and stubs shall be prescribed by the territorial treasurer and shall be approved by the Governor of the territory.

"Sec. 9. The commissioner shall, before entering upon the performance of his duties as herein prescribed, execute a bond to the territory of Alaska in the sum to be fixed by the territorial treasurer which shall not be less than double the amount which will probably come into his hands under this act during any one year. Said bond shall be executed with two or more sureties and the same shall be approved by the territorial treasurer; said bond shall be conditioned for the faithful discharge of the duties of his office and the said bond shall be filed in the office of the territorial treasurer.

"Sec. 10. The commissioner shall keep an accurate account of all moneys received by him under the provisions of this act, and he shall, not later than the first day in September in each year, transmit the same to the territorial treasurer. Such statement shall be verified by the affidavit of the commissioner to the effect that the same is in all respects a full and true statement of all moneys received by him under the provisions of this act; and after the first day of September in each year, the commissioner shall, at least once in three months, file an additional statement setting forth any taxes and penalties collected by him under the provisions of this act during such period of three months, and shall transmit such moneys to the territorial treasurer; such supplemental statement shall be made and verified, as herein provided for the first statement. The commissioner, for services rendered under the provisions of this act, shall receive as full compensation fifteen per centum of all taxes collected, except those collected by action, civil or criminal, and twenty per centum of all delinquent taxes and penalties.

"Sec. 11. The territorial treasurer shall make and prescribe all rules and regulation to carry into effect the provisions of this act.

"Sec. 12. Any person who shall violate any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be fined in a sum of not more than one hundred dollars nor less than five dollars, or imprisoned in the federal jail for not more than thirty days nor less than one day.

"Sec. 13. This bill shall take effect from and after its passage."

Demand having been made upon Callaham, by the United States commissioner for Juneau precinct of the territory by virtue of the said

act of the legislative assembly, for a poll tax of \$4 for the year 1913, Callaham commenced the suit numbered 2305 to enjoin the alleged threatened acts of the defendant to the suit, which suit was dismissed by the court below; a demurrer to the amended complaint having been sustained. The present appeal comes from that judgment. And the said commissioner, having filed a complaint in the court below against Callaham, charging him with the commission of a misdemeanor in having "willfully and feloniously refused to pay said poll tax," and that court having overruled the defendant's demurrer to the complaint, and the defendant thereto having elected to stand upon his demurrer, the court adjudged him guilty of the offense charged and sentenced him to pay a fine of \$5 and the costs of the action, to reverse which judgment the defendant sued out the writ of error that is here.

The two points urged on behalf of the appellant and plaintiff in error are: First, that the designation of the United States commissioner as poll tax collector was in violation of the act of Congress creating the legislative assembly of the territory; and, second, that the act of the legislative assembly upon the subject shows upon its face that there could have been no valid poll tax collected in the territory for the year 1913. We are of the opinion that both points are well taken. The act of Congress creating the legislative assembly expressly declared that:

"No person holding a commission or appointment under the United States shall be a member of the Legislature or shall hold any office under the government of said territory."

[1] The record shows that, at the time of the act of the territory here in question, the appellee and defendant in error, Marshall, held an appointment under the United States, for he was one of its court commissioners duly appointed by one of its courts, and engaged in the performance of his duties thereunder. Manifestly, therefore, he was ineligible to any office under the government of the territory. It is contended on behalf of the latter that the collector of its poll taxes is not an officer. It would seem a sufficient answer to the contention to say that the Legislature of the territory by the act above quoted in effect created the office of tax collector by prescribing the duties of such collector and providing that, before entering upon the performance of such duties, he shall "execute a bond to the territory of Alaska in the sum to be fixed by the territorial treasurer, which shall not be less than double the amount which will probably come into his hands under this act during any one year," which bond is by the statute required to be executed with two or more sureties, to be approved by the territorial treasurer, and which bond it is declared "shall be conditioned for the faithful discharge of the duties of his office, and the said bond shall be filed in the office of the territorial treasurer." That the position thus provided for is an office and the incumbent of such an office is an officer of the territory we regard as very plain. His duties are prescribed by the lawmaking power; they are public duties; he acts for the territory and therefore as its agent, for which he is by the statute allowed a certain prescribed percentage of the taxes thereby and thereunder collected as emoluments of the position. That the union of these things made of the position a public office and of the in-

cumbent of it a public officer is clearly shown in 29 Cyc. pp. 1361-1363, where is collected a large number of authorities.

[2] We are further of the opinion that the act of the territory in question, which, as has been said, was approved and went into effect May 1, 1913, shows upon its face that no poll tax could be collected thereunder for the year 1913. The act of Congress creating the legislative assembly provided that its first meeting should be held on the first Monday of March, 1913, which was March 3d of that year. The act of the legislative assembly in providing the method of the collection of the tax imposed by section 1 declared in section 2:

"That the commissioner of each precinct in the territory of Alaska, shall, on or before the first day of March in each year, set down upon such blanks as the treasurer of the territory of Alaska may prescribe, the names of all persons residing within his precinct subject to the tax herein provided for; one of such blanks shall be transmitted by the commissioner to the treasurer of the territory and the other shall be retained by him. At the time of transmitting one copy of said duplicate list of names of the persons subject to the tax herein provided for within his precinct, the commissioner shall cause to be published in at least one newspaper of general circulation published within his precinct or if there be no newspaper then by posting in five public places within his precinct a notice setting forth that the poll tax provided for in this act is due and payable between certain dates and that the payment thereof will become delinquent as provided in this act, and warning all persons to pay the same, and that in case of failure to pay the same, penalties, as herein provided for, will be imposed and it shall be the duty of every person liable to pay such tax, to pay the same to the commissioner within the time in which such notice specifies."

And section 3 of the act of May 1, 1913, is as follows:

"The tax herein provided for shall be paid between the first Monday in the month of April and the first Monday in the month of August in each year."

By section 8 it is declared:

"The territorial treasurer must, before the first Monday in March in each year, deliver to each commissioner in the territory of Alaska blank poll tax receipts, in book form with stubs numbered the same as the receipts, of one hundred in each book a sufficient number for each commissioner. The form of such receipts and stubs shall be prescribed by the territorial treasurer and shall be approved by the Governor of the territory."

The allegations of the bill in the injunction case, not denied, show that there was no territorial treasurer in Alaska until July 3, 1913.

It thus appears that the act of May 1, 1913, required the making of a roll in each precinct of the territory of all persons subject to the tax imposed by section 1 thereof, prior to the 1st day of March of each year, which of course could not be done in the year 1913, and providing, as the act did in section 3 thereof, for the payment of the tax therein provided for between the first Monday in April and the first Monday in August of each year, it is quite manifest that it could not have been the intent of the act that the provisions contained in it respecting poll taxes should apply to the year 1913.

It results from what has been said that the judgment in case 2308 must be and hereby is reversed, with directions to the court below to sustain the demurrer to the complaint, and that the judgment in case 2305 be and hereby is reversed, with directions to the court below to overrule the demurrer to the bill.

EPSTEIN v. STEINFELD.

(Circuit Court of Appeals, Third Circuit. January 2, 1914.)

No. 1769.

1. BANKRUPTCY (§ 467*)—FINDINGS OF REFEREE—REVIEW.

Findings of the referee in a bankruptcy proceeding, based on conflicting evidence, and affirmed by the district court, will not be disturbed on appeal, unless it is demonstrated that a plain mistake has been made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 467.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 136*)—WITHHOLDING ASSETS—DELIVERY TO TRUSTEE—POWER TO DELIVER.

An order, requiring a bankrupt to deliver property alleged to have been withheld from his trustee, should only be granted in case it appears that the bankrupt is physically able to deliver the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. B. McPherson, Judge.

Action by Abraham Steinfeld, as trustee in bankruptcy of A. Epstein, individually and trading as A. Epstein & Co., against Abraham Epstein. From an order (*In re Epstein*, 206 Fed. 568), requiring the bankrupt to deliver to his trustee certain specified goods, he appeals. Affirmed.

Julius C. Levi and Alexander J. Brian, both of Philadelphia, Pa., for appellant.

Henry N. Wessel and George P. Rich, both of Philadelphia, Pa., for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

YOUNG, District Judge. This is an appeal from an order of the District Court in bankruptcy in the matter of Abraham Epstein, bankrupt. The order appealed from is as follows:

"And now, to wit, July 21, 1913, in accordance with the opinion and order of court filed July 14, 1913, it is hereby ordered that the said A. Epstein, the bankrupt, do deliver to Abraham Steinfeld, trustee of the estate of A. Epstein, 3,061 dozen waists, 8,013 $\frac{7}{8}$ yards and 10,750 $\frac{5}{12}$ dozen trimmings, on or before July 25, 1913, which property the said bankrupt had in his possession at the time of the filing of the petition against him, and which he withheld from his said trustee."

Referring to the opinion of the learned judge of the District Court we find the following:

"In the present controversy (which is only in the first stage), I have considered the evidence, and approve the findings and order of the referee. But I

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

think it desirable to modify the order slightly by striking out the words, 'of the value of \$28,686.34,' and by striking out also the words, 'and still withholds.' And, as it is also desirable to fix another time within which the order is to be obeyed, I substitute July 25, 1913, for 'forthwith.' Thus modified, the order is affirmed."

[1] The findings of the referee were made by him after he had taken a large amount of conflicting testimony covering every phase of the alleged withholding of property by the bankrupt, and when he had the opportunity to and did see the witnesses who testified. His findings, as has been decided over and over again, ought not to be disturbed except where it is demonstrated that a plain mistake has been made. This rule is so forcibly stated in *Ohio Valley Bank Co. v. Mack*, 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184, by Judge Lurton, that we quote it at some length:

"No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's findings of fact must be substantially that applicable to a master's report. *Tilghman v. Proctor*, 125 U. S. 137, 8 Sup. Ct. 894, 31 L. Ed. 664; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Emil Kiewert & Co. v. Juneau*, 78 Fed. 708, 24 C. C. A. 294; *Tug River Co. v. Brigel*, 86 Fed. 818, 30 C. C. A. 415. Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But, if the finding is based upon conflicting evidence involving questions of credibility, and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion, and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon review, should not disturb his findings unless there is most cogent evidence of a mistake and miscarriage of justice. *Loveland on Bankruptcy*, § 32a; *In re Swift* (D. C.) 118 Fed. 348; *In re Rider* (D. C.) 96 Fed. 811; *In re Waxelbaum* (D. C.) 101 Fed. 228; *In re Stout* (D. C.) 109 Fed. 794; *In re Miner* (D. C.) 117 Fed. 953. In this case the conclusions of the referee necessarily involved the credibility of the witnesses who testified to the bona fides of the claim preferred by Charles Mack, Sr. The conclusion he reached in favor of the validity of his debt has also passed the scrutiny of the district judge. Under such circumstances, this court is not warranted in overturning the conclusions of two courts upon anything less than a demonstration of plain mistake."

It is the rule which has obtained in this circuit, and we again affirm it in order that it may be regarded as settled beyond controversy. The learned judge of the District Court had all the evidence and the findings of the referee before him and he has approved them. We have thus the conclusions of two courts, and they ought not to be disturbed except for a plain mistake which would result in the defeat of justice. We have carefully and thoroughly examined the evidence in this case to determine whether or not the findings of the referee are demonstrated to be clearly erroneous. The evidence which must be considered as the basis of the findings is that of an expert accountant. This accountant had all the books of the bankrupt, which appear to have been regularly kept, and which were stated by the bankrupt under oath to be correct, and he had a statement of assets and liabilities sworn to by the bankrupt on July 5, 1911. His examination covered the period from July 5, 1911, to October 11, 1911, the date of the bankrupt's ad-

judication. He had also during his investigation such information as could be obtained from the bankrupt and his employes as to the cost of manufacture. He submitted to the referee a voluminous statement, showing the manner of his examination and how he arrived at his conclusions, and also a summary of his work, showing the conclusions to which he had come. The only attack upon his evidence worthy of consideration is that his account is based upon the inventory or statement of the bankrupt's assets and liabilities, made and sworn to by the bankrupt July 5, 1911, and that this statement incorrectly gives the amount of made-up waists in dozens, whereas the actual count was that of units or single waists. Certain former employes of the bankrupt were called to testify that in making the inventory single waists were counted, the amount written on slips of paper and the price per dozen also stated thereon, and that these slips of paper were given to the bookkeeper for entry in the books, and that the bookkeeper took the statement of the price per dozen as indicating the numbers referred to as dozens, and therefore entered the numbers of single waists as dozens at the price of dozens, and thus made the inventory in that particular show 12 times the value of the goods on hand. The evidence of these witnesses was taken by the referee, and he saw the witnesses and heard them testify. He was better able to judge than we of their truthfulness and to pass upon the value of their evidence. The evidence in itself was conflicting and uncertain. Its comparison with the other evidence in the case as to the manner of taking former inventories, as to the amount of material bought for manufacture, the number of persons employed, the amount paid out for wages and the number of manufactured waists sold, makes the evidence far from clear and convincing. It was peculiarly a case where the referee would be the better judge of its value and persuasiveness, and it emphasizes the wisdom of the rule that his findings ought not ordinarily to be disturbed. We cannot say, after the most thorough consideration of the evidence, that we would have found otherwise, much less do we find that it demonstrates that a plain mistake has been made by the referee.

In his opinion the learned judge of the District Court stated the correct practice in cases of this kind as follows:

"When the charge is made that assets have apparently not been accounted for, the referee hears and decides the dispute in the first instance. The point of time to which the inquiry is directed is the date of bankruptcy, and the precise question is whether the bankrupt was then in possession or control of money or of goods that apparently should have come into the hands of the trustee. Being fundamental, this question needs to be examined first of all, but it neither involves the bankrupt's present ability to turn over, nor raises the question whether he should be punished for contempt—except, of course, as the complexity of human affairs may compel an occasional approach to these allied subjects. The two questions last referred to, therefore, do not need consideration at the first stage of the investigation. If the assets that presumably should have been in the bankrupt's possession or control at the time of bankruptcy have not been accounted for, the referee may, and probably will, draw the natural inference and direct the bankrupt to pay the money or deliver the goods, as the case may be. If this order becomes final, either by failure to have it reviewed or by affirmance in the District Court, a definite step has been taken; the proper tribunal has settled beyond future controversy that the assets described were in the bankrupt's possession or control at the time of bankruptcy."

[2] This is the first stage of the proceeding. The second stage is to determine whether or not the property required is still in the possession or control of the bankrupt, and that he is physically able to deliver it to his trustee. The correct practice at this stage of the proceedings has been authoritatively stated by Judge Gray in *American Trust Co. v. Wallis*, 126 Fed. 464, 61 C. C. A. 342, in the following language:

"If the bankrupt denies that he has possession or control of the property, or, if a third person in possession thereof claims to hold it, not as the agent or representative of the bankrupt, but by title adverse to him, and there is no evidence to indisputably show that such denial or claim is false or fraudulent, and that the case is one of simple concealment or refusal on the part of the bankrupt, or the one in possession, to deliver up the property as ordered, it would be an unwarranted stretch of power on the part of the court to resort to a summary proceeding for contempt for the enforcement of its order. In the absence of fraud or concealment, the bankrupt court can only order the delivery of property to the trustee which the bankrupt is physically able to deliver up, having the same in his possession or control. If it shall appear that he is not physically able to deliver the property required by the order, then, confessedly, proceedings for contempt, by fine and imprisonment, would result in nothing, certainly not in a compliance with the order. The contempt in this case could only be purged by a reiteration of the physical impossibility to comply with the order whose disobedience is being thus punished. An order made under such circumstances would be as absurd as it is inconsistent with the principles of individual liberty."

By following the practice as formulated by Judge McPherson in this case in the first stage of the proceedings in like cases, and by observing the guiding principles as stated by Judge Gray in *American Trust Company v. Wallis*, supra, in the final stage, we shall have a logical and just means of determining the rights of the creditors and of doing exact justice by the bankrupt. This much we think is necessary to be said so that the practice in this circuit may be uniform in all of the districts in the circuit.

The order of the learned judge of the District Court is affirmed.

CRONEN v. MOORE.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1914.)

No. 2,283.

1. SPECIFIC PERFORMANCE (§§ 8, 99*)—RIGHT TO REMEDY—DISCRETION—PERFORMANCE BY COMPLAINT.

Specific performance is not a matter of right, but rests in the sound judicial discretion of the court, and, before it may be awarded, it must appear that complainant, on his part, has complied with the substantial conditions of the contract, under the rule that he must himself do equity and come into equity with clean hands.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 17, 18, 299-304; Dec. Dig. §§ 8, 99.*]

2. SPECIFIC PERFORMANCE (§ 130*)—CONDITIONS PRECEDENT.

In a suit for specific performance, the court may not only require compliance with all the terms of the contract by complainant as a condition precedent to performance, but in its discretion may also withhold such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

relief and leave complainant to his remedy at law, unless he consents to such terms and conditions in relation to the subject-matter as the court may deem just and equitable; notwithstanding such terms may not have been expressed in the contract, subject only to the limitation that the court may not compel complainant to discharge obligations arising out of transactions distinct from and not connected with the subject-matter.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 424, 425; Dec. Dig. § 130.*]

3. SPECIFIC PERFORMANCE (§ 130*)—RIGHT TO RELIEF—CONDITIONS PRECEDENT.

Defendant having sued complainant for breach of marriage promise, a settlement was agreed on by which complainant was to pay \$6,000, of which \$3,000 was to be paid forthwith, and the remainder in 90 days. There were three papers prepared and signed by the parties, to wit, a stipulation dismissing the action, an instrument by which complainant certified to defendant's good character, and an instrument by which defendant discharged complainant from all claims and demands whatsoever. It was also agreed, as part of the settlement, that complainant should procure a statement from his brother and his brother's wife, who it was claimed had made statements derogatory to defendant's character, retracting the same and certifying to her good character; but this was not put in writing, though it was a material part of defendant's agreement, and, not having been furnished, defendant refused to abide by the settlement, whereupon complainant sued for specific performance. *Held*, that complainant was only entitled to such relief on furnishing the retraction, or certificate of defendant's good character, signed by complainant's brother and wife.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 424, 425; Dec. Dig. § 130.*]

Appeal from the District Court of the United States for the District of Oregon; R. S. Bean, Judge.

Suit by Walter Baker Moore against Mary E. Cronen. Decree for complainant, and defendant appeals. Modified and remanded, with instructions.

Stott & Collier, of Portland, Or., and J. L. Hope, of Astoria, Or., for appellant.

Alfred E. Clark and Malcolm H. Clark, both of Portland, Or., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. This is an appeal from a decree in a suit in equity brought by the appellee against the appellant for specific performance of a contract. The contract was a part of an agreement made between the parties to the suit to compromise and settle a pending action at law which had been brought by the appellant against the appellee for breach of a contract of marriage. On February 24, 1912, the attorneys of the respective parties in that action, together with the appellant, met to settle the terms of the agreement. It was agreed, among other things, that the appellee should pay the appellant \$6,000, of which \$3,000 was to be paid forthwith, and the remainder within 90 days. There were prepared and signed by the parties three several papers: (1) A stipulation signed by the attorneys of the respective parties dismissing the law action; (2) an instrument signed by the appellee herein, certifying to the good character of the appellant; (3) an

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

instrument signed by the appellant discharging the appellee from all claims and demands whatsoever. It was agreed that the papers be deposited in escrow with the Security Savings & Trust Company. An escrow agreement was executed, reciting that the three instruments named were deposited in escrow, and the following was added:

"Settlement of all matters and things between these parties has been agreed upon, and the sum of \$3,000 has been paid, and an additional \$3,000 is to be paid within ninety days from this date. Upon payment of such sum to you (the trust company), to be paid to John H. Stevenson, attorney, or to his order, you are to deliver to A. B. Clark, attorney for Walter Baker Moore, the stipulation and the release above mentioned, and you are to deliver to John H. Stevenson, attorney for Miss Cronen, the statement above mentioned, signed by Walter Baker Moore. In the event said sum of \$3,000 is not paid within the ninety days aforesaid, the escrow shall terminate, and the said stipulation and the said release shall be delivered to John H. Stevenson, and the said statement to A. E. Clark."

On the following day, the first \$3,000 payment was made, and the papers, together with the escrow agreement, were delivered to the trust company.

The foregoing statement, however, does not represent all that was agreed to in the conference of February 24, 1912. The appellant asserted at that time that the brother of the appellee, Frank Allen Moore, and his wife, Margaret Gleason Moore, had made statements derogatory to her character, and she insistently demanded as part of the agreement of settlement that they make a written retraction of such charges, and a certificate of her good character over their signatures. This was finally assented to by the attorney for the appellee, and, upon the appellant's insisting that such a paper be executed forthwith, he agreed that it should be signed and should be delivered to the appellant as soon as it could be drafted and mailed to Walla Walla, Wash., for the signature of Frank Allen Moore and his wife. It was agreed that two weeks should be allowed for this purpose. It was further understood that, upon receipt of the same, the appellant should execute a release of said Frank Allen Moore and his wife of all demands and claims. On April 4, 1912, the promised retraction had not been obtained, and on that date the appellant wrote to the trust company a letter, rescinding and canceling all agreements theretofore made with the appellant, in regard to the pending controversy. Thereafter, on July 17, 1912, the present suit was brought, the appellee alleging in his bill the execution of the three papers that were deposited in escrow, and the escrow agreement; but he made no mention whatever of that portion of the agreement of compromise which referred to the paper to be signed by Frank Allen Moore and his wife. The answer of the appellant, however, set forth that portion of the agreement, and the breach thereof, as justifying her in rescinding all agreements. Upon the issues and the testimony taken, the court below decreed the specific performance of the contract as it was alleged in the appellee's complaint, but no mention of the retraction of Frank Allen Moore and his wife was made in the decree. From that decree the present appeal is taken.

It is impossible to consider the testimony without arriving at the conclusion that, in entering into the agreement of settlement, the prin-

cial object sought by the appellant was vindication, the retraction of derogatory charges made by the appellee and by his brother and his brother's wife. These charges weighed heavily upon her mind, and caused her great mental distress. She paid no heed to the financial side of the transaction. This clearly appears from her testimony and the testimony of her attorneys. It is clear, also, that the agreement to procure the written retraction of Frank Allen Moore and his wife was one of the chief inducements which moved her to the settlement of the litigation. We do not think that, in the suit for specific performance, that agreement can be dissociated from the other terms of the agreement and ignored, from the mere fact that it was not mentioned in the writings which were deposited in escrow. It is obvious that the escrow agreement was not intended to embody all that was agreed to between the parties. The retraction of Frank Allen Moore and his wife was to be signed immediately, and it is the preponderance of the evidence that it was to be delivered to the appellant as soon as the signatures thereto could be obtained. And while it was not mentioned in the escrow agreement, the promise that it should be executed and delivered was nevertheless a component part of the agreement between the parties. There is no question here of varying the terms of a written escrow agreement by parol evidence. There is only the question of the equity of decreeing the specific performance of the escrow agreement, in the face of the fact that it was obtained and assented to in consideration of a material promise of the appellee, which has not been fulfilled. No excuse or explanation is offered of the failure to deliver the promised paper. It was not signed until some time after the expiration of 90 days from the date of the agreement. It has not been delivered to the appellant, and it was never tendered to her until September 4, 1912, just before the close of the trial in the court below.

[1] Specific performance is not a matter of right. It rests in the sound judicial discretion of the court. Before it may be awarded, it is an essential condition that the moving party shall have complied with the substantial conditions of the contract. He must himself do equity, and must come into court with clean hands.

[2] The court may not only require compliance with all the terms of the contract as a condition precedent to specific performance, but it is within the court's discretion to withhold specific performance and leave the complainant to his remedy at law, unless he consents to submit to such terms and conditions in relation to the subject-matter of the contract as the court may deem just and equitable, notwithstanding that those terms and conditions may not have been expressed in the contract. The only limitation of the power of the court in that regard is that the complainant may not be compelled to discharge obligations arising out of transactions which are entirely distinct from, and are not connected with, the subject-matter of the suit. *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501; *Westinghouse Air-Brake Co. v. Chicago Brake & Mfg. Co.* (C. C.) 85 Fed. 786; *Kirkland v. Downing*, 106 Ga. 530, 32 S. E. 632; *Richards v. White*, 44 Mich. 622, 7 N. W. 233; *Secrest v. McKenna*, 1 Strob. Eq. (S. C.) 356.

"The principle that he who comes into court seeking equity—that is, seeking to obtain an equitable remedy—must himself do equity, means not only

that the complainant must stand in conscientious relations toward his adversary, and that the transaction from which his claim arises must be fair and just in its terms, but also that the relief obtained must not be oppressive nor hard upon the defendant, and must be so shaped and modified as to recognize, protect, and enforce all his rights arising from the same subject-matter, as well as those belonging to the plaintiff." Pomeroy on Contracts, § 175.

In *Willard v. Tayloe*, the court said:

"It must also appear that the specific enforcement will work no hardship or injustice, for, if that result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result. If that result can be thus obviated, a specific performance will generally in such cases be decreed conditionally."

[3] We think that, upon the equities of the case as shown by the record, the decree of specific performance should have conditioned the relief which was afforded to the appellee upon his delivering to the appellant the paper which was signed by Frank Allen Moore and his wife, and that, instead of ordering the payment of the costs out of the \$3,000 deposited by the appellee in court, the appellee should have been required to pay the costs of the suit.

The cause is remanded, with instructions to modify the decree so as to require as a condition to specific performance of the contract sued upon, the delivery of the retraction or certificate of good character which was contracted for on February 24, 1912, and requiring the appellant in consideration thereof to deliver to the appellee a written release of all claims and demands whatsoever against said Frank Allen Moore and his wife, and decreeing that the appellee pay the costs in the court below, and further decreeing that upon the failure or refusal of the appellee to deliver said retraction or certificate within a reasonable time, to be fixed by the court below, the bill be dismissed at the appellee's cost

SPOKANE & I. E. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1914.)

No. 2,258.

1. STREET RAILROADS (§ 73*)—SAFETY APPLIANCE ACT—"USED ON STREET RAILWAYS."

The words "used on street railways," employed in Safety Appliance Act, Congress March 2, 1903, c. 976, § 1, 32 Stat. 943 (U. S. Comp. St. Supp. 1911, p. 1314), exempting such cars from the operation of the act, means those cars which at least are used on such railways in street railway traffic and do not include cars of an interurban line engaged in interstate commerce, though they are also run for a small portion of the distance over a street railway track to reach the terminal in the center of the city.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 153; Dec. Dig. § 73.*

Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. EVIDENCE (§ 513*)—EXPERTS—SUBJECT OF EXPERT TESTIMONY.

In an action by the government to recover penalties for failure of an interurban railway company to equip cars, used in interstate commerce, with proper handholds and grabirons as required by Safety Appliance Act March 2, 1903, c. 976, § 1, 32 Stat. 943 (U. S. Comp. St. Supp. 1911, p. 1314), whether openings in the buffer on the ends of the cars afforded the security intended by the act, so as to constitute a substantial compliance therewith, was not a proper subject for expert testimony, but was for the determination of the jury under the evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2317, 2318; Dec. Dig. § 513.*]

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action by the United States against the Spokane & Inland Empire Railroad Company. From a judgment for the United States (206 Fed. 988), defendant brings error. Affirmed.

Graves, Kizer & Graves, of Spokane, Wash., for plaintiff in error.

Oscar Cain, U. S. Atty., of Spokane, Wash., and Philip J. Doherty, Special Asst. U. S. Atty., of Washington, D. C.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was at the times here in question a common carrier engaged in interstate commerce by means of an electric railroad between the city of Spokane, in the state of Washington, and Coeur d'Alene city in the state of Idaho, and for alleged violations of the act of Congress known as the Safety Appliance Act, approved March 2, 1893 (chapter 196, 27 Stat. 531), as amended April 1, 1896 (chapter 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3174]), and as further amended March 2, 1903 (chapter 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1911, p. 1314]), the present action was brought by the government, the complaint in which action contains 15 counts, the first 12 of which allege in substance that the violation of the statute consisted in hauling over its road certain designated cars which were not provided with the grabirons or handholds required by the statute, and the last 3 of which alleged in substance the violation of the statute to have consisted in hauling over its road certain designated cars not provided with the automatic couplers thereby required. The case was tried with a jury, which returned a verdict against the railroad company upon which judgment was given against it, resulting in the present writ of error in its behalf.

[1] It is first urged that the cars in question do not come within the provisions of the Safety Appliance Act, and, second, that the trial court erred in refusing to permit the railroad company to introduce certain testimony, and in its instructions to the jury.

The first point thus urged is based upon the exception contained in section 1 of the act of March 2, 1903, excepting from the operation thereof cars "which are used upon street railways." The section reads as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the provisions and requirements of the act entitled 'An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and in the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, or which are used upon street railways."

These, among other, facts appear from the undisputed evidence:

In addition to its interurban lines, one of which extends from Spokane to Coeur d'Alene, a distance of about 40 miles, the plaintiff in error owns the street railway system in Spokane. The interurban line extending to Coeur d'Alene is of standard gauge and of standard weight of rails. The superintendent of that system testified, among other things, as follows:

"My superintendency is over the interurban lines. I do not control the street railway lines. On the interurban lines tickets are sold for particular stations the same as a railroad. We handle baggage for our passengers. Our trains are made up according to standard railroad rules, with markers to designate the trains, and are run on schedules and by train orders. The employes who are engaged in the street car service do not have anything to do with the operation of the interurban service. They use the same tracks, however, that come from the freight depot to the passenger terminal in the heart of the city. We do not take passengers on the interurban trains within the city limits exclusively. We receive passengers at points within the city limits for transportation outside, and drop passengers on interurban trains at various points within the city, but within the city limits we do no strictly street-car business."

The trains of the company in which were the cars here in question leave its passenger depot near the center of Spokane, and go out over the tracks of the company's street railroad system for a little over a mile to the yards of the company, where they take the direct line to Coeur d'Alene, which is on the company's private right of way. Those of the cars in question which are mentioned in the first 12 counts of the complaint are large passenger coaches having no grabirons or handholds on the ends of the cars; instead, on their ends there is a radial coupler and a heavy steel sill or buffer, round on the corners, in which buffer or sill, on the passenger coaches, there are, on each side of the coupler, openings measuring from 18 to 22 inches in length, and from 2 $\frac{1}{4}$ to 3 inches of clearance, but on the baggage and mail cars the sill or buffer is solid.

The three cars mentioned in the last three counts of the complaint, and which it appears were brought into the interurban service because

of a pressure of traffic, were street railway cars which not only had no automatic couplers thereon, but, because of their small size, were incapable of having them.

There is testimony to the effect—and none to the contrary—that the sharpness of the curves on the street car line is such as to make it impossible to run cars over that line having grabirons or handholds on the end of the cars. Conceding that to be true, it is no answer to the government's action if the act of Congress in question is applicable to the company's interurban lines. To hold with the plaintiff in error on this point would be to hold that, because the company uses the tracks of its street car lines for a mere trifle of the distance between its terminal points in order to reach the center of the city of Spokane, its entire interurban line, which has all of the characteristics in build and operation of a standard steam road, is not subject to the Safety Appliance Act. That would indeed be a case of "the tail wagging the dog."

We are of the opinion that the act of Congress does not admit of such an interpretation, especially in view of the manifest purpose of the legislation. The exception from its operation of cars "used upon street railways" we think means, if not those solely used on street railways, at least such as are used on such railways in street railway traffic, which was not the case here, according to the testimony of the company's own witnesses.

In *Moore et al. v. American Transportation Co.*, 24 How. 1, 16 L. Ed. 674, the Supreme Court in speaking of that provision of the Act of March 3, 1851, c. 43, 9 Stat. 635, entitled "An act to limit the liability of shipowners, and for other purposes," which declared, "This act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation," said:

"This word 'used' means, in the connection found, 'employed,' and doubtless, in the mind of Congress, was intended to refer to vessels solely employed in river or inland navigation."

The use of such interurban cars as we have here, engaged as they are in interstate commerce, for a comparatively short and relatively inconsiderable distance on a street railway in order to reach the city terminus of the company handling no street car business, can hardly be considered an intermingling of traffic; but if so it would, in our opinion, no more make inapplicable the Safety Appliance Act to the interurban line than does the intermingling of intrastate with interstate traffic defeat the power of Congress over the latter. See *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878; *Southern Railway Co. v. United States*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72.

We also regard as tending to support our conclusion in this respect the decision of the Supreme Court in the case of *United States v. Atchison, Topeka & Santa Fé Ry. Co.*, 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361, where that court had under consideration that provision of the Act of March 4, 1907 (34 Stat. 1415, 1416), making it unlawful for common carriers subject to the act to permit any employé subject

thereto to be on duty for a longer period than 16 consecutive hours, or after that period to go on duty again until he has had at least 10 consecutive hours off duty, or 8 hours after 16 hours work in the aggregate, with certain exceptions not necessary to be mentioned, in which case the court said:

"A trifling interruption would not be considered, and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent."

[2] The rulings and instructions of the court below remain to be considered. During the trial the witness Robertson testified, among other things, that he had been employed for 23 years as brakeman, switchman, yardmaster, and conductor, and had had a great deal of experience in coupling and uncoupling cars, and was familiar with the types of handholds ordinarily provided on steam railroads for the security of men going between the cars, and that generally there is uniformity in such appliances and the place of their location; that, "where there is a handhold on passenger coaches on steam roads, it is about midway from the bottom of the wooden sill to the bottom of the car above the track. The handholds that are used on steam railroads are about the height of my shoulder above the track. I am 5 feet 10 or 11 inches, and the handhold would strike me just about the shoulder. I have examined the passenger coaches on the Spokane & Inland Empire Railroad Company with reference to the openings which it claims is a handhold in the buffer or sill of their cars."

The record proceeds:

"Thereupon counsel for defendant asked the witness then on the stand this question: 'What would you say of them as a safe and proper appliance, one that would tend to preserve men from injury who might have to go between the cars for any purpose?' Plaintiff's counsel thereupon objected to the question, stating that, 'The question is, is it a hand hold?' The court sustained the objection 'on the ground that it invades the province of the jury'; that defendant was seeking to prove by the witness the very question that the jury were to decide. Counsel for defendant thereupon made the following offer of proof: 'Now, if your honor please, I offer to prove by the witness on the stand, and I will call other witnesses, and particularly experienced railroad men, of years of experience, to prove by him and by them, by questions and answers addressed to them, that the opening in the beam or buffer of these electric cars is intended to subserve and does subserve the same purpose as the round iron appliance that is prescribed by the rules of the Interstate Commerce Commission at the present time and is in use on steam railroads, that it is a better appliance than these are for the purpose of protecting men from injury who have to go between the cars. I offer to prove that and to ask questions of this witness to that effect.' Thereupon counsel for plaintiff objected to the offer, and the court sustained the objection upon the ground that it was not a question for expert testimony, but was a matter of common knowledge"—to which ruling the defendant excepted.

Another witness, Arlington Mahan, who was general foreman in the shops of the plaintiff in error, testified, among other things, as follows:

"I am familiar with the passenger coaches of that company that have a buffer at the end and an opening in it. I was in the employ of the company at the time these cars or some of them were purchased. The openings were in the beam or sill when the cars were received. There were handholds up and down on the sides of the cars when they were received. There were none on the ends of the cars in the place where they are put on steam cars.

I know of no reason for the openings on top of the angle iron on that beam. The men use them for grabirons whenever they have occasion to couple or uncouple cars, or go between them. I have had occasion to couple and uncouple cars in that yard and other yards."

The record proceeds:

"Thereupon counsel for defendant asked the following question: 'Does that opening in the top of the sill serve the same purpose, and is it as well fitted for the purpose of protecting the lives and limbs of men who have occasion to go between the cars in the exercise of their duties as the form of grabirons that is used on steam cars, that is brought below the end of the car?'

"Counsel for plaintiff objected to the question, and the court sustained the objection on the following grounds: 'I am of the opinion that this is one of the cases where witnesses must state facts and not conclusions, whether that is a reasonably safe appliance is within the knowledge of the ordinary man and no special experience is required.'

"Thereupon defendant asked and was allowed an exception to the ruling. The witness further testified: 'I am familiar with the form of grabiron or handhold that is used on the passenger cars of steam railroads. It is attached to the end of the car, one on each corner, and projects downward. The Interstate Commerce Commission requires that they shall have a clearance of at least 2 inches, preferably 2½, below the car sill. The handle runs different lengths. The Interstate Commerce Commission requires that it shall be not less than 16 inches inside clearance. There is one of these on each side of the drawbar. The opening in the angle iron in that buffer on the Spokane & Inland Empire cars runs in length from 16 to 24 inches. It is from 2½ to 2¾ inches wide, and there is one of such openings on each side of the drawbar on both ends of the car, making four in all. It would be impossible to put on the passenger cars of the defendant such grabirons as are in use on the cars of steam railroads because in going around the curves on the city streets the coupler would strike a brake.'

"And thereupon the following question was asked and the following matters occurred:

"'In your opinion, Mr. Mahan, and observation of these cars, is the opening in the angle bar a better and safer appliance for the safety of persons having occasion to go between the cars in the discharge of their duties than those that are used upon steam railroads?'

"Mr. Doherty: 'The question is objected to.'

"The Court: 'I will sustain the objection.'

"Mr. Graves: 'To which we take an exception.'

"Mr. Graves: 'I now offer to prove by this witness and also by other witnesses called, with your honor's permission, that the opening in this angle iron or sill or buffer is a better and safer appliance, better protection, greater protection to the men who have occasion to go between the cars than any form of grabiron or handhold that is known in railroad circles.'

"Mr. Doherty: 'I object to that.'

"The Court: 'Objection sustained on the ground that it is a question for the jury.'

"Mr. Graves: 'To which the defendant excepts.'

In its instructions to the jury regarding this matter, the court told them that the act of Congress relative to safety appliances provided that railroad cars "used in interstate commerce shall be provided with secure grabirons or handholds on the ends and sides of each car for greater safety to men in coupling and uncoupling cars," and instructed them as follows:

"The purpose of the act is to afford greater security to men coupling or uncoupling cars by reason of the presence of grabirons or handholds, than would be possible if there were nothing of the sort on the ends of the cars. If you should find from the evidence in this case that although there might not have been on the ends of the cars referred to anything which would be

known technically as grabirons or handholds, yet if there were upon the ends of such cars an appliance which could be used as a grabiron or handhold and which would afford as much security to men coupling or uncoupling the cars as would be afforded by having what would be technically known as grabirons or handholds on the ends of the cars, then your verdict should be for the defendant. The law does not require any particular kind of grabiron or handhold to be placed upon the end of the car, but only requires that some such appliance shall be placed there which will afford the person coupling or uncoupling cars equal security with that which would be obtained by the method I have given. Gentlemen, you have heard the testimony in this case, and you have examined the handholds in question, and it is for you to say from that testimony and from your personal examination of the cars whether the appliance provided by this company complies with the act of Congress; in other words, whether it affords that safety and protection to employes which the law contemplates and requires. The burden is upon the government to establish its case by a preponderance of the testimony. If, from a preponderance of the testimony offered herein, you are satisfied that the defendant has not furnished grabirons or handholds as I have defined these terms to you within the meaning of the law, you will find the defendant guilty on the first twelve counts."

We are of the opinion that the plaintiff in error has no valid ground of objection to these instructions, and agree with the trial judge that the question as to whether the openings in the buffer on the ends of the cars afforded the security intended by the act of Congress was not the subject of expert testimony, and that the personal inspection of such openings by sensible jurors was a safer guide to the truth in regard to the matter than the mere opinion of witnesses.

The judgment is affirmed.

KULP v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. January 19, 1914.)

No. 1795.

1. CRIMINAL LAW (§ 1167*)—WRIT OF ERROR—MISJOINDER OF OFFENSES.

Accused was not prejudiced by the denial of his motion to quash an indictment for misjoinder of different offenses of the same character, where the government offered no testimony in support of counts charging one offense, assented to their dismissal, and the case was submitted to the jury on other counts based on a single transaction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101, 3103-3106; Dec. Dig. § 1167.*]

2. CRIMINAL LAW (§§ 351, 412*)—EVIDENCE—INTENT—ACTS AND DECLARATIONS.

In a prosecution for transporting a female in interstate commerce in violation of the White Slave Traffic Act (Act Cong. June 25, 1910, c. 395, 36 Stat. 824 [U. S. Comp. St. Supp. 1911, p. 1343]), acts done and declarations made by accused after such transportation, and elsewhere, are admissible as bearing on his intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785, 894-917, 919-935; Dec. Dig. §§ 351, 412.*]

3. CRIMINAL LAW (§ 751*)—TRIAL—CONTINUANCE—DISCRETION.

Act Pa. March 15, 1911 (P. L. 20), provides that accused, while a witness in his own behalf, shall not be asked, or if asked, shall not be required to answer, any question tending to show that he had been of bad character or reputation. *Held*, that where the district attorney in cross-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

examining accused asked him if he had not, at one time, been a sort of a detective, and, on receiving an affirmative answer, asked if his license had not been revoked, which question was excluded on objection, the trial court's further refusal to withdraw a juror because the question had necessarily operated to defendant's prejudice was not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 751.*]

4. CRIMINAL LAW (§ 720*)—TRIAL—ARGUMENT OF COUNSEL.

In a prosecution for violating the White Slave Traffic Act (Act June 25, 1910, c. 395, 36 Stat. 824 [U. S. Comp. St. Supp. 1911, p. 1343]), the district attorney in argument stated that if the jury believed the testimony of accused in preference to certain other witnesses, the government might as well go out of business, and not try such cases, and again, in referring to one who had been jointly indicted with accused, and who had pleaded guilty, stated that he was not all that he ought to be, but he had pleaded guilty and would be punished. On being required by the court to qualify the latter remark, the attorney stated that he expected such codefendant would be punished, but that was something the attorney had nothing to do with, and that no one could give him freedom but the court. *Held*, that such remarks were unobjectionable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.*]

5. CRIMINAL LAW (§ 789*)—TRIAL—INSTRUCTIONS—"REASONABLE DOUBT."

An instruction defining "reasonable doubt" as one which would be raised in the minds of reasonable men by the evidence in the case, and which would require evidence to remove, and not a doubt raised by some whim, caprice, or prejudice on the part of any of the jurors, was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

6. CRIMINAL LAW (§ 1156*)—NEW TRIAL—AFFIDAVITS—REVIEW.

An order excluding affidavits, filed as a basis for a new trial for newly discovered evidence, on the ground that they were insufficient, cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.*]

7. CRIMINAL LAW (§ 1128*)—WRIT OF ERROR—NEW TRIAL—DENIAL—AFFIDAVITS.

On a writ of error to review a conviction, the Court of Appeals cannot consider affidavits of newly discovered evidence, made several months after sentence and handed up on the argument of the writ, as bearing on a motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2951-2953; Dec. Dig. § 1128.*]

In Error to the District Court of the United States for the Middle District of Pennsylvania; J. Whitaker Thompson, Judge.

Harry E. Kulp was convicted of violating the White Slave Traffic Act, and he brings error. Affirmed.

S. S. Herring, of Wilkes-Barre, Pa., for plaintiff in error.

A. B. Dunsmore, U. S. Dist. Atty., of Wellsboro, Pa., and Andrew Hourigan, Asst. U. S. Dist. Atty., of Wilkes-Barre, Pa.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. [1] Two defendants, Harry E. Kulp, the plaintiff in error, and Steve Stevens, were indicted for violating Act June 25, 1910, c. 395, 36 Stat. 824 (U. S. Comp. St. Supp. 1911, p. 1343), commonly known as the White Slave Traffic Act. Stevens pleaded guilty, but Kulp made a vigorous defense. The indictment contained 16 counts; of these the first 12 may be divided into two groups, one group charging the Shenandoah offense (to use a convenient phrase), and the other group charging the Wilkes-Barre offense. In these 12 counts Kulp and Stevens were indicted jointly; in the remaining 4 Kulp alone was indicted, being charged therein with an independent offense under the same statute, committed on different dates, with a different woman, and in connection with different interstate journeys. When the case was called for trial Kulp moved to quash the indictment for misjoinder of offenses, and excepted to the court's refusal of this motion. The question thus raised would need consideration (see *McElroy v. United States*, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355), if it were not for the facts that the government did not offer a word of testimony to support the last four counts, and assented to their dismissal by the court on Kulp's motion before he was required to proceed with his defense. It is clear, therefore, that he suffered no harm by the refusal to quash, and we need not consider this objection further.

He was convicted on the first, second, ninth, and tenth counts, all relating to the Wilkes-Barre offense, and his principal contention now is that the judgment ought to have been arrested, because there was no evidence—or practically none—to prove that the offense was committed in the Middle District. But the assertion is not founded in fact. We have carefully examined the whole record on this subject, and we find without difficulty that direct and positive evidence was given in support of each count on which he was convicted. The first two counts charge him with having caused to be transported, and with having aided and assisted in obtaining transportation for, and in transporting, in interstate commerce, two women for the purpose of prostitution; and the ninth and tenth counts charge him with causing these women to be persuaded, induced, etc., to go as passengers in interstate commerce for the same purpose. There is no doubt, and indeed there is no denial, that he furnished the transportation for both girls, and there was evidence (although it was conflicting) from which the jury might find the fact of persuasion. Both acts were done—if done at all—within the Middle District of Pennsylvania, and the verdict establishes these facts in favor of the government.

[2] Sufficient evidence also was offered to prove his then existing intention and purpose, and it was not necessary that the words and the acts indicating such intention and purpose should have been said and done within a particular geographical area. Acts done and declarations made afterward and elsewhere might be relevant to throw light upon the state of his mind and his will while he was furnishing the transportation and persuading the girls to take the interstate journey in question. The learned judge submitted the evidence upon this subject to the jury with proper instructions.

[3] The remaining assignments need little discussion. Complaint is made, because the court did not continue the case after the government had asked the following questions upon Kulp's cross-examination:

"Q. You were at one time a sort of detective, I believe, about Wilkes-Barre?
A. Yes, sir. Q. Your license was revoked, was it not?"

This question was objected to on the ground that a Pennsylvania statute, passed March 15, 1911 (P. L. 20) provides (with certain exceptions) that no person charged with a crime and called as a witness in his own behalf shall be asked—or, if asked, shall be required to answer—any question tending to show that he has been of bad character or reputation. The trial judge sustained the objection, and the defendant was not required to answer, but the objection was coupled with a motion that a juror be withdrawn and the case continued; the ground being that the question itself was improper, and might do harm in the minds of the jury. This motion was refused, but we see nothing in the refusal of which the defendant has any good reason to complain. The trial judge was not obliged to withdraw a juror, and properly exercised his discretion in refusing; as Kulp had not been compelled to answer the question, he had received the full protection of the statute. For the purposes of this case we assume (but without deciding) that the statute applies to practice in the federal courts.

[4] He also complains that during the government's closing argument to the jury the United States attorney said, and the court refused to sustain an objection thereto:

"If you believe that—namely, that the testimony of Mr. Kulp, an interested witness in the case, should be believed in preference to the testimony of Mrs. Phillips, Tom Phillips, and these two girls—the government might as well go out of business, might as well not attempt to try such cases."

And it is further assigned for error, that the United States attorney said also in the course of the same address:

"Mr. Stevens isn't all he ought to be by a great deal, but he has entered a plea of guilty and he will be punished."

Neither remark seems offensive; but, upon objection to the last, the court required the government to qualify it, and this was done as follows:

"I expect he will be punished when he comes up before the court. That is something I have nothing to do with. I am assuming he will be, and of course no one can give this man freedom excepting the court."

We see nothing inflammatory in either of these remarks. Both statements were within the limit of fair and vigorous argument, and we would be slow to hold that they vitiated the trial when the learned judge did not even require them to be withdrawn, and did not regard them as important enough to call for any other interference on his part than is shown above. No abuse of discretion appears in what took place on either occasion.

[5] And, finally, we see no error in the following instruction concerning reasonable doubt:

"When I say reasonable doubt I mean a doubt which would be raised in the minds of reasonable men by the evidence in the case, and which will re-

quire evidence to remove, and not a doubt raised by some whim, caprice, or prejudice on the part of any of the jurors."

[6, 7] The seventh assignment complains of the court for refusing a new trial on the ground of after-discovered evidence, and *Mattox v. U. S.*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917, is cited in support of the assignment. The case does not apply. There the trial judge excluded the affidavits, and, as he had not considered them at all, the Supreme Court did consider them on appeal. But here the affidavits were considered by Judge Thompson, and were held to be insufficient. We cannot review this action, and manifestly we cannot be influenced by other affidavits that were made several months after the sentence, and were handed to us on the argument of this writ.

The defendant had a fair trial, and we discover no error that would justify us in disturbing the verdict.

The judgment is affirmed.

BOLTON-PRATT CO. v. CHESTER.

(Circuit Court of Appeals, Sixth Circuit. February 3, 1914.)

No. 2548.

1. MASTER AND SERVANT (§§ 286, 289*)—NEGLIGENCE (§ 136*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an employe's action for injuries caused by sacks of cement falling on him from a pile from which shortly before he had taken several sacks, evidence *held* to make questions for the jury as to the employer's negligence in the manner of piling the sacks and in failing to properly inspect the pile to determine its safety, as to the employe's contributory negligence, and, if he was negligent, as to whether his negligence was slight in comparison with that of the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036, 1042, 1044, 1046-1050, 1089, 1090, 1092-1132; Dec. Dig. §§ 286, 289; * Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

2. TRIAL (§ 139*)—MOTIONS FOR PEREMPTORY INSTRUCTION.

A peremptory instruction for defendant is properly refused unless upon a survey of the whole evidence, and giving effect to every inference to be fairly and reasonably drawn therefrom, the case is palpably for defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

3. PLEADING (§ 406*)—WAIVER OF OBJECTIONS BY ANSWERING AND GOING TO TRIAL.

Where defendant, without objecting to plaintiff's pleadings, answered and went to trial, it waived all objections thereto on the ground of indefiniteness and uncertainty and might not complain of the admission of evidence, though the petition laid the foundation therefor somewhat indefinitely.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374, 1386; Dec. Dig. § 406.*]

4. MASTER AND SERVANT (§ 293*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

In an employe's action for injuries caused by sacks of cement falling on him from a pile of such sacks, though plaintiff offered no evidence as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to defendant's inspection of the pile, where defendant voluntarily did offer such evidence, the court properly charged as to defendant's duty to inspect the pile for the purpose of determining its safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge. Action by Joseph Chester against the Bolton-Pratt Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Howell, Roberts & Duncan, of Cleveland, Ohio, for plaintiff in error.

R. B. & A. G. Newcomb, of Cleveland, Ohio, for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

SATER, District Judge. Judgment having been entered for \$5,000 on the verdict returned in favor of the defendant in error (hereinafter called the plaintiff), the plaintiff in error (hereinafter called the defendant) prosecuted error to secure its reversal. The case is now for decision.

The case was tried under the act of April 30, 1910 (101 Ohio L. 195), section 6245—1 of which provides that contributory negligence on the part of an employé shall not bar a recovery where his contributory negligence is slight and the negligence of the employer is gross in comparison, but that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employé; and that all questions of negligence, contributory negligence, and assumption of risk, shall be for the jury under the instruction of the court.

[1] The disclosures most favorable to the plaintiff appearing on the record are sufficiently stated as follows: The sacks of cement, some of which, weighing 90 pounds each, fell upon and injured the plaintiff, had been piled or corded about two weeks prior to the accident by a servant experienced in work of that character within three to five feet of and parallel with the reinforced concrete building then in process of erection, and, to tie or bind them together to secure them against falling, were, as is usual in such cases, so placed that about the half of each sack of the several layers (except the first) overlapped the sack beneath. As the sacks were not entirely filled with the soft and yielding material, the binding effect was heightened by each overlapping sack fitting over and depressing the one beneath, in which depression the overlying sack rested. When thus properly stacked, the pile is not liable to fall from the removal of sacks, if they be removed, as is customary, layer by layer, beginning at the top, unless its condition has been in some manner so disturbed as to throw it out of plumb. The pile was about 14 feet long, about 4 to 5 feet wide, and from 5 to 8 feet high, and for protection from the weather was covered with tarpaulin or canvas, which, where the ground was level, was weighted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

down with bricks. In the basement of the building close to the wall nearest the sacks were a concrete mixer and hoisting engine used to mix and lift the concrete to the upper portions of the building, the operation of which quite noticeably jarred the building and less perceptibly the adjoining ground. The jarring of the ground will cause sacks, placed as those in question were, to settle and the cement to creep or shift towards their ends. The pile will consequently become weakened and liable to fall, if it was originally out of plumb or is put so by the settling, or if the sacks on account of being poorly tied are opened by the increased pressure of the settling cement, thereby permitting it to escape and the pile to incline or shift. About an hour before the accident occurred the defendant's superintendent found the tarpaulin off of one corner of the pile and replaced it. The pile then appeared to be "all right," but he did not test it to determine its condition or to know whether it had shifted or not. It was raining then, and also at the time the plaintiff was injured. The plaintiff, who was a carpenter and as such had been employed by the defendant for about three months in building wooden forms to receive the concrete and was wholly inexperienced in the handling of cement and was given no instructions in that respect by the defendant, was directed by its superintendent to assist the laborers who were engaged in carrying sacks to the workman who was emptying them into the concrete mixer, and also to pile and count empty sacks. Neither he nor his fellow workmen threw back the canvas covering from the north end of the pile from which the removal of the sacks was in progress. After carrying a couple of sacks to the mixer, which was about two feet to the north and four feet distant adjoining the building, he began to count empty sacks which lay between the building and the stack of cement about midway from its ends. While thus engaged, with his back turned toward the corded sacks, a number of them fell upon and bruised him, inflicting a severe, disabling, and permanent injury to his right knee in particular. The defendant's witness Green testified in chief that the plaintiff pulled the sacks which he carried to the mixer from "the bottom line right under the canvas," the effect of which would be to cause the pile to incline and endanger its falling, but on cross-examination he stated that the plaintiff removed the sacks "right off of the pile where they (the other workmen) left off"; i. e., from the top layer of the pile. He further testified that he called to the plaintiff to take the sacks from the top and not from the bottom, but the machinery made a "lot" of noise when running and no one heard any warning given.

The only charges of negligence that need be noticed are: (1) That the defendant did not exercise due care to furnish plaintiff a reasonably safe place in which to work, in that the sacks were not so stacked as to prevent slipping or as to allow for the shifting of the cement in them and of the pile itself; and (2) that the defendant failed duly and properly to inspect the pile to determine its safety.

[2] The contention that the trial court erred in its refusal to direct a verdict on the defendant's motion interposed at the conclusion of all the evidence is not well founded. It was required to withhold a

peremptory instruction to the jury unless upon a survey of the whole evidence, and giving effect to every inference to be fairly and reasonably drawn from it, the case was palpably for the defendant. *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754, 24 C. C. A. 305 (C. C. A. 6); *Worthington v. Elmer*, 207 Fed. 306, 125 C. C. A. 50 (C. C. A. 6). There was evidence from which the jury might reasonably conclude that the defendant was negligent as charged in the two respects above mentioned. Although the manner of piling was such as is usual, and the sacks, if properly stacked and not disturbed, were not liable to fall, the effect of the tremor induced during working hours by the operation of the machinery within the building was such as would cause the cement to creep towards their ends and the entire pile to settle and topple over, if it was not originally plumb, or if it was put out of plumb, as it was liable to be, by the creeping and settling processes. The plaintiff's failure to throw back the canvas before removing the sacks, which would have enabled him to see the condition of the pile, might very properly be attributed to his desire to protect it from the falling rain, and to a belief induced by the example of his fellow workmen and the want of instruction that due care for his safety did not require such precautionary act. The court in ruling on the motion was required to take the view, and the jury was at liberty to adopt it, that he removed the sacks from the same portion of the pile and in the same manner as did his fellowworkers, both of whom proceeded in what the defendant's witnesses deem a safe way. It does not appear that the removal of the sacks from the bottom of the pile at its north end, if they were thus removed, endangered its falling at a point near its middle, opposite which the plaintiff was working. There had been no inspection of the pile since it had been erected, unless the superintendent's observation, at the time he placed the covering over its corner to protect it from the falling rain, constituted such; but as the covering reached to the ground where level, and as there is nothing to show on which corner it was replaced, or how much of the pile he observed or could observe, or that he tarried in the rain to determine by an examination its stability or weakness either as an entirety or at the point from which the sacks fell upon the plaintiff, it was for the jury to say, and it might well conclude, that what under the circumstances the superintendent observed could not be fairly entitled an inspection, or that if it should be thus entitled was not such a reasonable and sufficient inspection as, in view of the disturbing influence of the machinery and the hidden condition of the sacks, due care required. *Felton v. Bullard*, 94 Fed. 781, 37 C. C. A. 1 (C. C. A. 6). Considering the conflicting character of Green's evidence, it was also for the jury and not for the court to say whether the plaintiff took the sacks from the top of the canvas covered pile, as the other workmen did, or from the bottom. A finding that he took them from the top layer would wholly exonerate him from the charge of negligence. If it found that he took them from the bottom, it would still have to determine whether or not the danger resulting from their removal from that place was so obvious to a person inexperienced and uninstructed as the plaintiff was that he could and should have seen

and appreciated the hazard to which he was exposing himself and the liability of the middle portion of the pile to fall, and whether or not, if both were guilty of negligence, his negligence was slight and that of the defendant in comparison was gross. The jury's finding of negligence on the part of the defendant is sufficiently sustained by the evidence. If it found the plaintiff guilty of contributory negligence at all, it necessarily found that his negligence was slight and that of the defendant in comparison was gross. *McMyler Mfg. Co. v. Mehnke*, 209 Fed. 5, 126 C. C. A. 147 (C. C. A. 6).

[3] Error is assigned to the admission of evidence that the operation of the concrete mixer and hoisting engine caused the building and adjacent ground so to vibrate as to induce the creeping and settlement of the cement and thus to render the sacks liable to fall. The petition lays somewhat indefinitely the foundation for the admission of such evidence, but, as the defendant without objecting to the plaintiff's pleadings answered and went to trial, it waived all objections thereto on the ground of indefiniteness and uncertainty, and may not now complain that the evidence should have been excluded. 6 Ency. Pl. & Pr. 283; *Burley v. German-American Bank*, 111 U. S. 216, 4 Sup. Ct. 341, 28 L. Ed. 406.

[4] Nor did the court err in charging the jury as to the defendant's duty of inspecting the pile of sacks. Although the plaintiff, on whom rested the burden of proving negligence as regards inspection, offered no evidence touching the same, the defendant voluntarily did so, and it thereby became the court's duty properly to instruct the jury on that subject.

Other errors are assigned, but none of them are well taken or need be considered. We find no error in the record. The judgment of the trial court is affirmed.

SOUTH MEMPHIS LAND CO. v. McLEAN HARDWOOD LUMBER CO.

(Circuit Court of Appeals, Sixth Circuit. February 3, 1914.)

No. 2402.

1. DAMAGES (§ 175*)—BREACH OF CONTRACT—EVIDENCE.

In an action for breach of a contract to secure a belt line railroad connection leading to plaintiff's sawmill and lumber plant, evidence that the successful operation of the plant during its 6 years' operation by plaintiff had been seriously impaired by lack of such connection was admissible in connection with other proof that, because of lack of such connection, it had been unable to secure sufficient logs so that the plant, which would normally cut 20,000,000 feet annually, was only able to cut less than 9,000,000 feet.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 469-471; Dec. Dig. § 175.*]

2. CONTRACTS (§ 349*)—DOCUMENTARY PROOF—LETTERS.

In an action for breach of contract to secure for plaintiff a belt line railroad connection which plaintiff claimed had seriously handicapped its business, correspondence between plaintiff and railroad representatives, relating largely to shipments over the lines of two different railroads, mostly since the commencement of the suit, pertaining to plaintiff's reg

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—17

ular daily business, and containing complaints about the service, were admissible to show that complaints were made, though they were, not evidence that the facts stated therein were true, or that the complaints were justified.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1096, 1781–1784, 1788–1798, 1809, 1811–1814, 1817, 1818; Dec. Dig. § 349.*]

3. APPEAL AND ERROR (§ 1050*)—RULINGS ON EVIDENCE—PREJUDICE.

Where, in an action for breach of a contract to furnish a belt line connection with plaintiff's plant, there was oral testimony concerning delays and inconvenience to plaintiff in making both in and out shipments, defendant was not prejudiced by the admission of certain correspondence between plaintiff and certain railroad representatives, containing complaints concerning the service.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. § 1050.*]

4. APPEAL AND ERROR (§ 1051*)—REVIEW—PREJUDICE—CROSS-EXAMINATION.

Where, in an action for breach of a contract to furnish plaintiff belt line railroad connection, there was evidence of the entire number of cars of logs shipped over two railroads up to two or three months prior to the second trial of the action, the average amount of lumber cut each year, and the proportion of logs brought in over such roads as compared to the total in-shipments, also the average amount of lumber carried per car, defendant was not prejudiced by the court's refusal to permit plaintiff's manager to be cross-examined as to the number of cars which the railroads specified handled for plaintiff, in order to show that the complaints made by plaintiff to the representatives of the roads were infinitesimal in comparison with the volume of business done.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

5. APPEAL AND ERROR (§ 1051*)—REVIEW—EXCLUSION OF TESTIMONY—PREJUDICE.

Where, in an action for breach of a contract to provide belt line railroad connection for plaintiff's plant, it was not disputed that the belt line railroad was ready to build the connection and had been prevented only by injunction, and that the connection would be built as soon as the railroad company was authorized, defendant was not prejudiced by the exclusion of testimony that the railroad company was actively engaged in building its line into a street from which a connection with plaintiff's plant would be constructed; etc.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

6. DAMAGES (§ 140*)—EXCLUSIVENESS—CONTRACTS—BREACH.

Where shortly after defendant had agreed to furnish belt line railroad connection for plaintiff's plant the railroad company was enjoined from constructing its line over the right of way of another railroad, and was thereby prevented from furnishing the connection of which plaintiff was deprived for 8 years, during which the capacity of this plant was materially decreased, and it suffered great inconvenience with reference to both in and out shipments, a verdict awarding plaintiff \$17,500 was not excessive on its face, because it appeared that the injunction had been ultimately dissolved, and that the connection would shortly be constructed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 404, 405; Dec. Dig. § 140.*]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by the McLean Hardwood Lumber Company against the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

South Memphis Land Company. Judgment for plaintiff for \$17,500, and defendant brings error. Affirmed.

See, also, 179 Fed. 417, 102 C. C. A. 563.

Luke E. Wright and K. D. McKellar, both of Memphis, Tenn., for plaintiff in error.

T. K. Riddick, of Memphis, Tenn., for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SATER, District Judge.

KNAPPEN, Circuit Judge. Plaintiff, who is defendant in error here, sued to recover damages for breach of defendant's agreement, to secure, by February 1, 1906, to plaintiff's sawmill plant in Memphis, Tenn. (the site for which was contemporaneously purchased from defendant), a track connection with the Union Railway, which was a belt line. The breach is not denied. Defendant had negotiated with the Union Railway Company a contract, afterwards executed, for the construction by the latter of its main track upon defendant's land, including the locating of the line upon Railroad avenue, adjacent to plaintiff's sawmill site, as well as the construction, on defendant's request, of spur tracks from the main line to any industry located on defendant's tract (which would include plaintiff's site)—

"provided the business to be obtained by the railway company by the construction of such spur tracks will be sufficient in the opinion of the managing officer of said railway company."

The defense, among others, was made that the Union Railway Company was ready, within the time provided by defendant's contract sued on, to make the connection, but was prevented therefrom by a temporary injunction issued from the equity side of the court below at the suit of the Illinois Central Railroad Company, forbidding the Belt Line to cross the Illinois Central tracks at grade. At the time of the first trial the injunction suit had not been heard upon its merits, and the temporary injunction was still in force. The trial court rejected the defense stated, and permitted recovery of verdict and judgment for plaintiff, the measure of damages adopted being the difference between the value of the sawmill plant with and without the guaranteed Belt Line connection. This court sustained the action of the trial court in rejecting the defense referred to, and approved generally the measure of damages adopted, holding that the jury was not required to take into account the contingency of defendant's ultimate compliance with its agreement, for the reason that plaintiff was suing for and was allowed to recover damages once for all, and the judgment in plaintiff's favor would thus effectually relieve defendant from further liability under its guaranty. We thought, however, that the jury should take into account the contingency of plaintiff's being able, independently of the defendant's agency, to obtain the desired connection; and, because we thought the jury might have understood from the charge that they were not to take that contingency into account, and for this reason alone, we reversed the judgment and directed a new trial (see 179 Fed. 417, 102 C. C. A. 563, where the material facts are fully stated). The last trial was confined to the question of dam-

ages. Plaintiff recovered verdict and judgment for \$17,500. The charge is not criticized; the errors presented relate only to the admission and rejection of testimony. After the last trial of the instant case, the district court rendered final decree in the injunction proceeding, perpetually enjoining the Union Railway Company from crossing the Illinois Central tracks at grade, permitting, however, an underpass upon certain conditions. This court reversed the decree of the district court, with instructions to dismiss the injunction bill. *Union Ry. Co. v. Illinois Central R. R. Co.*, 207 Fed. 745, 125 C. C. A. 283.

[1] Upon the trial now under review plaintiff presented testimony tending to show that the successful operation of the plant had, during its nearly six years' experience, been seriously impaired through the lack of the Union Railway connection. This testimony, considered in connection with other proof, had a material bearing upon the value of the plant with and without the connection. There was testimony tending to show that but for this lack of connection, resulting in inability to get in sufficient logs, the plant would normally have cut about 20,000,000 feet annually, instead of less than 9,000,000 according to actual experience; also that there had been serious difficulties in making out-shipments of lumber, due to the same general cause.

[2] Plaintiff offered a bundle of correspondence between it and railroad representatives, relating largely, if not entirely, to shipments over the Illinois Central and the Yazoo & Mississippi Valley Railroads, mostly since the commencement of suit. This offer was accompanied by testimony that the letters pertained to the "regular daily business of the company," and were written without reference to pending litigation. They were objected to because written after the breach of the contract, and as incompetent because in the nature of self-serving declarations, and error is assigned upon their admission. The letters were competent evidence of the mere fact that complaints were made. 3 Wigmore on Evidence, § 1768, p. 2274. They were not, however, competent evidence of the truth of the facts stated in them (*Drake Coal Co. v. Croze*, 165 Mich. 120, 130 N. W. 355; *Woolsey v. Haynes* [C. C. A. 8] 165 Fed. 391, 397, 91 C. C. A. 341); and, if it fairly appears that they were admitted as evidence of the truth of their contents, there was technical error. We doubt if the record should be construed as giving the letters the effect last stated. The court ruled that "they could only go in as showing what the reasonable situation or location of this mill has been," and shortly afterward spoke of the letters as "just [merely] complaints about the service." They were not mentioned in the charge, and our attention is not called to any reference to them in the record subsequent to their admission. If defendant wished the jury instructed as to their limited scope and effect, it would have been proper to ask such instruction. This was not done.

[3] But, assuming that there was technical error in admitting the letters, we think it unlikely that prejudice could have resulted, in view of the oral testimony, independently of the letters, concerning delays and inconveniences in making both in and out shipments.

[4] Error is also assigned upon the court's refusal to permit plaintiff's manager to be cross-examined as to the number of cars which

the Illinois Central and the Yazoo & Mississippi Valley Railroads handled for plaintiff, defendant's counsel urging that:

"It shows [possibly meaning 'would show'] that the complaints are infinitesimal in comparison with the volume of business done."

It seems clear that the refusal was nonprejudicial. The record elsewhere shows specifically the entire number of cars of logs shipped over these two roads up to two or three months before the last trial began. The average amount of lumber cut each year also appears, as does also the proportion (more than eight-ninths) of logs brought in over the Illinois Central and the Yazoo & Mississippi Valley as compared to the total in-shipments, also the average amount of lumber carried per car. There seems fair room for implication that the logs shipped in over these two roads were in large part, at least, shipped out over the same roads in the form of lumber. These facts would seem to afford substantial data for the desired comparison.

[5] Complaint is made of the exclusion of testimony proffered in mitigation of damages, tending, as claimed, to show that the connection in question would soon be made. This offered testimony included: (a) That of defendant's president, to the effect that the Union Railway Company was actively engaged in building its line into Railroad avenue, in accordance with its contract with defendant, when the former was enjoined from crossing; (b) that of the Union Railway Company's president, to the effect that that company was willing and able to build its line into plaintiff's plant whenever allowed to do so; and (c) the complete record in the injunction proceeding, including testimony and final decree.

We think these exclusions were not prejudicial. The readiness of the Union Railway to build its line, and the fact that it was prevented only by the injunction, do not seem to have been disputed, and indeed seem to have been either asserted or taken for granted by both parties. Defendant's manager testified, without objection, that the Union Railway's "steel crossings * * * have been on the ground three years ready to be put in"; and plaintiff's manager testified that defendant's president assured him that as soon as certain expense connected with the crossing was settled the Union Railway would come across. If the decree in the injunction suit had any reasonable tendency to show a probability that an underpass at least would be built under the terms of that decree, the tendency was remote, for the Union Railway might or might not accept the permission to so build. The proposed testimony of the Union Railway's president added nothing of substantial value to what was already in, for it scarcely amounted to more than an assertion that that company was prepared to carry out its contract with defendant, and compliance therewith was not only to be presumed, but readiness to comply does not seem to have been actually controverted. We say this because it was naturally to be assumed that the Union Railway, once allowed to enter Railroad avenue, would immediately build a spur to as prominent a shipping plant as is plaintiff's.

[6] It is strongly urged that the record shows on its face that an unjust result has been reached, that but for the erroneous issue and

continuance of the injunction, with which defendant was not connected, and for which it was not responsible, its contract with plaintiff would have been fulfilled, and that it has thus been subjected to damages whose excessiveness specially appears by the final disposition of the injunction proceedings, which makes probable an early supplying of the connection contracted for. But plaintiff has already been deprived of the connection for nearly eight years; and it cannot rightly be said that there was not substantial evidence sustaining the verdict, even on the assumption of but eight years' deprivation. While defendant is without moral fault with respect to this delay, plaintiff is equally innocent; and it need not be said that, as between the parties before us, contract rights and liabilities must govern. The discussion contained in our previous opinion would seem to render further elaboration unnecessary. While we have not discussed all the errors assigned, we have carefully considered them all, and are of opinion that no error has been committed to defendant's prejudice.

The judgment of the district court is accordingly affirmed, with costs.

THE LACKAWANNA.

(Circuit Court of Appeals, Second Circuit. December 9, 1913.)

No. 33.

COLLISION (§ 42*)—LIABILITY—DEFENSE OF "INEVITABLE ACCIDENT"—SUFFICIENCY OF EVIDENCE.

To exonerate a vessel from liability for a collision concededly due to her improper movements, on the ground of inevitable accident, where the real cause of such movements is not shown, she must eliminate liability for all possible causes by showing as to each of them that it could not have been prevented by the proper exercise of reasonable care, and, where important witnesses and evidence are not produced and the omission is not satisfactorily accounted for, the showing cannot be held sufficient.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 42; Dec. Dig. § 42.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3571-3573.]

Appeal from the District Court of the United States for the Western District of New York.

This cause comes here upon appeal from a decree of the District Court, Western District of New York, dismissing a libel. The action was brought by the owner of the barge Chieftain, which was injured by collision with respondent's steamship Lackawanna. The opinion of the District Judge will be found in 201 Fed. 773.

H. D. Goulder and O. D. Duncan, both of Cleveland, Ohio (Goulder, Day, White & Garry, of Cleveland, Ohio, of counsel), for appellant.

Brown, Ely & Richards, of Buffalo, N. Y. (Harvey L. Brown, of Buffalo, N. Y., of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LACOMBE, Circuit Judge. The collision occurred September 18, 1909, about 11:15 a. m., near the head of the St. Clair river. The steamer Shenandoah was bound up, having two barges in tow, tandem on hawsers; the Chieftain being the first in order. The steamer Lackawanna, unincumbered, was bound down. Near the rapids at the upper end of the river she blew a passing signal of two blasts to the Shenandoah, which the latter answered with two blasts. Both steamers continued on their courses and passed starboard to starboard at a distance of from 100 feet to 200 feet. As the Lackawanna's stern was about clearing the stern of the Shenandoah, she suddenly deviated from her straight course and without warning or apparent cause sheered sharply and broadly over to her starboard into the line between the Shenandoah and Chieftain. She broke the line and, continuing on through the gap, struck her port side on the Chieftain's stem at a point about one-third of the Lackawanna from forward. Further details will be found in Judge Hazel's opinion.

A point is made in the respondent's brief that the Chieftain was in fault for not casting off her towing line; but little is said in support of it, and we think it without merit. The main defense set up is "inevitable accident."

Immediately after the accident the master and chief engineer of the Lackawanna went to the inclosed room where the steam-steering apparatus was located. That apparatus consisted, in part, of a drum around which a chain played. The chain led downward from the drum to a space within an open metal framework fastened to the deck, and there engaged with two sheaves, which were mounted on an idler shaft. The ends of the idler shaft were countersunk $\frac{5}{8}$ of an inch into the under part of the frame; said ends being cut down on their engagement-side to a flat surface so as to engage horizontally with the frame. Pull from the chains brought the idler shaft against the frame and was resisted by the latter. The ends of the idler shaft were kept in place by two metal straps or caps, one at each end, which were bolted to the frame by $\frac{5}{8}$ -inch tap-bolts each $1\frac{1}{2}$ inches long; each cap was held by one tap-bolt on each side of the shaft. When there was no pressure from the chain holding the idler shaft against the frame, the caps were calculated to support the weight of shaft and sheaves (about 400 pounds) and hold the shaft from dropping out of place. When the steam-steering room was examined after the accident, it was found that two tap-bolts were gone entirely; no one apparently ever saw or found them. These were located one at the forward end of one cap, the other at the rear end of the other cap. Of the other two bolts, one was bent, the other "burred" or stretched, and the two caps were depending from them. This evidently had allowed the idler shaft to escape from its countersunk recess, and it had apparently turned sideways sufficiently to rise through the open framework and was, with the sheaves, jammed by the chain against the drum. Of course, in such a condition the steam-steering apparatus was out of commission. For further details of the evidence as to method of construction and prior history of the apparatus, its inspection, and experience, reference may be had to the opinion of the District Judge.

Concededly the Lackawanna violated the rules of the road, navigated improperly, and by her erratic movements caused the collision. Therefore, since the Chieftain was free from fault, the Lackawanna is to be held solely responsible for the collision. The law allows her to relieve herself (if she can) of that responsibility by proving that the accident was inevitable in the technical admiralty sense. That is, that it was of such a sort that it would not have been prevented by the use of that degree of reasonable care and attention which the situation demanded. The burden, of course, is heavily upon the vessel asserting such a defense. Sometimes it is established by showing what was the real cause of the accident (in a case like this the real cause of the erratic movements) and further showing that such cause became efficient without any negligence on the part of the ship. The respondent does not contend that it has shown the real cause of the accident.

The defense of inevitable accident has, in some cases, been held to be established, even when the real cause is not definitely ascertained. In all such causes, however, all possible causes have been exhaustively covered, and it has been shown, as to each and all of them, that the proper exercise of reasonable care by owner, master, officers, and crew would not have avoided them.

In the cause at bar the proof relied upon to eliminate liability by covering all possible causes is not satisfactory, by reason of the absence of two material instruments of evidence; their absence not being, as we think, satisfactorily accounted for. The "possible causes" to be accounted for are not the "possible causes" of the jamming of the idler shaft, but the "possible causes" of the Lackawanna's sudden and very broad sheer to starboard. Her wheelsman, manifestly an important witness as to all courses, is not produced. He was with the ship a short time after the accident; there is nothing to excuse his nonproduction except that it is not now known where he is. There is nothing to show that he was ever asked to make any statement, or that any effort was ever made to secure his attendance at the trial, or to keep track of his address, or learn from him, while he was yet with the ship, what means might be availed of to reach him. Of course, if steps had been taken at the proper time to keep track of him, and he had nevertheless disappeared, or perhaps died, sufficient excuse for his nonproduction would be made out. But he is so important a witness that something should have been done to secure him, if possible. The only witness as to helm movements is the master. He says that as his stern was a little bit past or about even with the Shenandoah's stern he ordered "starboard some"; that the wheelsman repeated the order and then told him he could not move the wheel; that witness looked and saw the wheelsman could not move the wheel; and that there was "a little bit port-wheel on the boat at the time." Immediately after came the broad sheer of the Lackawanna to starboard. Her steering chain led straight, as is the practice in ocean steamers, which require the wheel to be turned in the same direction the bow is to take. If the gear broke down with the wheel a little to port, we cannot see why a violent sheer to starboard followed. We are not told whether the rudder was loose or what caused the steering gear to break down.

It may have been the result of a defect in the steering engine or of the steersman's negligent handling of the wheel. These are among the possible causes which are not eliminated.

Moreover, another piece of evidence is not forthcoming, and its absence is not satisfactorily, or indeed at all, explained. Immediately after the accident and the breakdown of the steering apparatus, the master ordered all things kept in statu quo until the insurance representative could see them. We have not the testimony of what that representative saw, when he did come. Two bolts had come out of the retaining straps, and were not seen when the engineer went to the room immediately after the accident. Two others were still in place, one burred, the other bent. These were removed by the ship's officer. It might be supposed that they would be needed on the trial; but they have disappeared; no effort seems to have been made to preserve them. Respondent's expert witness (a construction engineer) said that if the bolts were present and shown to him he "thought he could probably tell what caused the bolt to come away."

In this condition of the proof we do not think it can be found that all possible causes have been enumerated and satisfactorily accounted for.

The decree is reversed with costs of appeal, and cause remanded with instructions to decree in conformity with this opinion.

BEACH FRONT HOTEL CO. v. SOOY.

(Circuit Court of Appeals, Third Circuit. December 23, 1913. Rehearing Denied February 24, 1914.)

No. 1605.

EVIDENCE (§ 382*)—PHOTOGRAPHS—EXCLUSION—DISCRETION OF COURT.

On an issue as to whether the ocean high-tide mark crossed certain lots at the times when they were conveyed, the exclusion of a photograph of the locality taken six years after one conveyance and four years after the other, and of a government coast map made about the same time, was within the discretion of the court, where the evidence as to the location of the high-water mark at the time of the conveyances and afterward was conflicting, and there was no direct evidence that it was in the same place when the photograph was taken and the survey made as when the conveyances were made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1658, 1659; Dec. Dig. § 382.*]

On rehearing. Judgment affirmed.

For former opinion, see 197 Fed. 881, 118 C. C. A. 579.

Gilbert Collins, of Jersey City, N. J., for plaintiff in error.

Robert H. McCarter, of Newark, N. J., for defendant in error.

Before GRAY and McPHERSON, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This court on writ of error affirmed the judgment of the court below in July, 1912. 197 Fed. 881, 118 C.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

C. A. 579. Subsequently the court granted a petition of the plaintiff in error for a rehearing, but confined it to the questions raised by the 13th, 16th, 18th and 19th assignments of error.

The fundamental question in this case is whether or not at the time of the execution by the Ocean City Association to Charles Matthews, under whom Richard R. Sooy, the defendant, claims, of the two deeds of July 26, 1880, and September 4, 1882, respectively, the ordinary high-water mark of the Atlantic Ocean extended across and cut off the front of the lots in Ocean City, numbered from 985 to 995, both inclusive, conveyed by the above deeds, and lying to the northwest of the northwesterly side of Atlantic Avenue. If it did not the Beach Front Hotel Company, the plaintiff, was entitled to a verdict; but if it did the defendant was so entitled. The plaintiff, in order to sustain the contention that at the time of the execution of the above two deeds the ocean at ordinary high tide did not encroach on the lots thereby conveyed, or any of them, or any part thereof, made certain offers of proof which were rejected by the court below. The assignments now before us on rehearing relate to the rejection of these offers.

The thirteenth assignment is founded on the refusal by the court below to permit Townsend Godfrey, a witness for the plaintiff, to answer the following question asked by the plaintiff's counsel, "What is the scene?" This inquiry had reference to a photograph taken in 1886 in the presence of the witness, purporting to show the configuration of the beach and certain buildings referred to by sundry witnesses for the defendant. Unless the photograph either by itself or in connection with the evidence in the case showed or tended to show that the line of ordinary high tide did not encroach upon the lots, or any of them, conveyed by the Ocean City Association to Matthews by the deeds of 1880 and 1882, the excluded question was immaterial and improper. The photograph was taken six years after the execution of the first deed to Matthews and four years after the execution of the second. Owing to the shifting nature of the beach, it is obvious that, while the photograph standing alone, if clear and definite on its face, might be evidence tending to show where with respect to the locus in quo the line of high water was at the time it was taken, it could afford no reliable evidence of the locality of that line in 1880 or 1882. We have carefully examined this photograph and think it fails to show that at the time it was taken the line of ordinary high tide did or did not touch or encroach upon the lots, or any of them; or to what extent, if any, there was such encroachment or failure to encroach. The admission in evidence of the photograph, considered in and by itself, would have been improper on at least two grounds: First, that upon its face it is too indefinite as to the locality of the line of ordinary high tide with respect to the lots conveyed to Matthews, and, secondly, the time it was taken was too remote from the execution to Matthews of the deeds for such lots. The photograph, even if clear on its face, would have neither added to nor detracted from the force of the other evidence on the vital point in the case; but would as to that point, if admitted, have been confusing to and calculated to mislead the jury. To render it material, as it would have been too remote, taken alone,

it was necessary that it should by proper evidence have been shown to bear such relation to the physical condition of things in 1880 and 1882 as to lend it some legitimate probative force. No one has testified directly that it represents the same or substantially the same conditions with respect to the locus in quo as existed six or four years respectively theretofore. There is testimony, it is true, tending to show that during certain years or times after the execution of the deeds to Matthews and before the taking of the photograph, the ocean substantially encroached upon the shore, and that during that period the ocean did not substantially recede; and it is urged by the plaintiff that, if in 1886 the line of high-water mark as claimed to be shown by the photograph did not encroach on or touch the lots conveyed to Matthews, much less could it have so encroached on or touched them in 1880 and 1882. But the evidence on the subject was not so clear and uncontradicted as to make it obligatory on the court below to receive the photograph or to allow the question, which was excluded. There was conflicting evidence as to changes in the beach after 1883 and before 1886. The contention of the plaintiff that there was either no change in the line of high-water mark between 1880 and 1886, or, if a change, that it was landward or westwardly, was not so clearly supported by the evidence as to show an abuse of judicial discretion in excluding the proposed evidence touching the photograph. Certain decisions have been referred to by the plaintiff on the subject of remoteness of evidence in point of time, but they are distinguishable from this case, and not controlling or even persuasive here. Judicial discretion is an important factor in the determination of objectionable remoteness, and we are not prepared to hold that it was abused in this connection.

The sixteenth assignment is based on the refusal by the court below to admit in evidence a United States Government map of a survey in 1886 of the coast line at Ocean City. It shows the line of ordinary high tide at the time the survey was made and that it did not then encroach upon any portion of the lots conveyed in 1880 and 1882 to Matthews. For reasons similar to most of those given in the consideration of the thirteenth assignment, the sixteenth assignment must be overruled.

The eighteenth assignment is based upon the action of the court below in overruling an offer in evidence by the plaintiff of a certain newspaper advertisement in 1889, presumably published by the defendant, in which it was stated that the defendant's hotel was at a distance of sixty yards from the surf; the offer having been made for the purpose of contradicting the defendant with respect to some of his testimony. Assuming that the defendant was responsible for the advertisement, it is not at all clear to us that it contradicts or prejudicially affects his testimony; and it was certainly too remote to serve either in and by itself, or in connection with the other proofs, as evidence of the location of the line of high-water mark in 1880 and 1882 with respect to the lots conveyed to Matthews in those years respectively. The eighteenth assignment must be overruled.

The nineteenth assignment is founded on the refusal of the court

below to admit in evidence an advertisement containing a picture of the defendant's hotel, published in an annual of the Ocean Beach Association in 1885, claimed by the plaintiff to be inconsistent with a certain photograph taken in March, 1883, and proved by the defendant. For reasons similar or analogous to those stated with respect to the eighteenth assignment, the nineteenth assignment must be overruled.

While the photograph, map, advertisements and pictures referred to in the four assignments might have been admitted in evidence, accompanied with proper instructions from the court, we are not able to hold that their rejection constituted an abuse of discretion amounting to reversible error.

The judgment below must be affirmed, with costs, and it is so ordered

PENNSYLVANIA R. CO. v. BUCKLEY.

(Circuit Court of Appeals, Third Circuit. January 10, 1914.)

No. 1780.

TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action to recover for an injury received by plaintiff while a passenger on defendants' railroad train by reason of the breaking of a switch which caused the car in which she was riding to run into a switch track, where it came into collision with other cars, where it appeared that the breaking of the switch was due to a latent defect in the iron not visible on the surface; that the switch was new, of an approved pattern, and came from a skilled maker; and that it had been inspected and tested but a few minutes before; it was error for the court, in instructing the jury that the liability of defendant depended on the adequacy of the test made by the inspector, to permit them to find that it was not adequate unless he tapped the parts with a hammer, where there was no evidence that such a test had ever been applied, or should be applied in railroad practice, but the only evidence on the subject tended to show that the test actually made was the usual and proper one.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

At Law. Action by Rose Turner Buckley against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Theodore Strong, of New Brunswick, N. J., for plaintiff in error.
George M. Shipman, of Belvidere, N. J., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. On January 20, 1912, the plaintiff (a married woman living with her husband) was a passenger on a train operated by the Pennsylvania Railroad Company. The train was composed of an engine and four cars, and was running through a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rural part of Northern New Jersey at an ordinary speed—from 20 to 25 miles an hour—when she was severely injured by an accident that took place under the following circumstances:

At Kent's Crossing a siding connects with the main line. The switch had been manufactured by the Pennsylvania Steel Company, was of approved pattern, and was nearly new. The engine and one car passed the switch, keeping to the line; but the three remaining cars turned into the siding, where they collided with a heavy steel car. The plaintiff was injured by being thrown violently against a seat. Immediate examination of the switch disclosed a broken lug or crank—an inconspicuous but important part of the mechanism—and disclosed, further, that a small latent defect existed, such as might occur in the process of casting. This defect was not visible on the surface of the lug, but showed itself on the edges of the broken metal.

The morning was very cold, and the low temperature may have had something to do with the break. There can be little doubt concerning what took place. The vibration of the heavy engine, the latent defect, and perhaps also the influence of the cold, combined to break the lug and then to jar the points of the switch out of place, thus deflecting the last three cars into the siding. The plaintiff did not contend, and there was no evidence, that the switch had been left open. On the contrary, it had been inspected a few minutes before the accident; and the testimony of the inspector—that he had moved the switch backwards and forwards, had relocked it, and had gauged the track—was corroborated by the undoubted fact that the engine and the first car must have found the points in proper position.

The case was carefully tried, and the jury were adequately instructed upon almost every question. But the learned judge fell into error in one particular that was crucial. There being no doubt that the plaintiff was injured while she was a passenger, and that her injury was due to a defective appliance of transportation, a presumption of the carrier's negligence arose immediately, and required explanation. The explanation was offered, and in several respects it was certainly sufficient. It showed that the switch was new, was an approved device, and had come from a skilled maker. It also showed a very recent inspection, and, if this inspection were adequate, if it measured up to the standard of care imposed upon the carrier, nothing more could be demanded. The defendant could not be held liable simply because an accident had been caused by a latent defect, if it had performed every duty imposed by law. The case turned therefore upon the adequacy of the inspection, and this was recognized by the trial judge. He correctly said to the jury:

"It is a question of fact for you to say whether, under all these circumstances that now confront you in the consideration of this question, and that confronted this examiner, tester of the switch, whether upon that occasion he made that practical test which this high regard for the safety of passengers, of which I have spoken, required. If he did, and if you are satisfied that he did, and are further satisfied that that lug broke either because of that latent defect, or because of the pressure that was exerted upon it by this locomotive passing over it upon that occasion, then my charge is that you must find for the defendant, because it is not chargeable with latent defects which could not be observed or discovered by applying the ordinarily accepted tests."

But what were "the ordinarily accepted tests"? It cannot be said that these may be discovered by turning to the stock of common knowledge; the subject is one about which a court and jury need instruction from competent witnesses having knowledge of the usual method, or of the proper method, of inspecting a switch. But on this matter the plaintiff offered no evidence whatever, while the defendant's evidence tends to prove the adequacy of the test that was actually made. No other information was given; nevertheless—apparently influenced by the suggestion of counsel in argument—the learned judge instructed the jury to apply a test that had no support in the evidence; and indeed he made the verdict depend upon the presence or absence of a single act. He had previously used the following language:

"Merely looking at that lug would not disclose that kind of a defect, as you can very well believe. The question arises, however, if it was the cause of the derailment, whether it could have been observed by any proper test that this man could have made on that occasion, such, for instance, as using a hammer, tapping it with a hammer, as has been suggested in the argument here, whether that would indicate any unsoundness."

And a few sentences afterward, in still more precise words, he went on to make the defendant's liability depend altogether on the point whether a hammer should have been used. After the words "ordinarily accepted tests," quoted above, he immediately added:

"If, however, you find that that was not a proper test to make [that is, moving the switch, etc.], and that the tapping of those parts with a hammer would have discovered a defect, then of course the defendant company cannot be absolved. But if you further find that a test of that nature would not have revealed or disclosed that defect, then it would be absolved."

We express no opinion about the propriety, or the severity, of such a standard of duty. The point here is that the record does not contain a word of evidence to show that such a standard had ever been applied, or should be applied, in railroad practice; and, without evidence to that effect, the jury should not have been allowed to base their verdict on what could only be conjecture. In our opinion this erroneous instruction was of the utmost importance, and requires us to reverse.

We may perhaps suggest, also, that, if a second trial take place, the New Jersey decisions seem to lend weight to the judge's evident misgivings about allowing a married woman, living with her husband, to recover a physician's bill as part of her damages for a personal injury—at all events, unless there be affirmative evidence of her intention to charge her separate estate.

The judgment is reversed, and a new venire is awarded.

UNITED STATES v. THIRTY-SIX BOTTLES OF LONDON DRY GIN et al.

(Circuit Court of Appeals, Third Circuit. February 2, 1914.)

No. 1772.

FOOD (§ 14*)—MISBRANDING—INTENT.

In a prosecution for condemnation of certain alleged misbranded gin under Food and Drugs Act June 30, 1906, c. 3915, § 8, 34 Stat. 771 (U. S. Comp. St. Supp. 1911, p. 1357), providing that an article shall be deemed misbranded if it be labeled or branded so as to deceive or mislead the purchaser or purport to be a foreign product when it is not so, the intent of the maker not to deceive is immaterial; the gist of the offense being whether the label deceives or is calculated to mislead and deceive the purchaser.

[Ed. Note.—For other cases, see Food, Cent. Dig. §§ 10-13; Dec. Dig. § 14.*

What constitutes a violation of pure good regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Judge.

Action by the United States against Thirty-Six Bottles of London Dry Gin; Sir Robert Burnett & Co., claimant. From a judgment in favor of claimant (205 Fed. 111), the United States brings error. Reversed, and new trial granted.

Walter C. Douglas, Jr., and Francis Fisher Kane, both of Philadelphia, Pa., for the United States.

John G. Johnson, of Philadelphia, Pa., for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

YOUNG, District Judge. This is a proceeding by the United States for the condemnation of certain bottles of gin alleged to be misbranded in violation of the Food and Drugs Act of June 30, 1906. The eighth section of that act provides that an article shall be deemed to be misbranded "if it be labeled or branded so as to deceive or mislead the purchaser or purport to be a foreign product when not so." The cause went to trial before a jury upon the libel and amended libel and answer thereto by Sir Robert Burnett & Co., the claimant. The libel alleges that the bottles were labeled and branded so as to purport to be a foreign product, whereas they were in fact a domestic product. The amended libel alleges that the bottles were labeled and branded so as to deceive and mislead purchasers thereof and to purport to be a foreign product when not so.

The assignments of error raise the single question whether or not, in a proceeding under the Food and Drugs Act for the condemnation of misbranded articles, the intent of the claimant is a necessary ingredient in the determination of the case. The learned trial judge admitted evidence, over the government's objection, for the purpose of showing good faith in the branding and absence of an intention to deceive. The court also submitted the question of intent as follows:

"The third question refers more particularly to the second charge of the government. It is this: In using the label in suit, did the maker of the gin

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

intend to deceive or mislead the purchaser by representing the gin to be a foreign product, when in truth it was not a foreign product."

Under the libel and amended libel, the sole question was whether the packages were so labeled and branded as to deceive and mislead the purchaser. This was not the question submitted to the jury, but the question submitted to the jury was, as we have seen: Did the maker of the gin intend to deceive or mislead the purchaser? The court was in error in submitting the question of intention to the jury. The Food and Drugs Act nowhere requires proof of intention by the use of the words "knowingly," "willfully," or such like words. The language of section 8 (in the case of food) subsec. 2, of the act, is:

"If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so."

This language clearly means if the label deceives or misleads the purchaser; if the purport of the label be that it is a foreign product when it is not so. This the label, and the label alone, must determine. The intention of the user to deceive is of no consequence. The act strikes at deceiving the public by selling them one thing when they desire to purchase another. As has been frequently said by courts, the purchaser has the right to choose for himself what he will purchase, and, when he has purchased, the right to receive that which he desires and not something else. It would be destructive of the act, nullify it entirely, to allow the intent of the maker to be considered as a defense. We believe the decided cases sustain the principle that the intent is not a necessary ingredient in the determination of the case.

In *McDermott v. Wisconsin*, 228 U. S. 115, on page 132, 33 Sup. Ct. 431, at page 435 (57 L. Ed. 754), it is said by Mr. Justice Day:

"The label upon the unsold article is in the one case the evidence of the shipper that he has complied with the act of Congress, while in the other, by its misleading and false character, it furnishes the proof upon which the federal authorities depend to reach and punish the shipper and to condemn the goods. If truly labeled within the meaning of the act, his goods are immune from seizure by federal authority; if the label is false or misleading within the terms of the law, the goods may be seized and condemned. In other words, the label is the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress."

It is the purchaser that is to be protected.

"The purchaser has the right to determine for himself which he will buy, and which he will receive, and which he will eat. The vendor cannot determine that for the purchaser. He, of course, can make his arguments, but they should be fair and honest arguments." *United States v. 100 Cases of Tepee Apples* (D. C.) 179 Fed. 987.

In *United States v. Johnson*, 221 U. S. 488, at page 497, 31 Sup. Ct. 627, at page 628 (55 L. Ed. 823), Mr. Justice Holmes says:

"In further confirmation, it should be noticed that, although the indictment alleges a willful fraud, the shipment is punished by the statute if the article is misbranded, and that the article may be misbranded without any conscious fraud at all."

In *District of Columbia v. Lynham*, 16 App. D. C. 85, it is said:

"It is no defense for a druggist prosecuted for selling an adulterated drug in violation of the Act of Congress February 17, 1898 (30 Statutes 246), re-

lating to the adulteration of food and drugs in the District of Columbia, to show simply that he was at the time of sale * * * ignorant of the fact that the drug was adulterated, as he must know what he sells, or proposes to sell, and that it conforms to the standard prescribed by law."

In *United States v. Five Boxes of Asafœtida* (D. C.) 181 Fed. 561, it is said by Judge Holland:

"The article of food or drug adulterated or misbranded is declared to be forfeited as an offending thing which threatens the health of the citizen, and therefore subject to seizure, without regard to the acts or knowledge of the owners or claimants."

For these reasons, the judgment must be reversed, and a new trial granted.

RIEGEL v. PULLMAN CO.

(Circuit Court of Appeals, Third Circuit. January 21, 1914.)

No. 1783.

CARRIERS (§ 320*)—PASSENGER'S ACTION FOR INJURIES—INSTRUCTIONS—CONFORMITY TO PLEADINGS AND ISSUES.

In a passenger's action for injuries caused by a door of a car swinging shut when he lost his balance and placed his hand thereon, where the statement charged negligence in not properly securing and fastening the door, plaintiff testified that the door was regulated as other doors were, one of his witnesses testified that the fastener was one with jaws and a tongue that came in and held it, there was no proof, suggestion, or charge of negligence raising any question as to a spring-jawed catch being a proper kind of appliance, the court without objection or exception in response to a contention of plaintiff stated that it was the company's duty to secure fasteners such as were usually used and to keep them in proper condition for the purposes for which they were used, thus showing that, as the case was tried, the issue was whether the catch worked, and the court charged that such doors were not intended to be fastened so they could not be opened and closed, and that the intention was that the fasteners should hold them so as to require a vigorous pull to loosen them, and so that if they were pushed back hard they would fasten, a further instruction that if defendant used the ordinary fasteners used to fasten doors of that kind, and if the fastener was in the usual condition and held the door as such fasteners were intended to hold doors, it had done all that the law required was not error, as, in view of the pleadings, proof, and course of the trial, it properly treated the fastener on that car as the only one involved, and left to the jury only the issue as to whether the particular fastener was in such order as to require a vigorous pull to open it and a hard pull to close it.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; James B. Holland, Judge.

Action by W. A. L. Riegel against the Pullman Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Ladner & Ladner, of Philadelphia, Pa., for plaintiff in error.

C. Andrade, Jr., of New York City, and Francis S. Cantrell, Jr., of Philadelphia, Pa., for defendant in error. •

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—18

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case Dr. William A. L. Riegel, the plaintiff, brought suit against the Pullman Company in a state court. Later the case was removed to the court below, where the jury rendered a verdict for the Pullman Company. On entry of judgment thereon, plaintiff sued out this writ.

Dr. Riegel was riding in the smoking room of a Pullman parlor car. His evidence was: That as he arose to leave that compartment the car gave a very heavy lurch, which threw him off his balance. That he put out his hand to steady himself when the compartment door swung shut and his thumb was caught and crushed by the hinged side of the door. His testimony as to the door was:

"It was regulated like all those doors that I have seen."

Buckner, a fellow passenger, testified:

"I examined the fastener and it did not seem to be secure. It was one of those kind of jaws that slip in like that. It was one of those fasteners with jaws, so to speak, and a tongue came in like that and held it. I examined it and it did not seem to be secure. It would sway like that, without coming out of the fastener, which showed that it was not secure. It would sway in the fastener when you would pull it. It would require a very slight pull to take it out."

On the part of the defense was the testimony of the porter that he saw the plaintiff immediately after the occurrence.

"I asked him what the trouble was. He told me he had caught his thumb in the door. He said he was sitting in the smoker with his hand on the door that way, with his thumb in the crack, and the door came to on him. He refused to give me his name absolutely. He said there was no one to blame but himself for it when I asked him for his name."

The porter also testified he examined the catch and found no defect; that it was firm; that it was the catch used generally on Pullman cars. The conductor testified:

"I asked him to show me where he was injured, and he promptly unwrapped his thumb and showed me that his thumb had been injured, and I asked for his name and address, and he objected to giving them to me. I asked him why, and he said it was only trifling at that time and not necessary to bother anything about it, and there was no one to blame but himself."

And:

"I found it as the usual catch is. That is to say, in good order. Its function was to hold the door back, of course, and when you push the door back it stayed there. I went back there and tried the door in the catch to see if the fault was there, but the catch held the door the same as ordinary catch springs do."

The plaintiff denied he told either conductor or porter that it was his own fault.

The statement charged that plaintiff was injured by "the negligence of the defendant company, its servants and employes, in not properly securing and fastening said door." In view of this charge in the pleadings and the proofs in the case, it is clear that the course of the trial was as to the condition of the catch used. There was no proof, suggestion, or charge of negligence which raised any question as to a

spring-jawed catch being a proper kind of appliance. The plaintiff's point, "It is the duty of the defendant to provide doors that are kept open with secure fastener and to inspect them often enough to insure discovery of any defect or weakening," and the court's answer, "It is the duty of the company to secure fasteners such as are usually used and to keep them in proper condition for the purposes for which they are used," to which no objection or exception was then taken, shows that, as the parties tried the case, the issue for the jury was whether the catch on this door did its work. In that respect the court said:

"Those doors, as you know, are not intended to be fastened so they cannot be opened and closed, and the intention of those fasteners is that they shall hold them, so as to require a vigorous pull to loosen them, and if you push them back hard they fasten so that you do not have to hook or unhook them."

Certainly the plaintiff had no reason to complain of this standard of "a vigorous pull" to open and "push them hard back" to close. But even with this required standard the jury found for the defendant. It is now contended, however, that the court erred when it charged:

"That if defendant used the ordinary fastener used to fasten doors of that kind back and to open them, and that fastener was in the usual condition and held the door as those fasteners are intended to hold doors, * * * then the defendant company has done all that the law requires of it."

In view of the testimony of the plaintiff himself that the door was regulated as other doors were, that of his witness, the negligence charged in his statement, the answer to his point, and the general course of the trial, we find no error in the court also treating the fastener on that car as the only one involved and in leaving to the jury the issue on which the case turned, namely, whether that fastener was in such order as to require a vigorous pull to open it and a hard pull to close it. In plain and simple terms the working order of the device was submitted to the jury, and the outcome shows they were satisfied with its condition and workings.

Such being the case, it follows the defendant was not negligent, and the judgment below should be affirmed.

UNITED STATES v. ATLANTA JOURNAL CO.

(Circuit Court of Appeals, Fifth Circuit. October 7, 1913.)

No. 2,421.

POST OFFICE (§ 15*)—POSTAGE—CHANGE OF RATE—AUTHORITY OF POSTMASTER GENERAL.

The regulation promulgated by the Postmaster General December 4, 1907, amending rule 456 of the Postal Laws and Regulations, to the effect that sample copies of a publication of the second class shall be accepted for mailing at the second-class rate of one cent per pound fixed by Act March 3, 1885, c. 342, § 1, 23 Stat. 387 (U. S. Comp. St. 1901, p. 2669), to the extent of 10 per cent. of the total weight of copies mailed to subscribers during the calendar year and requiring a higher rate on any excess above such 10 per cent., is an unauthorized restriction of the right given the publisher by the statute to mail both copies to subscribers and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sample copies at the one-cent rate without any limitation as to the quantity.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 22; Dec. Dig. § 15.*]

In Error to the District Court of the United States for the Northern District of Georgia; Don A. Pardee, Judge.

Action at law by the United States against the Atlanta Journal Company. Judgment for defendant on demurrer, and plaintiff brings error. Affirmed.

The following is the opinion of the District Court (Pardee, Circuit Judge):

The facts are that in 1908 the Atlanta Journal Company sent through the mails for delivery to subscribers 691,112 pounds of the semiweekly Journal, and also during the same year sent through the mails for transmission and delivery to divers persons, not subscribers or news agents, and as sample copies, 113,706 pounds of the semiweekly Journal; for and on all of which, as publications of the second class, the Journal Company paid the postage of one cent per pound, and as provided in the act of Congress approved March 3, 1885, 23 Stat. 387.

Now it seems that on December 4, 1907, the Postmaster General promulgated a regulation, taking effect January 1, 1908, amending rule 456 of the Postal Laws and Regulations and pertaining to second-class mail matter, to the effect that sample copies of publications entered as second-class matter shall be accepted for mailing at the second-class postage rate of one cent per pound to the extent of 10 per centum of the total weight of copies mailed to subscribers during the calendar year.

This rule has many detailed provisions relating to sample copies and the handling of the same, particularly providing that should a publisher offer for mailing, as sample copies, copies in excess of the amount above described, the postmaster shall require on such excess a deposit of money sufficient to cover postage at the transient second-class rate of one cent for each four ounces, etc., and report the matter, with details, to the Third Assistant Postmaster General.

According to this rule, the Journal Company was entitled to mail as sample copies of the semiweekly Journal, during the year 1908, 69,111 pounds of mail matter. The company actually mailed as sample copies of its publication 44,595 pounds in excess of the 10 per cent. limitation. Upon this excess the Journal Company paid postage at the rate of one cent per pound, and the matter was transmitted through the mails; and this suit is brought to recover the difference between that one cent per pound rate and the transient second-class rate of one cent for each four ounces.

It is inferable from the declaration, and it is admitted at the bar, that the copies of the semiweekly Journal transmitted through the mails for which the excess of postage is claimed, were sample copies in fact, and entitled to be carried in the mails as sample copies, within the purview of the act of Congress of 1885, unless the regulation promulgated by the Postmaster General in December, 1907, deprived them of that character and made them liable to a postage rate of four cents per pound, instead of a rate of one cent per pound as provided in the act of 1885. The regulation does not specifically define sample copies nor change the actual character of the matter. It restricts the quantity of sample copies publishers of publications of the second class may send through the mails as "sample copies" at one cent per pound. In effect, the regulation restricts the publisher's rights under the statute, changing to his injury both classification and rate, and this is beyond the authority of the Postmaster General. Adjudged cases to this effect are numerous, but I am satisfied with *Payne v. Railway Publishing Co.*, 20 App.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

D. C. 581; Review of Reviews Co. v. Hitchcock (C. C.) 192 Fed. 360. And see Houghton v. Payne, 194 U. S. 88, 24 Sup. Ct. 590, 48 L. Ed. 888.

The demurrer to the declaration is sustained.

Alexander Ackerman, Sp. Asst. Atty. Gen., of Macon, Ga., for the United States.

Alex. C. King, of Atlanta, Ga., for defendant in error.

Before SHELBY, Circuit Judge, and FOSTER, District Judge.

PER CURIAM. The judgment of the District Court is affirmed.

G. RICORDI & CO. V. MASON.

(Circuit Court of Appeals, Second Circuit. December 9, 1913.)

No. 76.

COPYRIGHTS (§ 60*)—INFRINGEMENT—LIBRETTOS OF OPERAS—"VERSION."

A booklet entitled "Opera Stories," giving a mere fragmentary description of the plot and characters of various operas, each scene being covered by a single paragraph and taken from descriptions other than the operas themselves, is not a "version" within the statute and is not an infringement of the copyrights on the librettos.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 56; Dec. Dig. § 60.*]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing a bill in equity by which it was sought to enjoin the defendant from publishing and selling a certain publication entitled "Opera Stories," upon the ground that such publication contained matter infringing certain copyrights owned by complainant. Judge Hazel's opinion will be found in 201 Fed. 184. Judge Coxe had the same question before him on application for a preliminary injunction which he denied. 201 Fed. 182.

Nathan Burkan, of New York City, for appellant.

G. F. Lewis, of New York City (Alex. P. Browne, of Boston, Mass., of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. It seems unnecessary to add anything to the two opinions referred to supra. We are clearly of the opinion that these extremely brief epitomes of the plots of the two operas, the librettos of which have been copyrighted and are the property of complainant, are neither of them in any true sense "a version" of the copyrighted work, as that word is used in the statute.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BALL, et al. v. COKER et al.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1913.)

No. 1151.

1. PATENTS (§ 27*)—PATENTABILITY—"PROCESS."

A "process," within the meaning of the patent law, is a useful art, and a process may be patentable, although a mechanism is necessary in carrying it out, and the mechanism may or may not be new or patentable; but a valid patent cannot be obtained for a process which involves nothing more than the operation of a piece of mechanism, or, in other words, the function of a machine.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*

For other definitions, see Words and Phrases, vol. 6, pp. 5642-5651; vol. 8, p. 7766.]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS OF HULLING COTTON SEED.

The Ball patent, No. 807,990, for a process of hulling cotton seed of various sizes without substantial disintegration of the meats, consisting essentially in passing the seed through a graduated series of hull cutting devices set successively closer together, is void for lack of invention as involving no more than the operation of well-known hulling machines acting independently but successively each more closely adjusted than the one before and acting only on the seed left unhulled by it. Also, *held* not infringed.

3. PATENTS (§§ 25, 26*)—SUBJECTS OF PATENTS—"COMBINATION"—"AGGREGATION."

The distinction between a "combination" and an "aggregation" lies in the presence or absence of mutuality of action; a "combination" essentially requiring that there be some joint operation performed by its elements, producing a result due to their joint and co-operating action, while in an "aggregation" there is a mere adding together of separate contributions, each operating independently of the other.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. §§ 25, 26.*

For other definitions, see Words and Phrases, vol. 2, pp. 1275, 1277; vol. 1, p. 271.]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Suit in equity by W. T. Ball, Francis I. Legare, and T. Allen Legare, administrators of George S. Legare, deceased, and Hampton K. Lea, Charles Miner, and Thomas H. Tatum, against J. L. Coker, J. J. Lawton, and D. R. Coker, doing business under the firm name of Hartsville Oil Mill. Decree for defendants, and complainants appeal. Affirmed.

George E. Tew, of Washington, D. C., and Thomas H. Tatum, of Bishopville, S. C., for appellants.

John M. Coit, of Washington, D. C., and W. C. Miller, of Charleston, S. C., for appellees.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before PRITCHARD, Circuit Judge, and KELLER and CONNOR, District Judges.

CONNOR, District Judge. The patent, upon which plaintiff relies and for the alleged infringement of which relief is demanded, was issued to W. T. Ball, upon application filed June 17, 1903, issued June 19, 1905, and numbered 807,990. The learned judge below, in his decree, sets out clearly a description of plaintiff's claim. He says:

"The patent is for a process in milling cotton seed. It appears from the testimony that, at the date of the application for this patent, the state of the art, method, or operation of milling cotton seed was that cotton seed was then milled or hulled by the cotton seed oil and meal manufacturers, or crushers, by running the cotton seed between hull-cutting cylinders or disks, or other hulling devices. The cotton seed, as it came from the cotton ginneries to the cotton seed oil and meal mills, was first subjected to the process of cleaning it of what are known as linters, that is to say, by denuding the cotton seed, as far as possible, from all lint or cotton growth still adhering, after the ordinary gin had stripped it of the cotton sold, as cotton, commercially. After the cotton seed mill operator had denuded it of these linters, the seed was passed through machines devised for the purpose of cutting off, or removing, the hull from the interior of the seed known as the kernel or meat; these hullers through which the seed was passed consisted of machines composed of cylinders or disks, with teeth, knives, or cutting edges or surfaces, whereby, as the seed passed between them, the hulls were removed. Cotton seed is of different sizes. The knives or cutting surfaces, however, between these cylinders or disks, were generally set at fixed distances and, therefore, as the seed passed through, all seed that was too large would have a larger portion of the meat cut off and left adhering to the hull when the hull was removed, or would be more or less crushed in passing between the knives or cutting surfaces, and seed that was small enough to pass, without being cut, would pass through unhulled. The extent of the seed that would pass through uncut, according to the testimony, varies, and presumably, necessarily varied according to the variation in the size of the seed; * * * but it may be assumed that quite a considerable percentage of the cotton seed passing through these hullers was cut or broken, so as to leave a good deal of the seed adhering to the hulls in the case of large seed and that quite a percentage of small seed passed through unhulled. Due to these conditions, there was a considerable loss in the outcome of the seed, after passing through the hullers, estimated, in some of the testimony, as high as six to ten per cent. Ball's application for a patent for an improvement in the method of milling cotton seed designed to obviate this loss or reduce it to a minimum. The improvement claimed by Ball consisted in passing the seed successively through different sets of rollers, or cylinders with teeth set at different distances, viz., the seed would be passed through the first pair of hulling rollers or cylinders, which were set at a distance, so as to hull only the larger seed, and pass through the smaller seed unhulled. When this was done, the mass would go to a separator which would separate the mass into uncut seed, hulls, and meat, and then the uncut seed would be delivered to a second pair of rollers or plates in which the knives or cutting surfaces were set closer together, when the operation would be repeated, and then a second separation would take place and finally the remaining uncut seed would be delivered to a third set of rollers set still closer together by which the still smaller seed would be hulled. According to the plan of this device, the number or sets of rollers or cylinders which could be used were indefinite. * * * The successive sets, enumerated in the patent and recommended by the patentees, as calculated to effect the best results are three different pairs of rollers or cylinders, upon the assumption that the seed would practically grade into these different sizes. The result of passing it in this way is, under the claim of the patentee, to prevent loss by, in the first place, preventing the breaking of the large seed and preventing too large a proportion of the kernels or meat adhering to the hulls, and also of prevent-

ing anything but a very small percentage of the small seed passing through unhulled."

The claims allowed by the patent are for a process of hulling cotton seed of various sizes.

"1. Without disintegrating the meats; consisting essentially in passing the seed through a graduated series of pairs of hull-cutting rollers set successively closer together, and cutting and removing the hulls of seeds of successively smaller size without disintegrating the meats.

"2. Without disintegrating the meats by extracting the whole meats from the hulls of successively smaller sizes of the seed at several successive cuts.

"3. By passing the seed through a succession of hulling devices of gradually decreasing clearance, set to remove the hulls and extracting the meats substantially without disintegration thereof.

"4. Without substantial disintegration of the meats, consisting essentially in passing the seed through a graduated series of hull-cutting devices set successively closer together."

The District Judge proceeds to say:

"A closer comparison of the patent as claimed by the complainant with the existing art at the time shows that the art of hulling cotton seed by passing it through hullers, whether cylindrical or disk, with teeth or knives or cutting surfaces set at graduated distances, was well known and practiced, and the patentee neither claims, nor can claim, any patent thereon. The real basis of his claim is for a process identically the same in character with the process in vogue at the time, but consisting only of passing the seed more than once through the hullers. That is, of going over the same process in succession, the process being identical, the only difference being that each machine in this successive operation has the teeth or cutting knives or surfaces set closer together. He does not, in any wise, claim any patent upon the process of having these knives or teeth set closer together or wider apart. Anybody who chooses to practice the old process with a single pair of hullers could set the teeth, knives, or surfaces at any distance apart he saw fit. The distance at which these teeth or knives would be set would depend upon the judgment or skill or caprice of the operator. Ball's patent depends only upon the fact that the seed, instead of being subjected to the operation of passing through the hullers once, is passed through the hullers two or more times, and it is only upon the passing it more than once and successively through a machine, that is unpatentable in itself, that a patent is claimed in this case. The patent claimed is not on the machine, but on the method of repeating the operation."

The learned judge, in discussing the questions presented upon the pleadings and the evidence, inquired, first, whether the process claimed by plaintiff Ball, as covered by his patent, was patentable, within the language and meaning of the statute. After a careful examination of the question, he reached the conclusion that:

"The passing of the seed through the machine a number of times instead of once, and thereby procuring better results, may mean more careful and skillful workmanship and operation, but does not involve that organization of a new device, or of such inventive skill, as would authorize a patent. The results are the product of mere mechanical skill and not of invention."

This conclusion constitutes plaintiff's first assignment of error.

The judge recognized and reached his conclusion, with due regard to the elementary rule that:

"Letters patent are prima facie evidence of invention, unless sufficient evidence appears to overcome the presumption." *Mitchell v. Tithman*, 19 Wall. (86 U. S.) 287, 22 L. Ed. 125; *Parks v. Booth*, 102 U. S. 96, 26 L. Ed. 54, and many other decisions cited in plaintiff's brief.

[1] The assignment of error will be considered by this court, with this well-settled truth in mind. The fact must be kept in view that the patentee does not claim to have invented any new device or instrumentality. This, however, is not determinative of the validity of the patent. A "process," within the terms and meaning of the Constitution and statute, "is a useful art." It is defined to be:

"A mode of treatment of certain materials to produce a given result. It is an act, or series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful it is just as patentable as a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may, or may not, be new or patentable; whilst the process itself may be altogether new and produce an entirely new result. The process requires that certain things should be done with certain substances and in a certain order; but the tools to be used in doing this may be of secondary consequence." *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139.

The process, in that case, was useful for increasing the production of the best quality of flour by separating from the meal, first the superfine flour and then the pulverulent impurities mingled with the flour producing portions of the middlings so as to make "white" or "purified" middlings which, when reground and bolted, would yield pure white flour which, when added to the superfine, would improve the quality of the flour resulting, from their union, instead of deteriorating its quality, as had theretofore been the case. The patent was held to be valid. In *Tilghman v. Proctor*, 102 U. S. 728, 26 L. Ed. 279, it is said:

"The mixing of certain substances together, or the heating of a substance to a certain temperament, is a process."

This is illustrated in *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968. In *Risdon Locomotive Co. v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899, Mr. Justice Brown says:

"It may be said, in general, that processes of manufacture which involve chemical or other similar elemental action are patentable, though mechanism may be necessary in the application or carrying out of such process, while those which consist solely in the operation of a machine are not."

The learned justice says:

"It is equally clear, however, that a valid patent cannot be obtained for a process which involves nothing more than the operation of a piece of mechanism or, in other words, for the function of a machine."

In *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683, Mr. Justice Grier says:

"A process, *eo nomine*, is not made the subject of a patent in our act of Congress. It is included under the general term 'useful art.' An art may require one or more processes or machines, in order to produce a certain result or manufacture. The term 'machine' includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called 'processes.' A new process is usually the result of discovery; a machine of invention. The arts of tanning, dyeing, making waterproof cloth,

vulcanizing India rubber, smelting ores, and numerous others, are usually carried on by processes as distinguished from machines. * * * It is for the discovery or invention of some practical method or means of producing a beneficial result or effect that a patent is granted, and not for the result or effect itself. It is when the term 'process' is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means which are not effected by mechanism or mechanical combinations. * * * But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it."

[3] The distinction between a "combination" and an "aggregation" lies in the presence or absence of mutuality of action.

"To constitute a 'combination' it is essential that there should be some joint operation performed by its elements, producing a result due to their joint and co-operating action, while in an 'aggregation' there is a mere adding together of separate contributions, each operating independently of the other. * * * Defendant's machine comprises merely an aggregation of two devices. There is no mechanical or functional mutuality of operation. It is not a combination because there is no co-operation between the coating and jarring mechanisms, because the two devices do not unitedly perform their function, and because they are not necessarily combined in one machine, and do not act together to secure the final result. * * * But there is absolutely no union or mutuality of operation, no conjoint or qualifying co-operation of the parts. Each device is individually independent in the sense that each performs its peculiar function without affecting or being affected by the action of the other device." *Chocolate Machinery Co. v. Helmstetter*, 142 Fed. 980, 74 C. C. A. 240.

It is said in *Osgood Co. v. Metropolitan Dredging Co.*, 75 Fed. 670, 21 C. C. A. 491, that:

"It is a commonly accepted rule in the law of patents that the inventive idea is not ordinarily present in the conception of a combination which merely brings together two or more functions, to be availed of independently of each other. The mechanism which accomplishes such a result is ordinarily spoken of as a mere aggregation."

So, in *Richards v. Chase*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991, it is said:

"Unless the combination accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements. Indeed, the multiplicity of elements may go on indefinitely without creating a patentable combination, unless by their collocation a new result was produced."

In *Hailes v. Van Wormer*, 20 Wall. 353, 368, 22 L. Ed. 241, Mr. Justice Strong says:

"It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregation of several results each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition and then allowing each to work out its own effect without the production of something novel, is not invention."

This language is quoted, with approval, by Mr. Justice Matthews in *Pickering v. McCullough*, 104 U. S. 310, 317, 26 L. Ed. 749. Applying the principle to the case then under consideration, he says:

"In Niblo's apparatus, it is perfectly clear that all the elements of the combination are old, and that each operates only in the old way. Beyond the separate and well-known results produced by them severally, no one of them contributes to the combined result any new feature; no one of them adds to the combination anything more than its separate, independent effect; no one of them gives any additional efficiency to the others or changes in any way the mode or result of its action."

To be patentable the combination of all elements or devices must "form, either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. Otherwise it is only a mechanical juxtaposition and not a vital union."

[2] In the light of these, and many other, more or less, analogous decided cases, we concur in the conclusion reached by the court below. As said by the counsel for appellee:

"Neither huller acts on any seed acted on by the other huller, but, on the contrary, acts on different seed. Each huller has its own function and produces its own result; the hulled seed or kernel coming from one machine being separate and distinct from those coming from the other machine and being in no way changed in character or condition by the other machine. The product of each machine is collected separately, and it is clear therefore that there is no new combined result, but a mere addition of separate and independent results."

It would be a strange construction of the patent laws if one could obtain a monopoly by means of a patent in the mere manner of using three or more hullers by changing the position of the knives, and thereby securing the result for which the huller is designed—the separation of the hull from the meat without disintegrating the meat.

We can add nothing of value to the manner in which the learned judge below has stated his conclusion, in which we concur.

The court was also of the opinion that, conceding the patentability of the process claimed to have been discovered by Ball, the evidence did not show any infringement by defendants. He thus describes the manner of defendants' treatment of seed:

"The evidence produced by the plaintiffs shows that the seed was first passed by defendants through a huller with the knives set at a fixed opening or clearance. After passing through this, the unhulled seed was passed through a second huller formed of a pair of discs claimed by the defendants to be in reality a grinder, in which the surfaces of the hulling or grinding discs were kept closer together than the distance between the cutting knives or teeth in the first huller. This was accomplished by the use of a thumb or set screw, which could be operated to reduce or enlarge the clearance between the discs, according as it was set. One of these discs was stationary, and the other revolved. The pulleys driving the shaft of the revolving discs were so aligned that the tendency was to draw the revolving discs up against the stationary one and thus separate the surfaces only by the size of the seed. The second huller, however, did not have the effect of delivering the seed whole or not disintegrated; but, on the contrary, a large proportion of the seed that passed through the second huller, under the process used by the defendants, was badly cut and the meats or kernels of the seed more or less crushed or ground. As a conclusion of fact it would appear that the process followed by the defendant was entirely different from that embraced in the patent and produced very different results than that claimed to be the result to be produced by the patentee's process. The device used by the defendants

was not of passing the seed through successive hullers, with the cutting surfaces set at fixed clearances, but of passing through first one huller and then another, with the cutting surfaces of the last set at a variable clearance, according to the set of the thumb screw or the pressure produced by the pulley alignment at the time. Next, the hulled seed was not delivered substantially without disintegration by the second huller, but, on the contrary, was delivered with a very large percentage of disintegration."

It appears that the purpose or object which Ball had in view in his process, using these hullers with the knives so adjusted that all of the seed were hulled and the meat without disintegration, became available, free from hulls—he was of the opinion that the use of three hullers was, for practical purposes, taking into consideration the graduated size of the seed, sufficient to produce satisfactory results. The meal was, from this view point, to be practically free from hulls. Defendants, on the other hand, conceived that, after passing the seed through one huller, those passing into the second huller should be ground with the hulls and, in that condition, after extraction of the oil, be used as meal. As said by the judge, the purpose or object in view by defendants was not only different but contrary to that of plaintiff. Defendant Lawton explains this very clearly. He says:

"We wanted to do two or three things with that huller. We wanted to cut these seeds which had escaped the first huller. So in order to do that we ran the machine very fine. That is one thing we wanted to do. Then, in addition to that, we wanted to grind up our hulls very fine because we wanted to put these hulls in our meats, because we found that, by admixing a good proportion of the hulls to the meats we can get very much more oil out of the seed. That was another thing we wanted to do. And then, another thing we wanted to do was to put the hulls into our meal, to regulate our ammonia contents. * * * There were several objects in view. One was that we wanted to recover any seed that might escape the first huller. But the most important thing, I would say, in all, was that we wanted to get a lot of fine ground hull into our meats, because we found that we could get very much more oil by doing that. * * * When you put a quantity of ground hulls in with the meats, it makes the meats very much more porous, and you get better results by mixing the hulls with the meat, and the result is that the mills by putting in more meats with the hulls can get two or three tons more for their seed. That was one reason. And then another reason is that we can regulate the ammonia contents of the meal, by putting in more of the hulls, which acts as a filler on the meal, and we can comply better with our state law by putting in a good quantity of hull."

Samples of the results of defendants' method of treatment were in evidence before the district judge. The principle comment made upon the conclusion reached, upon this branch of the case, was that the judge had not reached a correct conclusion of fact. In this we do not concur. It seems to us manifest, from the excerpts from the evidence given and much other of the same character, that the conclusion of the learned judge is correct. To permit a patent for a process, based upon claims so intangible and elusive as the one upon which plaintiffs rely, to be given so comprehensive, inclusive operation as insisted upon here, would not only do violence to the policy upon which our patent laws are based, but unreasonably and unduly restrict industrial liberty. It would be difficult to fix the boundary within which, in the mechanical, manufacturing, domestic, and agricultural activities, people might safely act.

Upon a careful examination of the record and the briefs filed, we are of the opinion that, in both aspects of the case, the learned district judge reached a correct conclusion

The decree is affirmed.

BENJAMIN MENU CARD CO. v. RAND, McNALLY & CO. et al.

(Circuit Court, N. D. Illinois. June 7, 1894.)

No. 22,741.

1. PATENTS (§ 26*)—PATENTABILITY.

A piece of cardboard with printed matter thereon employed as a means in a system of doing business may be patentable; it being no objection that the elements employed are not themselves patentable.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MENU CARD.

The Gellenbeck patent, No. 482,899, for a combination of a menu card and meal checks so arranged that when any check is detached a portion of the remainder is rendered incomplete as a bill of fare, whether or not the device is correctly designated as a combination is sufficiently definite in its description, and, in view of the utility and extended use of the article, must be conceded novelty and invention; also, *held* infringed.

3. PATENTS (§ 26*)—PATENTABILITY—"COMBINATION."

As applied to patent law, when the elements are so united that by their reciprocal influence upon each other, or their joint action on their common object, they perform additional functions and accomplish additional results, the union is a true "combination."

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

For other definitions, see Words and Phrases, vol. 2, p. 1275.

Patentability of combinations of old elements as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

In Equity. Suit by the Benjamin Menu Card Company against Rand, McNally & Co. and others. On final hearing. Decree for complainant.

Francis W. Parker, of Chicago, Ill., for complainant.

Gridley & Hopkins, for defendants.

SEAMAN, District Judge. The complainant has title to the alleged invention of improved meal checks, or a combination of menu card with meal checks, under letters patent No. 482,899, issued to Frank C. Gellenbeck, September 20, 1892, and sues in equity for infringement by defendants, for injunction and accounting. The infringement is undisputed, and all defense rests upon defeat of the patent for invalidity.

The claims of the patent are stated as follows:

"1. The combination, with a menu card, of two or more checks detachably secured thereto, two of said checks being designated respectively as 'guest's check' and as 'cook's check,' so as to make the remainder incomplete as a bill of fare, and hence useless for another guest.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"2. The combination of a menu card having a bill of fare on its face, with a check or checks upon the reverse side thereof, and placed so that when removed the bill of fare will be mutilated, so as to make the remainder incomplete as a bill of fare, and hence useless for another guest."

Utility in the alleged invention is well shown by the testimony, especially in its adaptability to railroad dining car service, to and of which the showing is directed. It appears that prior to this device the checks in use for that service were printed in blocks or books, each sheet or page having three checks, bearing like number and made detachable by perforated lines between each, one designated "cook's check," one "guest's check," and one "waiter's check," or the like. These were so employed that when the passenger made his order from the separate bill of fare one check was delivered by the waiter to the cook as a voucher, and the others became vouchers in the hands of the waiter and conductor or steward, as might be arranged, so that three corresponding checks must be returned to the company for each meal served. The object was to prevent fraud; but when these servants were in collusion the plan did not insure detection, and was found ineffective.

The patentee was a practical dining car servant, acquainted with the need for better check upon fraud, and conceived the device of combining with the checks the bill of fare or menu card, utilizing the three courses of the meal so that each could enter into a triplicate check—thus bringing the passenger or person taking the meal into the combination for avoidance of fraud. With the order for his first course taken by the waiter the cook's voucher would be served, and (as the patent describes it) "the bill of fare will be mutilated so as to make the remainder incomplete as a bill of fare, and hence useless for another guest." This plan now appears of great simplicity. The record shows that it has been extensively adopted, since the issue of the patent, and is a decided improvement.

The validity of the patent is challenged upon several grounds, all of which have been considered, and are well worthy of more attention than the other demands upon my time will permit in this opinion.

[1] 1. The defense urges:

"That it is not a patentable invention within the intent of the patent law, it being only for a piece of cardboard paper, with printed matter or composition on both sides thereof, and divided on one side by perforated lines and employed in a system of doing business."

If there is invention in it, I find no ground for objection that the elements or ingredients here employed are not themselves of patentable nature. The fact that the structure may be of cardboard with printed matter upon it does not exclude the device from patentability according to the practice of the Patent Office, as shown by the numerous patents introduced for the defense of anticipation; and the patentability of devices of like quality has been repeatedly recognized in decisions. *Waring v. Johnson* (C. C.) 6 Fed. 500; *United States System v. American Co.* (C. C.) 51 Fed. 751; *Thomson v. Citizens' National Bank*, 53 Fed. 250, 3 C. C. A. 518; *Carter v. Wollschlaeger* (C. C.) 53 Fed. 573.

The case of *Thomson v. Citizens' National Bank*, *supra*, decided by the Circuit Court of Appeals for the Eighth Circuit, seems to answer this point.

[2] 2. It is asserted that the patent is void because "each of its claims is for the combination of a whole with one or more divisible parts thereof." This objection is that the invention is claimed as a "combination."

[3] In *Robinson on Patents*, § 155, this definition is given:

"When the elements are so united that by their reciprocal influence upon each other, or their joint action on their common object, they perform additional functions and accomplish additional results, the union is a true combination."

Whether this term was aptly given to this union of bill of fare and meal checks, or whether the invention should have been denominated "an article," as suggested by the learned experts for the defense, is not essential in view of what is actually shown. There is no ambiguity in the description of the device or its performance, and there is no room for mistake of the actual claim. The defense urges the rule that a patentee cannot have the claim in his patent enlarged by construction beyond the scope of the claims as allowed. There is here no call to expand the claim, but to give it the benefit of that which is clearly shown. It is entitled to the rule that:

"In construing a patent the court will remember that the specification and claims are often unskillfully drawn and that the claim shall be construed, if possible, to sustain the patentee's right to all that he has invented." Per Putnam, J., in *Reece Buttonhole Machine Co. v. Globe, etc., Co.* (1st C. C. A.) April 20, 1894, 61 Fed. 958, 10 C. C. A. 194.

The infringing device appears precisely patterned after the description given in this patent; its intent was as clear to the infringer as it seems to the court. This technical objection should not prevail against the well-shown intent.

3. It is further contended that the patent in suit is void for want of novelty, or as showing simply a double use. This point is based upon the showing of the prior state of art, and the following prior patents: (1) No. 153,507, to C. H. Waite, for a coupon railway ticket, on the reverse side of which are maps showing the route covered by the ticket, serving as guide maps and to prevent counterfeiting; (2) No. 158,072, to C. W. Harvey, for railway station ticket, perforated and printed upon both sides, to prevent resales; (3) No. 163,732, to L. Brush, for another form of railway ticket to prevent fraud; (4) No. 359,620, to F. McMichael, for a theater ticket in combination with a printed program, for convenience of the taker; (5) No. 191,435, to E. G. Johnson for another form of railroad ticket with perforated lines to enable separation in two corresponding parts; (6) No. 399,842, to J. Culton, for a conductor's railway ticket, with list of stations on reverse side, to be separated into two parts, one for passenger and one for conductor.

The first application for complainant's patent was rejected by the examiner in the Patent Office "on the ordinary coupon railroad or

theater ticket" and citation of some of the above-mentioned patents. The examiner said:

"The railroad tickets in common use all have checks or vouchers attached thereto, and many of them have a series of vouchers or checks, one for each officer of the road to whom such voucher or check should be properly sent. To apply this same scheme or idea to a bill of fare is merely a double use, and does not involve invention; that is to say, a construction of a ticket with a voucher or check attached thereto being old, it is, of course, immaterial whether the matter printed upon the ticket be such as to adapt it to one use or another, and it is also equally immaterial whether the printed matter be on either or both sides of the ticket or check. It is, of course, obvious that the removal of a coupon or check from any ticket mutilates the ticket to a certain extent. It is believed therefore that applicant's claim is fully answered by the state of the art above referred to."

It appears, however, that upon reconsideration the Patent Office rejected this view, for the patent was subsequently allowed after some formal amendments.

The opposing views which controlled the original rejection and the subsequent allowance of the claims in this patent present the serious question for consideration here. It is difficult to mark the distinctions, and the patentable novelty is not entirely free from doubt. Cardboard or paper have long been used for coupon tickets of various kinds, for various uses, perforated upon the desired lines for separation, with printed matter arranged upon opposite sides as required. Printed bills of fare and printed meal checks are old. Nothing new can be claimed in either of these simple elements, but there may be invention in the thought to bring together the bill of fare, with its three courses, and the three required meal checks, so that they shall co-operate for a common object and enlist the passenger (involuntarily) in the work of detection or avoidance of fraud. This device seems simple enough now, but the record shows that, although some such simple means was long sought and with all the light of these various devices of coupon tickets, it had not occurred to any of the seekers to utilize the bill of fare until the thought came to this patentee. It does not appear to have had suggestion from the patents in evidence any more than from the older forms of coupon tickets, out of which would only come the well-known plan of perforated lines for division and printed matter arranged upon the reverse sides.

The use here employed does not seem so clearly analogous to that of the prior devices, nor is the want of invention so apparent that the *prima facie* force of the patent should be destroyed, especially in view of the utility and extended use shown in this record. *Magowan v. N. Y. Belting Co.*, 141 U. S. 332, 12 Sup. Ct. 71, 35 L. Ed. 781; *Barbed Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558; *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, 13 Sup. Ct. 850, 37 L. Ed. 707.

I think this is a case in which doubt should be resolved in favor of the patentee, and decree will be entered for the complainant accordingly.

ANGLE v. BANKERS' SURETY CO.

(District Court, N. D. New York. November 17, 1913.)

1. INDEMNITY (§ 12*) — DISCHARGE OF INDEMNITOR OF SURETY — RELEASE OF SURETY.

A contractor for the doing of certain work on the New York State Barge Canal sublet a portion of the work taking a bond for its performance by the subcontractor signed by a surety company. The subcontractor again sublet to a construction company taking a bond from it signed by the same surety company. Bankrupt, who was an officer and stockholder of the construction company, executed a bond to the surety company to indemnify it against loss on the latter bond and later secured the same with other obligations by a mortgage on his own property. Later, by an agreement between them to which bankrupt was not a party, the first subcontractor released the surety company from liability on the bond given him by the construction company. *Held*, that the effect was to discharge bankrupt from liability on the indemnity bond and also to discharge the mortgage in so far as it secured such liability.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 26, 27; Dec. Dig. § 12.*]

2. BANKRUPTCY (§ 178*) — PREFERENCE — MORTGAGE TO SECURE ADVANCES TO CORPORATION.

Bankrupt, who was an officer and stockholder of a construction company engaged in the performance of contracts which it did not have sufficient money to complete, within four months prior to his bankruptcy executed a mortgage to a surety company which was surety on the bonds given for performance of the contracts to secure money to be advanced by the surety company as needed to carry on the work, and the money was so advanced and used. Bankrupt was also indorser on the paper of the construction company, had indemnified the surety company against loss on account of its suretyship, and was vitally interested in the completion of the contracts. *Held*, that the mortgage was not a fraud on creditors nor a preference, but was based on a present consideration and was valid and enforceable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5498, 5499; vol. 8, p. 7759.]

In Equity. Suit by Edwin C. Angle, as trustee in bankruptcy of Edward F. Garling, against the Bankers' Surety Company. Decree for complainant for partial relief.

Suit in equity to set aside a mortgage on real estate executed and delivered by Edward F. Garling and wife to the Bankers' Surety Company on the 2d day of August, 1910, and recorded October 12, 1910, and given to secure the payment of the sum of \$13,000 to be advanced by the Bankers' Surety Company to the Mohawk Engineering & Construction Company and also to indemnify the said Bankers' Surety Company against loss by reason of its being surety on two bonds of said corporation conditional for the completion and performance of two contracts for construction work.

Daniel Naylor, Jr., and John D. Miller, both of Schenectady, N. Y., for complainant.

Joseph A. Murphy, of Albany, N. Y., for defendant.

RAY, District Judge. The mortgage sought to be set aside is dated August 2, 1910, and is executed by Edward F. Garling and Ella E.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 210 F.—19

Garling, his wife, and also by the Bankers' Surety Company in the form of an agreement. It recites: (1) The letting to the American Pipe & Construction Company contracts No. 20-C and No. 20-D for the building and construction of sections 2 and 3 of the New York State Barge Canal. (2) The assignment and subletting of certain of such work to Harry J. Warner of Albany, N. Y. (3) The assignment and subletting by said Warner of the work to be done by him to the Mohawk Engineering & Construction Company. (4) That said Mohawk Company (so called for brevity) was to give a bond to be executed by a surety company for the faithful performance of the work to be done by it in conformity to the said contracts, No. 20-C and No. 20-D. (5) That the said Mohawk Company did give a bond with the Bankers' Surety Company, this defendant, as surety. Also: (6) That in April, 1910, the trustees of the Village of Matteawan, N. Y., let to the said Mohawk Company a contract for certain grading and paving in said village. (7) That said Mohawk Company was to give a bond to said village for the faithful performance of its contract. (8) That it did give such a bond with said Bankers' Surety Company as surety thereon. Also: (9) That said Bankers' Surety Company, as a condition of executing such bonds, required the said Mohawk Company to give it a bond of indemnity. (10) That Edward F. Garling (the mortgagor) became such indemnitor for said Mohawk Company. (11) That the Mohawk Company is temporarily in need of money for prosecuting the work of both of said contracts. (12) That the Bankers' Surety Company is willing to furnish such money to said Mohawk Company in a sum not exceeding \$13,000, to be used in the prosecution of such work and the performance of such contracts. Such mortgage then states that Garling and wife, parties of the first part, in consideration of one dollar "and the sum of \$13,000, which said sum is to be held for the use and benefit of the Mohawk Engineering & Construction Company and to be paid by the party of the second part to the said Mohawk Engineering & Construction Company upon weekly estimates of the work done upon the two contracts hereinbefore referred to, the said weekly estimates to be made and furnished by one John J. Ryan of Albany, N. Y., do hereby grant and convey unto the said party of the second part (said Bankers' Surety Company) its successors and assigns," all, etc. (Here follows a description of the mortgaged property.)

Then came the following conditions and agreements:

"And the said party of the second part in consideration of the conveyance and conveying of the above described property to it does hereby agree to furnish and provide for the use and benefit of the Mohawk Engineering & Construction Company the sum of thirteen thousand dollars (\$13,000.00) to be used in the performance of the work of the said two contracts hereinbefore referred to the said sum to be paid by the said party of the second part to the Mohawk Engineering & Construction Company upon weekly estimates of the work done upon the two said contracts and the said weekly estimates to be made and furnished by one John J. Ryan of Albany, N. Y.

"It is hereby mutually agreed and understood that the party of the first part after the expiration of ninety days from the completion of the two contracts hereinbefore referred to shall be entitled to and shall have a reconveyance of the property hereinbefore described and conveyed from the party of the second part, its successors and assigns upon his showing to the satisfac-

tion of the said party of the second part, its successors and assigns that the said contracts have in all things been fully, properly and faithfully performed and completed and upon the said party of the first part paying to the said party of the second part, its successors or assigns the sum of thirteen thousand dollars (\$13,000.00) with interest thereon at the rate of 6 per cent. per annum, and upon his likewise paying to the party of the second part such costs and expenses as it may have incurred in inspections made of and upon the work of said contracts and attorneys' fees in the matter of this agreement and its preparation.

"It is further mutually expressly understood and agreed that should a loss be sustained in the performance of the work of either or both of said contracts which the said party of the second part might as a surety on the bond of the Mohawk Engineering & Construction Company be liable to pay that then and in that event the said party of the first part shall not be entitled to a reconveyance of the property hereinbefore described and conveyed until said loss shall have been adjusted, satisfied and fully paid and further that said party of the first part shall not be entitled to a re-conveyance of the said property hereinbefore described and conveyed until any liability that the party of the second part may have incurred as a surety on the bond of the Mohawk Engineering & Construction Company shall have been adjusted, settled and fully paid to the amount of the value of the property hereinbefore described and conveyed and that said property is not only liable, responsible and answerable to the party of the second part for the sum of thirteen thousand dollars (\$13,000.00) and interest and costs and expenses hereinbefore mentioned but likewise for any loss, liability, damage or expenses that the said party of the second part may sustain or incur as a surety on the bonds of the said Mohawk Engineering & Construction Company.

"It is further expressly mutually agreed and understood that the liability of the said Edward F. Garling, the party of the first part hereto is not by the execution of this agreement in any way limited, modified or changed as an indemnitor on the bonds of the Mohawk Engineering & Construction Company upon which said bonds the party of the second part hereto is a surety."

It appears on the face of this instrument, assuming the recitals to be correct, that Garling, the mortgagor, had already assumed a liability, contingent, of course, as indemnitor for the said Mohawk Company, which company was to perform the contracts referred to, and that he, in and by said mortgage, pledged the mortgaged property to the Bankers' Surety Company as security for the repayment of the sum of \$13,000 to be thereafter advanced by said surety company to or for the Mohawk Company, and which money was to be used in the prosecution of such work; that is, the work called for by the contracts.

April 12, 1910, H. W. Sylvester and Edward F. Garling had signed a bond to the Bankers' Surety Company in the sum of \$15,000, reciting that:

"Whereas the said Bankers' Surety Company has become or is about to become surety at the request of the said Mohawk Engineering & Construction Company on a certain bond in the sum of \$15,000, wherein Mohawk Engineering & Construction Company is principal, conditioned for the construction of the paving of the main street of the village of Matteawan, now the condition" etc.—which was that Sylvester and Garling would save harmless said Bankers' Surety Company by reason of its becoming surety for the Mohawk Company.

On this bond was written and signed by Garling the following:

"I am worth in personal and real estate clear of debt above the sum of fifteen thousand dollars.
Edward F. Garling."

May 23, 1910, said Sylvester and Edward F. Garling had signed a like bond in the sum of \$15,000 to said surety company to save it harmless, etc., for having signed the bond of the Mohawk Company for the construction of certain Barge Canal work, recited as "the construction of Barge Canal contract supplementary to contract No. 20-C and No. 20-D."

May 16, 1910, the Mohawk Company with the Bankers' Surety Company gave a bond to Harry J. Warner in the sum of \$13,000 to perform the work, etc., on the Barge Canal, contracts No. 20-C and No. 20-D, in accordance with the terms of the contract between the Mohawk Company and Harry J. Warner.

October 18, 1910, Warner released and canceled this bond as follows:

"I, the undersigned, hereby release, cancel and surrender this bond to the Bankers' Surety Company in consideration of an agreement executed concurrently herewith by and between the Bankers' Surety Co. and myself.

"Dated Albany, N. Y., Oct. 18, 1910.

Harry J. Warner."

The agreement referred to reads as follows:

"This agreement, made between the Bankers' Surety Company of Cleveland, Ohio, party of the first part, and Harry J. Warner of Albany, N. Y., party of the second part, Witnesseth that:

"Whereas, the first party did heretofore issue a bond in the penalty of thirteen thousand dollars (\$13,000.00), to the second party, conditioned for faithful performance of a contract entered into between the said second party and the Mohawk Engineering & Construction Company; and

"Whereas, the said Mohawk Engineering & Construction Company has defaulted in the performance of the terms of said contract and abandoned same; and

"Whereas, the said first party did issue a bond in the penal sum of twenty thousand dollars (\$20,000.00), to the American Pipe & Construction Company, for the faithful performance of the work set forth and covered by a contract between the said second party and the said American Pipe & Construction Company, which latter contract is dated the 7th day of May, 1910, and the second party is totally unable to carry out the terms of said contract so entered into by him, with said American Pipe & Construction Company, and desires to be relieved of any liability on the bond so given, and of all liability of every kind and nature arising or growing out of the execution by him, of either or both said bonds, to the first party.

"Now witnesseth: That the said second party hereby surrenders to the first party, said bond in the sum of thirteen thousand dollars (\$13,000.00), issued to him by the Bankers' Surety Company, for cancellation and surrender waiving any and all rights which said second party secured thereunder, by reason of default of the said Mohawk Engineering & Construction Company; and the first party in consideration thereof, hereby agrees to release and discharge, and hold harmless the second party as principal or otherwise, of and from all liability arising or that may hereafter arise, under and by virtue, of a bond in the sum of twenty thousand dollars (\$20,000.00), executed by the second party as principal to the American Pipe & Construction Company, on or about May 23, 1910.

"In witness whereof, the parties have hereunto set their hands and seals, this 18th day of October, one thousand nine hundred and ten.

"The Bankers' Surety Company, by

"Harry B. Sprague, Assistant Secretary. [L. S.]

"Harry J. Warner. [L. S.]"

May 23, 1910, the Mohawk Company, by said Sylvester, its president and said Garling, its treasurer, applied to the Bankers' Surety

Company for a bond in the sum of \$13,000 to be given to Harry J. Warner for the "construction of creek entrances," etc. May 25, 1910, Harry J. Warner applied to the said surety company for a bond in the sum of \$20,000 to be given to the American Pipe & Construction Company for "employment contract connected with the construction of Barge Canal, contract No. 20-C and No. 20-D." At same time the Mohawk Company applied to the Bankers' Surety Company for a bond in the sum of \$15,000 to the village of Matteawan for paving. November 29, 1910, said Edward F. Garling was duly adjudicated a bankrupt on a petition filed that day, and Edwin C. Angle was duly appointed trustee of his estate and duly qualified as such.

August 5, 1910, it was resolved by the board of directors of said Mohawk Company that John J. Ryan of Albany, N. Y., be appointed attorney in fact for said company for the purpose of collecting and receiving the said \$13,000 to be advanced by said Bankers' Surety Company under said mortgage agreement and applying said money in and towards the prosecution and carrying on of said paving work in Matteawan and in building and constructing the work of part of sections 2 and 3 of the said Barge Canal, and also for the purpose of receiving for and on behalf of the Mohawk Company all money due or to grow due upon either or both of said contracts for work done in execution of the Matteawan contract or in execution of contracts on sections 20-C and 20-D of the Barge Canal. Sylvester, as president of the Mohawk Company, was authorized and directed to execute the power of attorney.

The Bankers' Surety Company by check paid to said John J. Ryan, attorney in fact, as follows:

August 4, 1910.....	\$ 3,000 00
August 12, 1910.....	4,000 00
August 31, 1910.....	2,000 00
September 7, 1910.....	2,500 00
September 16, 1910.....	1,500 00
Total	\$13,000 00

John J. Ryan, attorney in fact, paid to Sylvester, president, by check as follows:

August 6, 1910.....	\$2,500 00
August 6, 1910.....	500 00
September 17, 1910.....	1,200 00
September 17, 1910 (to Sylvester personally).....	50 00

And to E. F. Garling treasurer by check as follows:

August 26, 1910.....	\$3,167 19
August 26, 1910.....	600 00
August 26, 1910.....	252 26
September 10, 1910.....	3,077 12
September 10, 1910.....	75 00

And also as follows:

August 13, 1910, H. W. Jackson.....	\$2,761 36
August 13, 1910, H. W. Jackson.....	200 00
August 13, 1910, Wm. S. Ver Planck.....	145 00
August 13, 1910, D. P. Bruk Co.....	7 20

August 13, 1910, H. L. Bond Co.....	\$ 694 85
August 13, 1910, O. A. Kappel Co.....	250 00
August 20, 1910, L. J. Dooley.....	500 00
August 23, 1910, Rose & Kiernan.....	1,024 28
August 23, 1910, P. V. Baird.....	50 00
August 24, 1910, D. S. Gardenier.....	109 62
August 29, 1910, D. S. Gardenier.....	50 00
September 1, 1910, L. Hardware Co.....	104 49
September 2, 1910, Rose & Kiernan.....	252 26
September 3, 1910, Rose & Kiernan.....	3 90
September 3, 1910, D. S. Gardenier.....	109 07
September 3, 1910, D. S. Gardenier.....	50 00
September 6, 1910, D. S. Gardenier.....	121 36
September 6, 1910, P. P. Lent.....	200 00
September 7, 1910, H. D. Schutt.....	50 00
September 13, 1910, E. O. Brien.....	337 40
September 13, 1910, Rose & Kiernan.....	25 00
September 19, 1910, P. V. Baird.....	35 00
October 5, 1910, Rose & Kiernan.....	1 35
October 5, 1910, Rose & Kiernan.....	76 00
October 9, 1910, Cash.....	10 00
October 12, 1910, P. B. Paul.....	2,043 00
October 11, 1910, P. B. Paul.....	457 00
October 17, 1910, Mrs. J. W. Whalen.....	21 50
October 17, 1910, Sewell & Alden.....	20 00

November 10, 1910, an involuntary petition in bankruptcy was filed against said Mohawk Engineering & Construction Company, and January 28, 1911, it was duly adjudicated a bankrupt accordingly. August 2, 1910, Garling was not only a stockholder in the Mohawk Company, but its treasurer, as stated.

At the time the mortgage was given it appears that the Mohawk Company had proceeded with the work on the Matteawan contract and on the Barge Canal contract (known as the Tribes Hill Job) so long as their money lasted, and that they then went to the bonding company and made arrangements for a loan. Garling says:

"Q. What was done to make arrangements for the loan? A. We arrived at the amount of \$13,000 by my giving a bond and mortgage. Q. And that is the mortgage that has been introduced in evidence here dated August 2, 1910? A. Yes."

At that time Garling had the following property: State street property; Center street property; Helderberg avenue property; 3 life insurance policies; 5 Mohawk Brewing Company bonds; 25 shares of stock in the brewing company; 30 shares of stock in this Mohawk Company; also in cash \$3,400.

He was then owing:

Mohawk National Bank.....	\$11,000 00
Schenectady Trust Company.....	7,500 00
Wagon Watson Company.....	1,900 00
Herald Bond Company.....	300 00
Other creditors about.....	1,800 00

At that time there was no market for the stock of the Mohawk Company or the bonds of the Mohawk Brewing Company. The Mohawk Company was then engaged in doing the work on three contracts; Matteawan commenced in May, 1910; the Barge Canal (Tribes Hill); and a paving contract at St. Johnsville. It was then a going concern.

Garling puts the value of his Center street property at \$50,000.

June 2, 1910, Mr. Garling made a statement of his assets and liabilities to the Bankers' Surety Company in which he placed the value of his real estate at \$82,000, subject to a mortgage of \$3,000; that of his stocks and bonds at \$7,500; with cash in bank about \$6,000. He says he based real estate values on rents received, not market values.

The claims proved against Garling in the bankruptcy proceedings are \$22,239.41. The claims proved against the Mohawk Company are \$26,833.28.

The money received by Ryan and paid as attorney in fact over and above the \$13,000 came from the Matteawan contract; nothing from the Tribes Hill contract. One P. B. Paul, employed by the Bankers' Surety Company, completed the Matteawan contract, and on this there was a small profit. After putting in a cofferdam on the Tribes Hill contract at an expense of some \$75,000, it was washed out, and that contract was abandoned.

The plaintiff has given proof showing that August 2, 1910, the property of Garling was actually worth \$32,150, and that his liabilities aside from his contingent liabilities by reason of having become indemnitor for the Mohawk Company were \$17,382. Adding the contingent liabilities on the Matteawan contract \$15,000, which never became fixed, and that on the Barge Canal contracts \$15,000, and his total liabilities were \$47,382. The mortgaged property was worth \$23,250, at least leaving other property of the value of \$7,900, or about.

In short, on the 2d day of August, 1910, Garling in order to secure a loan to the Mohawk Engineering & Construction Company of which he was treasurer and in which he was a stockholder and for which he had become indemnitor, to enable it to prosecute the work on the contracts which it had undertaken to do, mortgaged certain of his real estate to secure such loan to the Bankers' Surety Company, which, of course, knew of Garling's liability to it as indemnitor for the bonds it had given for the faithful and complete performance of the work. This was within four months of Garling's bankruptcy. But Garling and the Bankers' Surety Company went further than this, for the mortgage secured, so far as it would go, the Bankers' Surety Company against its liability and possible loss by reason of having become surety on the bonds mentioned, and hence incidentally Garling gave the mortgage as security for his own liability as indemnitor to the Bankers' Surety Company. That is, by making the loan of \$13,000 to the Mohawk Company, and obtaining the agreement by which the money was to be devoted to the work for the performance of which the surety company had given its bond, it secured the performance of so much of the work, obtained security for the repayment of the money thus lessening its own liability, and at the same time obtained security by way of mortgage from Garling for his liability as indemnitor. This was the effect of the transaction. If the transaction was intended as a fraud on the other creditors of Garling within the meaning of the law, it could be set aside; but it was based on a valid consideration, and I do not see that it was intended by any one to cheat or defraud any one. Was the transaction a preference in the eye of the bankruptcy act? The Bankers' Surety Company knew that the work to be done under

the contracts which the Mohawk Company was to perform had come substantially to a standstill and that it must have financial aid or it would become bankrupt. I think it knew the Mohawk Company was in fact then, as matters stood, insolvent. This, of course, involved Garling to some extent. Of this there can be no reasonable doubt. I cannot find under the evidence that the Bankers' Surety Company had reasonable cause to believe that the giving and enforcement of this mortgage as security for the loan would operate as or effect a preference so far as the creditors of Garling were concerned.

[1] The money borrowed and advanced was furnished to enable the Mohawk Company to go on with its work under these contracts and secure the profits, if any, that would accrue from their full and complete performance, not to pay old or antecedent debts of Garling or of the Mohawk Company. It seems that all believed there was money in the contracts. But when we come to the giving by Garling of the mortgage to the Bankers' Surety Company to secure it for the full, proper, and faithful performance and completion of such contracts by the Mohawk Company, and thus relieve the surety company from its loss in case it should be compelled to pay the obligee or obligees in the bonds given for the faithful performance of the work, and thus secure the bonds given by Garling to the surety company, we have a different proposition. It was security to the Bankers' Surety Company for any loss it might sustain, or any sum it might be compelled to pay, by reason of its having signed the bonds of the Mohawk Company and indirectly security to it for Garling's bonds. Garling had indemnified the Bankers' Surety Company by his bond and had incurred a liability to it. It is self-evident that the surety company was seeking security and that Garling was induced to give it. The mortgage created a lien on Garling's real estate for the benefit of the surety company, to secure it for its existing liability on its bonds and the existing liability of Garling to the surety company on his bond. It was security for an antecedent liability. It is evident that Garling was actually insolvent on the 2d day of August counting against him his liability on his bond to the surety company. He was then indorser on the notes of the Mohawk Company in the sum of \$10,182 in addition to his other obligations and liabilities. The trustee urges that as to the \$13,000 bond executed by the Mohawk Company to Warner to secure the performance of the Canal contract work with the Bankers' Surety Company as surety, and as to which Garling became the indemnitor of the Bankers' Surety Company, the same was released and canceled by the obligee Warner October 18, 1910, and that as Warner, to whom and for whose benefit it was given, released the surety on such bond, he also released the indemnitor of the surety company, Garling; that if the Bankers' Surety Company was not liable thereon after October 18, 1910, its indemnitor, Garling, could not be; and that, so far as the Barge Canal work was concerned (Tribes Hill contract), Garling personally had incurred no personal liability or obligation other than by executing such indemnity bond to the surety company; and that therefore the mortgage in no event can be continued or held as a security for any default or resulting damage growing out of the nonperformance of such Barge Canal contract. The mortgage expressly re-

cites the liability of Garling as indemnitor to the surety company on this bond given by the Mohawk Company to Warner. That liability, so far as the Barge contract was concerned, was created and fixed by that indemnity bond. As to that part of the consideration for the mortgage the liability of Garling would end if the Barge Canal work was fully performed, or if the consideration wholly failed, or if the bond executed by the surety company was canceled or ended, for in such case the contract of indemnity would fall with it. Garling indemnified the Bankers' Surety Company for executing the bond and secured it for its liability by reason of executing such bond. If then the Bankers' Surety Company never became liable on the bond and cannot become liable thereon, how can Garling be or become liable on his indemnity bond? But it is said there was a substitute for the bond of \$13,000 executed by the Mohawk Company with the Bankers' Surety Company as surety and to which the indemnity bond of Garling applied, and that therefore Garling's liability continues; he having executed the mortgage prior to the release of the bond. Garling was not a party to the agreement of October, 1910, pursuant to which that \$13,000 bond was released and canceled, and did not assent to it. When he executed the mortgage, he was not securing his own personal debts, but the obligations of others.

The agreement of October 18th, between the Bankers' Surety Company and Warner, expressly recites that the Mohawk Company has defaulted in the performance of the contract (Barge Canal contract) and abandoned same. It also expressly recites the bond of \$20,000 given by Warner to the American Pipe & Construction Company with the Bankers' Surety Company as surety for the performance of this Barge Canal work, and that Warner is totally unable to perform his contract and desires to be relieved of liability on the bond given to the American Company and of all liability of every kind and nature arising or growing out of the execution by him of either or both of said bonds to the Bankers' Surety Company. Hence Warner, protected by the \$13,000 bond, surrenders and cancels it and waives all rights which he secured thereunder and the surety company in consideration of being released on such \$13,000 bond releases and discharges Warner from his liability on such \$20,000 bond. Here is a new contract and agreement with new obligations and liabilities on the part of the surety company, and I do not see that it can be held to operate to continue the liability of Garling to make good the Bankers' Surety Company in case it as surety for the Mohawk Company was compelled to pay anything by reason of the default of the Mohawk Company to perform the contract. On default by the Mohawk Company, Warner voluntarily surrendered and canceled the bond, and as a consideration agreed with the surety company, waiving all rights which Warner had thereunder by reason of the default of the Mohawk Company, that it would save him harmless on the \$20,000 bond, a liability to the American Pipe & Construction Company. As the Matteawan contract paid out in full, the mortgage secures nothing on that, and, if Garling's liability on the \$13,000 bond was released, the mortgage can only stand, in any event, as security for the \$13,000 money advanced.

When A. gives a bond to B. with surety for the doing of a partic-

ular thing, and C. indemnifies the surety for becoming such, and A. makes default, and thereupon B. releases the surety and cancels the bond, does he thereby release such indemnitor on his bond? It cannot be doubted that such is the effect. It may be that if there is default, and damage results, and the surety pays a fair sum agreed upon, the indemnitor will be liable for that sum. *City of New York v. Baird*, 176 N. Y. 269, 68 N. E. 364; *Bank of Buffalo v. Schwartz et al.*, 53 App. Div. 517, 65 N. Y. Supp. 981. But the obligation of the indemnitor cannot be transferred without his consent to the performance of some other and different contract not contemplated by it and to which he does not assent. The American Company took the contract and agreed to do the work therein mentioned. It sublet to Warner, who agreed to do the work. Warner with the Bankers' Surety Company as surety gave bond to the American Company to perform the contract. Then Warner sublet to the Mohawk Company, which agreed to do the work, and it gave bond to Warner with the Bankers' Surety Company as surety that it would. Garling in effect agreed that, if the Mohawk Company did not do the work, and Warner paid any damage or suffered any loss, and the surety company had to pay, he would reimburse it. Garling never agreed that if Warner did not do the work, and the American Company paid any damage or suffered any loss, and the surety company was compelled to pay, he would reimburse it. The mortgage recites no such obligation or liability and was not given to secure any such liability. The work to be done may have been the same, but the party who was to do it was entirely different, and the obligations of the two contracts were different.

I therefore hold, so far as the Matteawan contract is concerned, that there is and can be no liability under the mortgage, and, so far as the Barge Canal contract (Tribes Hill) is concerned, that there is not and cannot be any liability under the mortgage. The mortgage was given August 2, 1910, and the bond was surrendered and the surety released October 18, 1910. That mortgage was not a substitute for the bond of the surety company, nor a security in addition to that afforded by that bond, so far as the Barge Canal work is concerned. It was, and was intended to be, security for the obligation and liability of Garling as indemnitor to the surety company. If not so, so far as the Barge Canal work is concerned, it was and is without consideration and, as against the trustee, void. When Warner, the obligee in the bond, released the surety on that bond, he at the same time and thereby released the indemnitor of the surety company. *Montgomery v. Sayre*, 100 Cal. 182, 34 Pac. 646, 38 Am. St. Rep. 271; *O'Mara v. Nugent*, 37 N. J. Eq. 326; *Dibble v. Richardson*, 171 N. Y. 131;¹ *Wronkow v. Oakley et al.*, 133 N. Y. 505, 511, 31 N. E. 521, 16 L. R. A. 209, 28 Am. St. Rep. 661. In *Montgomery v. Sayre*, supra, it is held that the release of an indorser on a note releases the surety on a collateral note. In *O'Mara v. Nugent*, supra, it is held that one who pledges property of his own as security for the debt of another is entitled to a retransfer of the property after a release of the debtor by the creditor. In *Wronkow v. Oakley*, supra, Peckham, J., said:

"Upon the affirmance of the judgment by the latter court, the sureties on the last appeal bond took an assignment of the judgments, and in their hands

¹ 63 N. E. 829.

there was no longer any liability on the part of the sureties on the first appeal. Such sureties (first appeal) became, on the giving of the second undertaking to pay the judgments, sureties for the second sureties, and, when the second sureties paid or discharged their obligation to the owner of such judgments and took an assignment of them, they could not enforce them against the first sureties."

That is, the release of the surety releases the surety of such surety.

[2] Here Warner was secured by the Bankers' Surety Company, which in turn was secured by its surety, Garling, who gave the mortgage (so far as Barge Canal work is concerned) to secure his obligation. When Warner released his surety and that surety accepted the release, the surety of such surety was also released, and, of course, there was no longer any liability on the mortgage as security for the performance of that contract. This brings us back to the consideration of the question of the validity of the mortgage as security for the payment of the \$13,000 advanced by the Bankers' Surety Company to carry on and complete the work done under the contracts. True the money was not advanced to Garling for his personal use and benefit in his own personal business, but it was advanced at his request and to carry on work in which he was vitally interested. The Mohawk Company owed him, as he was an indorser on its paper, and he had stock in the company. He had indemnified the surety of that company obligated to make good the performance of the contract where money was to be made or lost by the Mohawk Company by its performance or nonperformance. Garling's estate was involved. His solvency was in peril. It is doubtless true that the Bankers' Surety Company knew all this. Doubtless it knew that there might be nonperformance of the contract and a liability which the Mohawk Company could not meet, and which Garling would be compelled to pay, and which might exhaust the entire estate of Garling and leave him insolvent. These were possibilities. Work was at a standstill. The Mohawk Company was out of funds. Notice had been given that the work must proceed, etc.

Section 60a of the Bankruptcy Act provides:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

And section 60b provides:

"If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of the transfer, * * * the bankrupt be insolvent and the judgment and transfer then, operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." Act July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1506).

If this \$13,000 had been advanced for the purpose of reducing a fixed obligation or indebtedness of the Mohawk Company which the surety company was obligated to make good and which Garling as indemnitor was obligated to make good, we would have a case where

the debt or obligation of Garling to the surety company was reduced by the \$13,000 advanced, and its obligation to pay the debt of the Mohawk Company was reduced, and where Garling was securing such payment and preferring his creditor the surety company to the detriment of his other creditors. But that is not the case. This was a struggle on the part of Garling to have a contract performed in which his estate was indirectly involved. It was borrowing money for the Mohawk Company to be used by it or for it and the giving of security for such cash advanced and the advance of which benefited or was intended and supposed to increase and benefit Garling's estate. Here was a present cash consideration to the extent of \$13,000 for this mortgage. It was not an old debt. The money was put into work in which Garling was financially interested and not to rescue him from present but to save him from possible future insolvency. The obtaining of this money under such circumstances and the giving of this mortgage to secure its repayment was not a fraud on creditors or a preference.

But it is urged that this \$13,000 so advanced has been repaid to the Bankers' Surety Company. When this money was advanced, it was to be used in prosecuting the work on the Matteawan contract and the Barge Canal (Tribes Hill) contract. The evidence clearly shows that it was put into work on both contracts. Some \$2,500 of it with the consent of Garling was used in the prosecution of another contract being performed by this Mohawk Company. As already stated, there was a flood and a washout on this Barge Canal work and it was abandoned. The money put into it—stated to be something like \$75,000—was a dead loss. But the Matteawan contract was completed by and under the direction of P. B. Paul, employed by the Bankers' Surety Company, and all the money put into it came back by way of compensation for the work done.

The power of attorney to Ryan authorized him to collect and receive: (1) The \$13,000 from the Bankers' Surety Company. (2) To apply same in and towards the prosecution and carrying on of the paving contract with the village of Matteawan and the work of building and constructing a part of sections 2 and 3 of the Barge Canal. (3) And further to receive for and on behalf of the Mohawk Company all moneys due or to grow due upon either or both of said contracts by reason of any work done upon the said contracts.

Nothing was said as to the disposition to be made of these moneys due or to grow due on such contracts when collected by Ryan. When collected it became the money of the Mohawk Company. Ryan was its attorney in fact and testifies that all the \$13,000, and all of the money received by him on the Matteawan contract was used on the Barge Canal contract and the Matteawan contract in payment of the debts of the Mohawk Company. That he mingled the \$13,000 and money received from the Matteawan job and paid them out on the jobs. It must be presumed, in the absence of evidence to the contrary, that the agent paid and disbursed the money as he was authorized to do by the Mohawk Company. I do not find that he was ever authorized or directed to pay anything on the \$13,000 secured by the mortgage, or that he ever did. I cannot find evidence to sustain the contention that

Ryan was agent for the defendant, so that payments to him of money coming in on the Matteawan contract were payments to the defendant and reduced the mortgage. It is true that at least \$10,465.21 was received on the Matteawan contract more than was necessary to complete it, and more than was used to complete it, and this sum was used on the Barge Canal contracts; but it was the Mohawk Company that controlled and so applied this money. Neither can I find evidence to support any finding or conclusion that Paul, who was sent to complete the contracts, received more than \$1,598.67 which is applicable to the reduction of the \$13,000 secured by the mortgage. The counsel for the plaintiff neither points out nor indicates any figures to this effect. There was no sufficient accounting on the trial to demonstrate any greater sum was received by him. But after completing the Matteawan contract he did have that sum, and it was applicable to the mortgage debt. The defendant by its agent received it.

The assertion is made that as to the \$13,000 advanced it was fully paid, but how and when I am not informed, unless it be on the assumption that all money received by Ryan on the Matteawan job and not put into it should have been applied to the mortgage and not used on the Canal job. But Ryan was agent of the Mohawk Company for receiving the money and, so far as appears, for paying it out, and it does not appear that he violated any duty or instructions in carrying on the work on both contracts so long as he did and so long as he had money belonging to the Mohawk Company.

I am therefore forced to the conclusion that this mortgage is a good and valid security for the sum of \$13,000 and interest on same from the dates the various sums making it up were advanced, less \$1,598.67, and for no other or greater sum or liability. This is an equity action, and it seems to me that with the parties before the court a final judgment or decree can be pronounced as to the rights of the parties under this mortgage. I think the trustee can sell this mortgaged property free and clear of the mortgage lien if he can sell it for more than the sum due thereon, and, if it brings more than the \$13,000 and interest less the said \$1,598.67, he will pay the defendant the amount found due it and retain the balance. This can be done under the direction of the referee approved by the court. Or on payment to the surety company, the defendant, of the sum of \$13,000 and interest less the sum named, the trustee will be entitled to a cancellation and satisfaction of the mortgage.

There will be a decree that the sum now secured by the mortgage is \$13,000 and interest as stated, and that it is a good and valid security for that sum less \$1,598.67 and no more, and, to that extent and no more, a lien on the real estate described therein; that on payment of such sum of \$13,000 and interest thereon less \$1,598.67 to the Bankers' Surety Company the trustee will be entitled to a satisfaction or cancellation of such mortgage which the defendant will be directed to execute and deliver. In the meantime the defendant will be enjoined and restrained from foreclosing the mortgage.

WHITRIDGE et al. v. MT. VERNON WOODBERRY COTTON DUCK CO.
et al.

(District Court, D. Maryland. December 20, 1913.)

1. CORPORATIONS (§ 473*)—BONDS—INTEREST PAYABLE FROM INCOME—RIGHT TO MAKE RESERVATION FOR DEPRECIATION OF PROPERTY.

A manufacturing corporation issued first mortgage bonds and also cumulative income bonds secured by a second mortgage on all its property. The latter bonds stated that they did not "bear interest unconditionally but only out of the income of the company, if sufficient, realized and remaining after the payment of all taxes, rentals, operating or current expenses and losses, necessary repairs, maintenance," and the interest on the first mortgage bonds. The mortgage expressly included in the items so specified "charges for depreciation by age or wear." The interest was payable semiannually and was cumulative. *Held*, that such provision of the bonds must also be construed to authorize the company to maintain its capital unimpaired, and to that end to reserve from its gross income during each semiannual period in addition to the expenditures enumerated a sufficient sum to make good losses from depreciation of its property before setting apart the portion applicable to the payment of interest on the bonds.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842-1853, 1855; Dec. Dig. § 473.*]

2. CONTRACTS (§ 116*) — PUBLIC POLICY — CONTROLLING STOCKHOLDER OF ANOTHER CORPORATION.

A corporation, which owned a controlling interest in the stock of another corporation operating a number of manufacturing plants, entered into a contract with a third corporation of which it owned all the stock, by which it made the latter exclusive selling agent for 10 years, at a stated commission for all its products of the "several mills owned or controlled" by it. The manufacturing company was not a party to the contract, but its products were sold through such agency for a number of years, and it was charged the contract commissions therefor. *Held*, that so far as it undertook to bind such company the contract was contrary to public policy and void, and that bondholders of the company who were dependent on its income for payment of interest on their bonds were entitled to an accounting from the stockholding corporation, as trustee, for any profits made by it through the sale thereunder of the company's products.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

3. CORPORATIONS (§ 473*)—BONDS—INTEREST PAYABLE FROM INCOME—SUIT TO DETERMINE RIGHTS OF HOLDERS.

Complainants were owners of bonds of one of the defendant corporations the interest on which was payable from income only, and they had received but a small part of the interest due for a number of years. The other defendant corporation was owner of about 96 per cent. of the stock of the first and practically controlled its operations and also owned about the same per cent. of the same issue of bonds. Complainants alleged that certain items of expenditures, not large in number, which should have been charged to the second defendant or its predecessor whose liabilities it assumed, had been improperly charged against the earnings of the first corporation, reducing the amount of income which should have been applied to interest. *Held* that, owing to the relations between the defendants, the charges involved should be closely scrutinized, and that the burden of proof should not be imposed on complainants, but defendants, who had knowledge of the facts, should explain the same fully; also, that for the same reason, and because the owner-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ship of such a very large proportion of the bonds by the second defendant deprived complainants of the benefit of provisions of the mortgage for their protection, the court, after determining the present rights of the parties, would retain jurisdiction of the case to decide any future questions which might arise between the parties.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842-1853, 1855; Dec. Dig. § 473.*]

In Equity. Suit by William Whitridge, Lemuel T. Appold, and Henry Williams against the Mt. Vernon Woodberry Cotton Duck Company, the Consolidated Cotton Duck Company, and the International Trust Company of Maryland, trustee. On exceptions to report of master. Decree for complainants.

Charles Morris Howard and William L. Marbury, both of Baltimore, Md., for complainants.

Bond, Robinson & Duffy, of Baltimore, Md., for Mt. Vernon Woodberry Cotton Duck Co.

Lemmon & Clotworthy, of Baltimore, Md., for Consolidated Cotton Duck Co.

Gans & Haman, of Baltimore, Md., for International Trust Co.

ROSE, District Judge. All three defendants are corporations. Two of them, viz., the Mt. Vernon Cotton Duck Company and the Consolidated Cotton Duck Company, hold their charters from the state of Delaware. For brevity the former will be called the "Mt. Vernon," the latter the "Consolidated."

The plaintiffs are citizens of Maryland. They hold 164 out of 6,000 income bonds issued by the Mt. Vernon. The third defendant is the International Trust Company of Maryland. It is the trustee under the mortgage securing the income bonds. It is a Maryland corporation. The plaintiffs expressly say that they ask no relief against it. It is therefore either a nominal party, the citizenship or state of incorporation of which is immaterial, or else its proper position on the record is that of a plaintiff. It will be referred to as the trustee.

The income bonds provide for the payment of cumulative interest, if earned, at the rate of 5 per centum per annum payable semiannually. These bonds were of the denomination of \$1,000 each. The suit was brought August 9, 1909. Eight years had then elapsed since July 1, 1901. If the Mt. Vernon had been prosperous, \$400 might in that time have been paid as interest on each bond. Only \$100 was. The plaintiffs claim that the remaining \$300 a bond, or a material part of it, was in fact earned but has been wrongfully withheld from them.

The Mt. Vernon was incorporated June 23, 1899. It was formed for the purpose of buying and operating 14 different mills which had been theretofore engaged in the production of cotton duck. It was said that those mills made 90 per cent. of all the cotton duck produced in this country. The plan under which the Mt. Vernon was launched called for the creation of \$8,000,000 of first mortgage 5 per cent. bonds. (\$1,000,000 of which were to be retained in the company's treasury to provide for its future needs), \$6,000,000 of 5 per cent. cumulative in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

come bonds, and \$9,500,000 of capital stock. The par value of the securities which were to be at once floated was thus \$22,500,000. An underwriting syndicate bought the \$7,000,000 first and the \$6,000,000 income bonds, paying for them \$11,275,000. The price realized by the company for its first mortgage bonds was 92½ and for its income bonds 80. It gave the syndicate as a bonus \$3,250,000 of its stock. Its actual resources as against its nominal capitalization of \$22,500,000 were \$11,275,000 cash and the remaining \$6,250,000 par value of common stock. Out of these it paid for the mills it was formed to buy, and compensated the promoters who had secured options on them and who had brought about its own organization.

There are some things in the testimony which at least suggest that the bulk, if not all, of the \$6,250,000 of common stock which did not go to the underwriting syndicate was received by the promoters. It appears probable that the actual price obtained by the former owners of the tangible property acquired by the Mt. Vernon did not exceed, if it equalled, the \$11,275,000 cash paid in by the syndicate. None of these former owners were under any legal compulsion to sell. The prices accepted must have been at least all that they thought their properties were worth to them. Except in one instance, the record does not show how the sum paid by the Mt. Vernon for the mills which it bought compared with the cost of those mills to its vendors. That case may not be typical. It is suggestive. The mill in question for the six years preceding the organization of the Mt. Vernon never paid a dividend. One of 3 per cent. was paid by it a few days after the Mt. Vernon was incorporated and a few days or a few weeks before it was transferred to the latter company. It cost the Mt. Vernon \$237.50 for each \$100 share of its stock.

The period when the Mt. Vernon came into being was that immediately following the Spanish-American War. The reaction from the long period of depression which had followed the panic of 1893 was at its height. In those days many thought that a number of different business properties if combined in a single ownership would be worth several times as much as the aggregate of their individual values if they were to be separately operated. It might be, and often was, the case that the large company could, if it were so minded, duplicate all the old factories and equip them with the most modern appliances for a fraction of the price it paid their former owners. Such fact was regarded as immaterial. Fortune in finance, as in other things, sometimes favors the bold, provided that they know when to let go as well as when to take hold. By a coincidence which has been frequently noted in like cases, the statements issued by the Mt. Vernon during the early months of its existence were very encouraging. Interest on both the first and the income mortgage bonds were paid. Dividends on the capital stock were reported earned and were declared. With the coming in of the new century, or a few months earlier, things took on a different complexion. The Mt. Vernon's brief period of real or apparent prosperity ended. It was without sufficient working capital. Its credit was impaired, if not destroyed. The services of financial doctors had to be called in. The treatment prescribed was

the formation of another company. This new concern was to buy three or four mills which had not gone into the first company. It was to pay cash for them. They were clear of important incumbrances. One of them had a large amount of quick assets. This second Richmond was known as the United States Cotton Duck Corporation. It will be spoken of as the "United States." It was a New Jersey creation. It was not to issue bonds. Its capital was to be in the form of common and preferred stock. It was hoped by purchase or exchange to acquire all the capital stock of the Mt. Vernon and to induce the holders of the income bonds of the latter to exchange them for preferred stock of the United States. If the new mills could be bought for less than their worth, something substantial would have been accomplished. If the price paid for them was equal to or in excess of their value, their acquirement was not in itself a gain, except, perhaps, as a bait to draw into the enterprise fresh capital which otherwise could not have been tempted in that direction.

The United States was organized. It bought the mills in question. It acquired an overwhelming majority of the stock of the Mt. Vernon, but the holders of the income bonds of the latter were not willing to exchange them for the preferred stock of the new company. For some four years the United States, as the owner of the new mills, in its own right and as the holder of the great majority of the stock of the Mt. Vernon, directed the business of both corporations. In the spring of 1905 things again came to such a pass as to lead those in actual control of the companies to believe that some new scheme to diminish the fixed charges and to increase the credit of the concerns was imperatively necessary. Again they sought relief in the formation of a new company, the third, the defendant, the Consolidated. It was hoped that it might do what the United States had failed to accomplish. The latter, it is true, had brought all the mills under what was in fact a single control; but in legal theory there were still two companies. It had not been able to get rid of the Mt. Vernon income bonds. In any event, and on any theory of the rights of the parties to this litigation, it may be said that down to the spring of 1905 experience had abundantly shown that, capitalized and managed as it was, the Mt. Vernon would not ordinarily earn enough to pay the full interest on its income bonds and to provide a sufficient reserve to offset depreciation in its buildings and machinery. The Consolidated proposed to take over all the common stock of both the Mt. Vernon and the United States and to give \$500 in par value of its preferred and $\$133\frac{1}{3}$ of its common stock for each income bond of the Mt. Vernon. It had no difficulty in acquiring all the stock of the United States. The last-named company thereupon went out of existence. The Consolidated became the owner of more than 96 per cent. of the entire stock of the Mt. Vernon. The holders of the great majority of the income bonds of the latter agreed to exchange them for the stock of the Consolidated on the terms already stated.

At the time of the taking of the testimony in this case, the Consolidated held 5,758 out of the 6,000 income bonds, or about 96 per cent. of the total issue. A few of the owners of the income bonds would

not transfer them to the Consolidated. The majority of such bonds not now belonging to the latter are held by the plaintiffs. Within a year or thereabouts after the Consolidated was formed, it made up its mind to concentrate the selling of the products of both companies in the hands of a single selling agency. It selected the old established concern of J. Spencer Turner & Co., some of whose members or officers had been among its own directors. It was arranged that a new corporation to take over the Turner business should be formed under the laws of New York. It was organized under the name of J. Spencer Turner Company. It will be referred to as the "Turner." It was capitalized at \$600,000. All of its stock was acquired by the Consolidated. Some reasons, certainly plausible and apparently sound, are given why one selling agent was likely to be more useful than many. In view of the chronic need for ready money of both the Mt. Vernon and the Consolidated, it is not quite so easy to understand why this large investment should have been made in the selling agent's business.

Apparently since the filing of the bill in this case, things have gone on very much as they did before. There are incidental references in the record to the subsequent formation of two new companies which in some way took over either in fact or in theory the business of the defendants. If in the multitude of corporations there is safety, the Mt. Vernon should by this time be secure. The scheme of consolidating the cotton duck industry has led to the successive formation of no less than five companies; each of the last four being intended to absorb its predecessors.

It has seemed necessary to tell the general story at this length in order to understand more clearly the position and contentions of the parties.

Was There a Scheme to Depress the Value of the Income Bonds?

The plaintiffs seem to have been greatly disappointed at the contrast between the meager earnings of the Mt. Vernon and those which the original prospectus indicated. That contrast is marked. To the holders of the Mt. Vernon securities it must have been unpleasant. No relief is in this case sought against anybody on the ground that any of those early statements were false or fraudulent. There is nothing in the record to suggest that any of the parties to this litigation were responsible for them in any other sense than that both the Mt. Vernon and the syndicate manager, who acted as well for some of the plaintiffs as for others, gave currency to them. Doubtless many of the individuals who more or less directly indorsed these representations believed them to be true. The record does not disclose that anybody was better informed than his fellows. If any one connected with the Mt. Vernon at that time knew that they were unreliable, his identity has not been disclosed. The position of the plaintiffs is not that those statements were false and extravagant, but rather that they were substantially true. Their theory is that the Mt. Vernon has earned more interest on its income bonds than it has paid and that money which ought to have been applied to such payments has been diverted to other purposes. They base their claim for relief upon two contentions:

First, that the Consolidated wished to force the nonassenting income bondholders to exchange their bonds for its stock. They assert that it absolutely controlled the actions of the Mt. Vernon, and that it required that company so to make up its statements and to keep its books as untruly to indicate that its earnings were not sufficient to pay more interest on its income bonds than it actually did.

Second, that apart entirely from motives and intentions, the Mt. Vernon without right made certain deductions from its earnings which would otherwise have gone to the income bondholders.

My predecessor, Judge Morris, overruled a demurrer to the bill of complaint and sent the case to a special master. Much testimony has been taken before the latter. He has filed an able, painstaking, and elaborate report. He finds that the first contention of the plaintiffs, viz., that interest was withheld from the income bondholders for the purpose of depressing the value of their securities and thereby inducing them to accept the offer of the Consolidated for them, is not sustained. The plaintiffs except to such finding. It may well be that some of those who were influential in the affairs of the two companies were irritated by the opposition of the plaintiffs and those who were associated with them. They may at times have taken some pleasure in calling attention to some circumstance which seemed to show that plaintiffs had acted unwisely. They certainly were disposed to deny the plaintiffs' requests for detailed information unless the right to make such requests was too clear for argument. This attitude on their part was not altogether unnatural and not without some justification in some of the demands of the plaintiffs.

I agree with the master that there is no evidence of any fixed plan by improper bookkeeping to depreciate the value of the income bonds.

If the Mt. Vernon was sometimes required to pay money which should have come out of the treasury of the Consolidated, and if all the earnings of the Mt. Vernon which should have been used for the payment of interest on the income bonds were not so employed, the effect would, of course, have been to have depreciated unfairly the market value of such bonds.

Plaintiffs allege that such things were done. In this connection it is sufficient to say that, even if this be so, there is no reason to suppose that they were done with any special purpose or intent to lower the price of the income bonds. The plaintiffs' exceptions to this finding of the special master are therefore overruled.

Sums Said to have been Improperly Deducted from Earnings.

It will be convenient now to pass to the consideration of the plaintiffs' charges that money which should have been paid out as interest on income bonds has been improperly withheld either by being taken by the Consolidated or by being used by the Mt. Vernon for purposes to which it could not be lawfully applied until after interest on the income bonds had been paid in full.

There are a number of these charges. Two of them from their amount are of greater practical importance than the others.

Depreciation Reserve.

[1] One of them relates to portions of income from time to time retained by order of the directors as a reserve against depreciation. From 1901 to June 30, 1909, the aggregate amount so set aside was \$639,698.23. Of this sum, however, \$60,000 was subsequently used in paying interest on income bonds. The balance is \$579,698.23, or about \$70,000 a year. It is admitted that the average annual depreciation of the buildings, machinery, etc., of the Mt. Vernon would amount to \$375,000. The sum reserved for depreciation has been \$300,000 a year less than was required to maintain the company's property at its original value. Plaintiffs say that under the terms of the income bonds all this is immaterial. The interest on such bonds should have been paid in full before the directors could rightfully make any provision for depreciation. The special master has sustained their contention. He finds that the plaintiffs should have received the same proportion of the depreciation reserve of \$579,698.23 as their 164 bonds bear to the 6,000 issued; that is to say, they are entitled to recover a trifle less than \$15,850. To this conclusion the defendants have excepted.

The mortgage or deed of trust which secured the income bonds provided that the income applicable to pay the interest thereon "shall be so much of its (the Mt. Vernon's) total income during each six months ending December 31st and June 30th as remains after deducting all taxes, rentals, operating or current expenses and losses, necessary repairs and maintenance (including charges for depreciation by age or wear)" and the interest on the first mortgage bonds. The income bonds themselves stated that they did not "bear interest payable unconditionally but only out of the income of the company, if sufficient, realized and remaining after the payment of all taxes, rentals, operating or current expenses and losses, necessary repairs, maintenance and interest" on the first mortgage bonds. "The amount of income applicable to the payment of interest on said bonds shall be computed and declared as of January 1, 1900, and semiannually thereafter in the manner particularly provided in the mortgage securing the same." The master thought there was a clear discrepancy between the bonds and the mortgage. He accordingly held that the terms of the bonds must prevail as they were the substance, while the security was only the shadow. 2 *Machen on Corporations*, § 1729; 3 *Cook on Corporations*, § 764; *Railway Co. v. Sprague*, 103 U. S. 756, 26 L. Ed. 554; *Chicago & I. Ry. Co. v. Pyne* (C. C.) 30 Fed. 86.

But is there any clear discrepancy between the bond and the mortgage, or any discrepancy at all? The bond itself says that interest is to be paid only out of earnings realized and remaining after the payment of all taxes, rentals, operating or current expenses and losses, necessary repairs, and maintenance. This language would seem to imply that the income bondholders would not get any interest unless the company could pay it and leave at the end of the half year in its capital account property of at least as great value as it had at the beginning. If its property at the close of any semiannual period was worth less than at the opening, it had from any practical standpoint suffered losses. In order to determine whether any business has made or lost

money during any given time, it is necessary, among other things, to ascertain the value of its property at the beginning of the period and again at the end. An illustration will make this clear. In the case of this particular corporation it might in the late fall of any year assume that the price of cotton was likely to go up. It therefore might buy a year's consumption in advance. On the 1st of January if it had done so it might have had stored in a particular warehouse 10,000 bales of cotton which it did not expect to use, and, in point of fact, did not use until the next July and August. It had paid for that cotton 14 cents a pound, or \$70 a bale. The cotton was on January 1st worth that price in the open market. By June 30th spot cotton had declined to 10 cents a pound, or \$50 a bale. If the inventories of the company were made up properly, these 10,000 bales of cotton would have figured in its January statement for \$700,000, in its July for \$500,000. The difference of \$200,000 would have been a business loss suffered during the six months. The effect of a diminution in value in the company's machinery or in the company's buildings is precisely the same, although it is much more difficult accurately to determine the difference in value of such property at periods removed from each other by only a few months or a year or two.

Depreciation is "an inevitable fact which no system of accounts can properly ignore." *Kansas City Southern Ry. Co. v. U. S. et al.*, 231 U. S. 423, 34 Sup. Ct. 125, 58 L. Ed. —, decided December 1, 1913.

From the standpoint of the plaintiffs, the most that can be said is that the bond does not clearly and unequivocally say that depreciation is to be taken into account in determining whether there were any earnings or not or how great the earnings were. The mortgage does. The plaintiffs contend that when they invested their money they looked at the former only and paid no attention to the latter. They say that an income bond, the interest on which must be paid, although such payment will render impossible any provision against depreciation, is a more attractive security than one which requires or permits such provision to be first made. From the wording of their bonds it is possible to argue that the debtor did not reserve a right to set apart an allowance against depreciation before making payment of interest. The bonds should be construed most strongly in their favor.

In passing upon the weight of this contention, it is hard to leave out of mind that the beneficial interest in most of the bonds held by the plaintiffs is still in persons who were members of the original syndicate or in those who took from such persons by operation of law. The syndicate put \$6,475,000 in first mortgage and only \$4,800,000 in income bonds. A purchaser of the first mortgage issue had a vital interest in protecting the mortgaged property against depreciation. No one who simultaneously invested \$647.50 in first mortgage and \$480 in income bonds would have been more ready to do so if he had thought that the latter required a course of business which would so greatly imperil the security for the former.

These special considerations it may be said are applicable only to the precise circumstances under which the bonds in suit were originally floated. Apart from them, can it be contended that it is to the in-

terest of any bondholder to require his debtor to do that which will necessarily result in a steady diminution in the value of the mortgaged property? It is true that ordinary mortgages seek to bind the mortgagee to pay the interest whether he earns it or not. Yet if they are to run for many years and the property covered by them consists of widely scattered industrial plants, they will, if carefully drawn, provide that the security shall be kept up to at least its original value. In the absence of such provision, default may be avoided by paying to the creditor as interest what for all practical purposes is part of his principal. It may be doubted whether he profits thereby.

The mortgage now in question is not an ordinary one in the sense here meant. By its terms interest is not to be paid unless it has been earned. It is expressly subject to the operation of a prior lien. If interest is not paid on the latter, there will be a default. A foreclosure may follow. Interest on even first mortgage bonds cannot be indefinitely paid out of anything except earnings or profits. If a manufacturing plant is allowed to run down, if its machinery is not kept equal in efficiency to that of its competitors, it will soon cease to earn sufficient to pay interest on its first mortgage securities, especially when, as in this case, they amount on the most favorable showing to very nearly as much as the debtor's tangible assets are worth. If such a plant be sold because it has not made enough to meet the interest on its senior bonds, there will usually be little left for the holders of its junior obligations. Owners of income bonds in search of a buyer will want interest paid. They will be only secondarily interested as to whether it has or has not been earned. It is not to the public good that any securities shall thus have a fictitious and temporary value given to them. If the Mt. Vernon does not make good the steady depreciation in its property, it will not long be able to earn anything above its running expenses and the interest on its first mortgage bonds, if so much. The income bondholders will perforce have to forego their interest. They will then be in a worse position than they now are, for their ultimate security will be of less value. It must be borne in mind that their bonds are cumulative. If sufficient is ever earned, they will receive all that is now withheld from them. It is clearly to their ultimate good that the property shall be kept in a condition to make money. It is not questioned that there may be circumstances in which income bonds will be more valuable, if they require that interest shall be demandable before any sums are set aside for depreciation than if they do not. All that is asserted is that there is no presumption that such would ordinarily be the case. It is not to be assumed that it is to the interest of an income bondholder to construe ambiguous language in his bond so as to compel the debtor to pay him as if it had made more money than it had lost, when in truth and in fact the reverse was true. The mortgage in this case does not contradict the bond. It merely makes a little plainer than the bond the fact that all parties intended that whether there were or were not earnings should be determined in a way which in the long run will be best for everybody interested in the property.

The defendants' exceptions to so much of the findings and conclu-

sions of the special master as hold that the Mt. Vernon was not entitled to set apart for depreciation the sums allocated to that purpose must be sustained.

Turner Company's Commissions.

[2] The master finds that the Turner Company has received as commissions on the goods of the Mt. Vernon sold by it the aggregate sum of \$534,489.16. The plaintiffs say that no such charge could properly have been made against the Mt. Vernon. If it had not been, the earnings of the Mt. Vernon would have been greater by that amount. As the holders of 164 bonds, they would have received as interest some \$14,600 more than they have. In support of this contention they point out that the Consolidated owned all the stock of the Turner and 96 per cent. of that of the Mt. Vernon. It made a contract with the Turner by which it agreed that for the period of ten years from the 1st day of February, 1906, the latter should be the "exclusive agent for the sale of all the products of all the mills owned by the Consolidated and of the several mills owned or controlled" by the latter at a commission of 3½ per cent. on domestic and 5 per cent. on foreign sales. The Consolidated controlled both the Turner and the Mt. Vernon. It was the sole owner of the Turner. There was no possibility of any difference between them. The Mt. Vernon had both outstanding stockholders and outstanding income bondholders whose interests were not the same as those of either the Consolidated or the Turner. The Consolidated, by exercising its power as it did to control the actions of the Mt. Vernon, made itself a trustee for the latter or for the interests other than itself in the latter. In plaintiffs' view it follows that it could not charge for its own services in selling the Mt. Vernon products.

In their bill of complaint plaintiffs charged that the Consolidated had received dividends from the Turner. No such dividends have been paid. It does appear that at some periods since the making of this contract the Turner has made considerable profits. These were applied to the reduction of its pre-existing indebtedness.

The Turner Company was originally made a defendant in this cause. Process was served upon an alleged agent of it in this district. On its motion this service was quashed on the ground that it was not carrying on business in this state. It is not therefore before the court.

The special master found that the actual commissions paid the Turner were fair and reasonable. The Mt. Vernon would have had to pay at least as much to any other selling agency. It would have saved nothing by being its own salesman. Upon this state of facts he concluded that the contract made between the Consolidated and the Turner and acted upon by the Mt. Vernon was binding upon the latter. To this conclusion the plaintiffs have excepted.

The defendants contend that the Consolidated and the Mt. Vernon are in law separate entities. They may lawfully contract with each other. It should be borne in mind, however, that so far as this record discloses there never was any contract between the Mt. Vernon and the Consolidated or between the Mt. Vernon and the Turner as to this selling agency. What actually took place was in form at least

different, and in theory was governed by other legal principles. The Consolidated itself agreed with the Turner that the latter should for ten years be the sole selling agent of the Mt. Vernon and should receive for performing the duties of such agency a stipulated compensation. Upon the assumption so strenuously contended for by the defendants, that the three corporations were distinct and could, within the limits of their respective corporate powers, deal with each other as any three natural persons might have done, the Consolidated put itself in such a position that for a decade it had either to exercise its voting control to compel the Mt. Vernon to employ the Turner to sell its goods, or else to become liable to the Turner for a breach of its contract.

Such an agreement, the Supreme Court has said, is contrary to public policy and void. *West v. Camden*, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254.

The other persons interested in the Mt. Vernon were entitled at all times to the exercise by the Consolidated of a fair and unbiased judgment as to whether it was to the advantage of the Mt. Vernon to continue such arrangement with the Turner. The Consolidated could not be permitted to make a bargain by which its duty to the minority in the Mt. Vernon might require it to take action which would be contrary to its own individual interests under the contract.

It may be said that there can be no such conflict in the case under consideration. So long as the Consolidated owns all the stock of the Turner, and the latter remains solvent, there is no real possibility of its being sued for breach of the contract. For all practical purposes the Turner while solvent is a mere agency through which the Consolidated carries on a part of its business.

In its agreement with the Turner it suited the Consolidated to act, or at all events to speak, as if the Turner were a separate and distinct entity with whom it could enter into binding contractual obligations. At that time and for that purpose it equally pleased it to ignore the corporate existence of the Mt. Vernon altogether and to contract precisely as it would have done had it itself owned all the mills of the last-named company.

Plaintiffs contend that if the Consolidated, whenever it found it convenient, ignored the distinctions between the corporations, it may not set them up whenever it finds it useful so to do.

In this case it is unnecessary to pass on a question of such difficulty. It is sufficient that the law is well settled that all contracts between the Mt. Vernon and the Consolidated or between the Mt. Vernon and any corporation, all of whose stock is owned by the Consolidated, are to be scrutinized, if not with distrust, yet with a large measure of watchful care. *Richardson v. Greene*, 133 U. S. 43, 10 Sup. Ct. 280, 33 L. Ed. 516.

The Supreme Court has declared that the doctrine that the courts will view with jealousy such contracts is founded on the soundest morality. *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328.

From the record it does not appear that up to the time of filing the bill of complaint in this cause, which somewhat to the reproach of the

law is now more than four years ago, the Consolidated had actually received into its treasury any money or any money's worth as a result of the contract made by it with the Turner Company. It may be that the value of its stock in that company has appreciated, or the reverse may be true. The record does not disclose. In this connection the court cannot close its eyes to the fact that we do not know what profit the Turner has made out of this contract because the latter set up its exemption from suit in this district. As all the stock of the Turner is admittedly owned by the Consolidated, its action in making such a defense could not have been displeasing to the latter. The Consolidated has withheld light which it might have thrown upon this much controverted transaction.

Under all the peculiar circumstances of this case inquiry should not stop with the mere ascertainment of the fact that the charge made to the Mt. Vernon was not above the market rates for similar services. The fiduciary relation here existing is so close that more should be known.

It does not follow that the plaintiffs are entitled to the relief for which they ask. In any event, it would have cost the Mt. Vernon an appreciable sum to have sold its goods, whether it had sold them directly or had employed a number of agents for the purpose. In order to sell them the Turner must have laid out a substantial amount. All the commissions it received were not clear profit.

Plaintiffs cite and rely upon the rule that a trustee who undertakes himself to sell trust property may not charge anything for the trouble or even for the personal expense to which he has been put in making the sale. The analogy between the cases in which that principle has been applied and the one now under consideration is not close enough to make them necessarily binding here. A court of equity should always seek to do actual justice. It is only under compulsion of some general and imperative rule of public policy that it will impose penalties or enforce forfeitures.

Those in control of a corporation made a contract with themselves to work for it at highly excessive prices. The agreement was set aside. The court, however, awarded the offenders fair compensation for what the corporation received. *Thomas v. Brownville R. R. Co.*, 109 U. S. 526, 3 Sup. Ct. 315, 27 L. Ed. 1018.

The master's finding that on the record as it now stands it is not affirmatively shown that at the time suit was brought the Consolidated owed the Mt. Vernon anything on account of the commissions deducted by the Turner from the proceeds of the sale of the goods of the Mt. Vernon is correct. The exceptions to it must therefore be overruled, but from what has been said such action must be without prejudice to the right of the plaintiffs in this or other proceedings to recover their share of whatever portion the Mt. Vernon may be ultimately held equitably entitled of any profit which the Consolidated through its ownership of the Turner stock may realize out of the commissions received from the sale of the Mt. Vernon's goods. It may make little difference whether the Consolidated obtains these profits in the shape of dividends upon its Turner stock or in the en-

hanced price at which it may sell that stock in consequence of the improved financial condition of the Turner resulting from the receipt by it of the commissions in question. Until such profits have been actually realized, it will be premature to discuss how to state an account dealing with them. Many questions will necessarily arise concerning it. It may or may not be necessary then to inquire whether the capital which the Consolidated put into the Turner was actually required to enable the Turner efficiently to discharge its duties as sales agent, and, if so, if any allowance should be made to the Consolidated for the use of such capital.

Burden of Proof as to Propriety of Particular Deductions from Earnings.

[3] There are a number of items of expenditure charged against the earnings of the Mt. Vernon upon its books which are attacked by the plaintiffs. The special master has found that the burden of showing that they are improper charges is upon the plaintiffs. They have excepted to this finding.

It is hard to lay down any general rule upon this subject. It is clear that the plaintiffs cannot require the defendants affirmatively to prove the propriety and good faith of every one or even of many of the numberless charges against the Mt. Vernon's earnings which are to be found on its books. They have not attempted to do anything of the kind. They have assailed a few specific items, less than a dozen in number. The facts as to some of these would seem to be within the knowledge of the defendants. It would appear to be easy for them to put on the stand witnesses who could in a few minutes clear up all questions of fact concerning them. The plaintiffs seem in good faith to have tried to find out their true history. The defendants do not appear to have thought that it was any of their duty to aid in so doing. Throughout the case they have as a rule preferred to stand on what they have conceived to be their technical rights. If the relations among these corporations had been different from that which in fact they were, had each one of them dealt with the others at arms length, and had the Consolidated not held an overwhelming majority of both the stock and the income bonds of the Mt. Vernon, this attitude would have given no occasion for remark much less for criticism.

Under the conditions actually existing, it would seem to have been the duty of the defendants to make clear the nature and history of the few charges actually attacked or to show that lapse of time, death of all the persons having first-hand information, or other causes, had made it impossible now to do so.

Tallassee Dam Repairs.

These challenged items will be separately considered. From the papers in evidence it appears that one of the company's dams had been damaged or destroyed by a flood. It had to be repaired. It is to be regretted that defendants did not see fit to put on the stand some one who could in a few minutes have told the whole story of this dam and of the occasion for the repairs to it. Nevertheless, on the record as it stands, the master was justified in holding that the entries on the Mt.

Vernon books of sums expended upon this dam were proper charges against earnings.

West Point Contract Forfeit Charges.

When the United States was organized, it acquired an option on the West Point mills. For some time it operated them. It lost money in so doing. Those losses were entered upon its books. A portion of them aggregating \$26,267.25 were subsequently charged to the Mt. Vernon and paid by it. The plaintiffs' share of this sum would be only \$717.97. Nevertheless the burden of showing that the Mt. Vernon was liable for it was upon the Consolidated, which had taken over the liabilities of the United States with its assets. The exceptions to the master's finding that this item was a proper charge must be sustained.

Cotton Options.

The master held that the Mt. Vernon had been improperly charged with \$21,739.10 in excess of its share of the losses on certain cotton options which had been carried for the mutual protection of the United States and the Mt. Vernon. The plaintiffs' proportion of this sum would be \$594.20. Defendants' exception to this finding must be overruled.

Officers' Salaries.

From 1906 to 1909 the salaries of some of the officers of the Consolidated were charged to and paid by the Mt. Vernon. The master finds that during that period the companies were closely associated. The duties of their respective officers necessarily overlapped. The companies apportioned the total expenditure for this purpose of both of them between themselves upon the basis of the total production of each company. The plaintiffs except to the master's finding that what was done in this respect should not now be disturbed. With much hesitation I overrule this exception. What in this respect took place illustrates the practical impossibility of keeping separate the affairs of the two companies. The Mt. Vernon was in fact conducted as a mere operating department of the Consolidated. Despite legal theory, it must sometimes be treated as such; a position which the defendants have in this connection in effect taken.

Interest Charges.

The Mt. Vernon was a borrower. It paid from 4½ to 6 per cent. for the money it obtained from outsiders. A good deal was lent to it by the Consolidated. For these sums it always paid at the rate of 6 per cent. The Consolidated itself frequently borrowed money, usually at a less rate than that it charged the Mt. Vernon. The master finds, however, that there is no evidence that it ever borrowed at a rate less than 6 per cent. and lent that same money to the Mt. Vernon at 6. The Consolidated doubtless could show what interest it did pay for the money it let the Mt. Vernon have. It was almost impossible for the plaintiffs to do so. If the matter was of greater importance than it is, I should be reluctant to dispose of it, as the master does, upon a ruling as to the burden of proof. The total amount of interest paid by

the Mt. Vernon to the United States and the Consolidated was \$139,-497.73. It is not likely that it cost the lenders themselves much less than $5\frac{1}{4}$ per cent. on the average. If so, their aggregate profit from the 6 per cent. paid by the Mt. Vernon would have been less than \$17,-500. The plaintiffs' share of this, if refunded, would be under \$500. It doubtless would cost at least that much accurately to ascertain the facts. The transaction may be open to criticism. It does not on the whole seem wise to disturb the master's conclusions concerning it.

New Carding Machinery.

The Mt. Vernon spent \$116,451.03 for new carding machinery. It assumed the right to pay for it out of earnings in preference to the payment of interest on the income bonds. It could be wished that defendants had given a fuller explanation of the circumstances. From what is before the court the master would seem to be right in holding that it was such a replacement of machinery as was justified by the terms of the mortgage. Even if it were to be treated as an additional allowance for depreciation, the amount which has been set aside for that purpose would still be far less than it should have been.

Default in the Mortgage.

From what has been said it follows that certain sums which should have been long since paid the plaintiffs have been withheld from them. They assert that as a consequence the mortgage is in default. The amounts due the plaintiffs are relatively very small. The decree may provide that if paid within a limited time after its date, or after any date to which its operation may by appeal and supersedeas be suspended, the default will be set aside.

Retaining Jurisdiction.

In their bill of complaint the plaintiffs ask the court, if it does not direct a sale of the mortgage property, to decree that the Consolidated and the Mt. Vernon be adjudged to hold all of the properties of the Mt. Vernon in trust for the holders of the income bonds. The court is requested to assume jurisdiction of the trust and to require the defendant companies to file with it at stated times full and proper accounts of the operations of the properties by them, showing their receipts and expenditures and the application of revenues of the Mt. Vernon in order that the true amount of income applicable to the payment of interest payable on said bonds may at all times be known to and received by the holders of such bonds. The master finds that the plaintiffs are entitled to this relief. To this finding the defendants have excepted. Many of the provisions of the original mortgage for the protection of the holders of income bonds have become inapplicable to the situation which now exists, 5,758 of the 6,000 income bonds are owned by the Consolidated. It owns practically all of the capital stock of the Mt. Vernon. The mortgage contemplated that the great mass of the bonds would be held during its life by persons who in fact were creditors of the Mt. Vernon. 96 per cent. of them are now owned by a corporation whose interests are identical with those of the debtor. If the 5,758 bonds belonging to the Consolidated are

to be treated as outstanding, the holders of the other 242 bonds are helpless to avail themselves of such of the protective privileges of the mortgage as may be exercised by not less than 25 per cent. of the bonds. If, on the other hand, those held by the Consolidated are to be excluded altogether, the situation will be very different from that which was originally contemplated by any of the parties to the mortgage. The requirement for indemnity to the trustee, which might be reasonable enough when it was an obligation to be borne by the holders of income bonds of the par value of at least a million and a half, might be very burdensome if imposed upon the holders of securities of the par value of \$61,000.

The record in this case shows how hard it is properly to keep the accounts of two companies which stand in such relation to each other as that borne by the Mt. Vernon to the Consolidated, even assuming that everybody connected with either is entirely free from any consciously improper motive. It will be practically impossible for the laymen who carry on the affairs of such corporations always to act in accordance with the right legal theory or indeed with any consistent one.

As has already been said, the position in which the Consolidated has placed itself to the Mt. Vernon is one which the courts are bound to scrutinize with jealous care.

This appears to be a case in which it is best that an impartial tribunal should retain jurisdiction in order that disputed questions of accounting may be from time to time promptly and cheaply disposed of. *Stewart v. Chesapeake & Ohio Canal Co.* (C. C.) 5 Fed. 149.

Disposition of the Exceptions to the Master's Report.

It follows that the plaintiffs' first, second, third, fourth, seventh, ninth-A, tenth, and eleventh exceptions must be overruled. Their eighth, ninth-B, and fourteenth should be sustained. It does not seem necessary to rule upon the remaining exceptions of the plaintiffs otherwise than in this opinion has been done. They involve general statements of law sound enough under particular circumstances, but seemingly more or less inapplicable to the facts of this case.

The court having held that the Mt. Vernon was entitled, before paying interest on income bonds, to set aside the sums it did set aside for depreciation, the first five exceptions of the Mt. Vernon are to that extent sustained. In so doing it is not intended to express concurrence in everything found in such exceptions. It is sufficient to decree that the plaintiffs are not entitled to complain of the depreciation charges.

The Mt. Vernon's sixth, seventh, eighth, ninth, and tenth exceptions appear to be well founded. They are sustained, although in the view which had been taken of the questions involved those findings have become immaterial.

The eleventh and twelfth exceptions of the same defendant are overruled.

The thirteenth and fourteenth are sustained, and the fifteenth is overruled.

The first and sole exception of the Consolidated is overruled.

The objection of the defendants to the jurisdiction of the court on the ground that the plaintiffs are not entitled to sue herein, and their contention that the plaintiffs are barred by laches, have not been lost sight of. Judge Morris was of opinion that the plaintiffs were the holders of the bonds in such sense as entitled them to sue thereon. In that view I concur. Those other than themselves who were beneficially interested in the bonds were entitled, if they had wished, to sue in their own names. The bonds were not placed in the hands of the plaintiffs in an attempt to create a jurisdiction which would not otherwise have existed.

Whatever merit there might have been in the defense of laches as an answer to the claims of the plaintiffs that no depreciation reserve could be properly created, there would seem to be none with reference to the matters upon which the plaintiffs have been held entitled to relief.

A draft of decree in accordance with the views herein expressed may be presented. If the parties cannot agree upon its terms, an early day for settling them will be fixed.

WILLIAMS v. POTTER et al.

(District Court, N. D. New York. November 18, 1913.)

1. PILOTS (§ 5*)—LICENSES—DECISION OF BOARD OF INSPECTORS—REVIEW BY COURTS.

Under Rev. St. § 4442 (U. S. Comp. St. 1901, p. 3037), which provides for the granting of a license as pilot of steam vessels by the board of local inspectors if on personal examination they shall be satisfied that the applicant possesses the requisite knowledge and skill and is trustworthy and faithful, the decision of the inspectors as to an applicant's qualifications is final and not reviewable by the courts unless it appears that they acted arbitrarily or with malice in denying a license.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

2. PILOTS (§ 5*)—LICENSES—EXAMINATIONS—VALIDITY OF REGULATIONS.

Rule 5, subd. 7, of the regulations adopted by the board of supervising inspectors of steam vessels, under authority conferred by Rev. St. § 4405 (U. S. Comp. St. 1901, p. 3017), which requires an applicant to whom a pilot's license has been denied after examination by a board of local inspectors to wait a year before being entitled to another examination, is not in conflict with Rev. St. § 4442 (U. S. Comp. St. 1901, p. 3037), providing that "whenever" any person shall apply for a license the inspectors shall determine his fitness by a personal examination, etc., but is a reasonable, necessary, and valid regulation.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

3. WORDS AND PHRASES—"WHENEVER."

"Whenever," strictly construed, means at whatever time; at what time soever.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7441, 7442, 7835.]

In Equity. Suit by Frank R. Williams against Charles Potter and Robert Chestnut, Oswego, N. Y., local inspectors of steam vessels;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John Molther, Oswego, N. Y., ex local inspector; Frederic Pope and William Nolan, Buffalo, N. Y., local inspectors of steam vessels; Niles Nelson, Cleveland, Ohio, supervising inspector of steam vessels; James Stone, Cleveland, Ohio, ex supervising inspector of steam vessels; and George Uhler, Washington, D. C., Supervising Inspector General of steam vessels. Decree for defendants.

Suit in equity for a judgment decreeing that the plaintiff, Frank R. Williams, is entitled to a license as a second-class pilot on steam vessels between Ogdensburg, N. Y., and Detroit, Mich., and for damages for the refusal of the inspectors to issue to the plaintiff a license upon the examination given him. Also, for a decree or judgment declaring that rule 5 of sections 42 and 46 of the rules and regulations of the department having control of the granting of licenses to pilots is invalid. Also, restraining defendants from acting under such rule in other cases.

Frank R. Williams, of Syracuse, N. Y., in pro. per.

George B. Curtiss, U. S. Atty., of Binghamton, N. Y., for defendants except Stone and Uhler.

RAY, District Judge. On or about the 21st day of December, 1908, the plaintiff, Frank R. Williams, made a written application to Robert Chestnut and John R. Molther, constituting the board of local inspectors of steam vessels at Oswego, N. Y., for an examination for a license as pilot, master, and mate correspondingly, on steam vessels under 100 tons, running from Ogdensburg to Detroit on the St. Lawrence river, Lake Ontario, Niagara river, Lake Erie, and the Detroit river. This application for examination on its face showed that the applicant had not had three years' experience in the deck department of a steam vessel, motor vessel, sail vessel, or barge consort, as required by sections 42 and 46 of rule 5 of the board of supervising inspectors approved by the department, and which rule was adopted under and pursuant to section 4405, United States Revised Statutes. That section reads as follows:

"Sec. 4405. (Meetings of board; assignment of districts.) The supervising inspectors and the Supervising Inspector General shall assemble as a board once in each year, at the city of Washington, District of Columbia, on the third Wednesday in January, and at such other times as the Secretary of the Treasury shall prescribe, for joint consultation, and shall assign to each of the supervising inspectors the limits of territory within which he shall perform his duties. The board shall establish all necessary regulations required to carry out in the most effective manner the provisions of this title, and such regulations, when approved by the Secretary of the Treasury, shall have the force of law. The supervising inspector for the district embracing the Pacific Coast shall not be under obligation to attend the meetings of the board oftener than once in two years; but when he does not attend such meetings he shall make his communications thereto, in the way of a report, in such manner as the board shall prescribe." U. S. Comp. St. 1901, p. 3017.

Sections 42 and 46 of rule 5 provide as follows:

"42. No original license as second-class pilot shall be issued to any person who has not had three years' experience in the deck department of a steam vessel, motor vessel, sail vessel, or barge consort. The local inspectors shall, before granting a license as second-class pilot, satisfy themselves that the ap-

plicant is qualified to steer; provided, that on the Mississippi and territory rivers one year of such required experience must have been in the pilot house as steersman."

"46. No original license for pilot of any route shall be issued to any person, except for special license for steamers of 10 gross tons and under, who has not served at least three years in the deck department of a steamer, motor vessel, sail vessel, or barge consort, one year of which experience must have been obtained within the three years next preceding the date of application for license, which fact the inspectors may require, when practicable, to be verified by the certificate, in writing, of the licensed master or pilot under whom the applicant has served, such certificate to be filed with the application of the candidate."

Section 4442 of the Revised Statutes of the United States reads as follows:

"Sec. 4442. (License of pilot.) Whenever any person claiming to be a skillful pilot of steam vessels offers himself for a license, the inspectors shall make diligent inquiry as to his character and merits, and if satisfied, from personal examination, of the applicant, with the proof that he possesses the requisite knowledge and skill, and is trustworthy and faithful, they shall grant him a license for the term of one year to pilot any such vessel within the limits prescribed in the license; but such license shall be suspended or revoked upon satisfactory evidence of negligence, unskillfulness, inattention to the duties of his station, or intemperance, or the willful violation of any provision of this title." U. S. Comp. St. 1901, p. 3037.

Another rule or regulation, viz., regulation 7, provides that:

"Any applicant for license who has been duly examined and refused may come before any local board for examination after one year has expired"—meaning after one year has expired from the date of the first examination.

Acting under and in pursuance of sections 42 and 46 of rule 5, Chestnut and Molther refused to give Williams an examination as it appeared on his own statement in writing that he had not had the requisite experience. Thereupon the plaintiff, Williams, brought suit in the United States Circuit Court for the Northern District of New York for a decree compelling such inspectors to give him an examination. The case was heard on the agreed state of facts, and the single question was presented of the validity of that regulation. The Circuit Court held that the regulation was reasonable and proper and that, as it was predetermined by the duly adopted rules and regulations of the department that a pilot's license should not issue to a person who had not had the requisite experience, an examination was not necessary to determine that fact when it appeared by the application itself that the applicant had not had the necessary experience. The opinion of the Circuit Court is found in 189 Fed. 700.

On appeal to the Circuit Court of Appeals the decision of the lower court was reversed (*Williams v. Molther et al.*, 198 Fed. 460, 117 C. A. 220), and the court held:

"While no citizen has the inherent right to a pilot's license, every citizen has a right to be examined for it. The local inspectors are to determine the applicant's qualifications. They may hold in any case that he has not had sufficient deck experience. That, however, is quite different from refusing him an examination for this reason."

The court thereupon held that sections 42 and 46 of rule 5 were invalid inasmuch as they denied an examination, although it appeared from the application itself that the applicant had not had the neces-

sary or sufficient deck experience. The court expressly held that the board of local inspectors might hold in any case that the applicant had not had sufficient deck experience, but in effect held that an arbitrary rule that three years' experience was necessary was illegal and improper and that an examination must be held in every case to ascertain whether or not the applicant had had sufficient deck experience. The court in that case held that sections 42 and 46 of rule 5 were invalid, and the court below was directed to enter a decree declaring sections 42 and 46 invalid and directing the defendants to examine the complainant Williams.

The lower court entered a decree accordingly, and hence as between Williams and the defendants here John Molther and Robert Chestnut the sections of rule 5 referred to must be deemed and held to be invalid. It has been so adjudicated. As to the defendants Charles Potter, Frederic Pope, William Nolan, and Niles Nelson, they have not attempted to enforce against this plaintiff the provisions of sections 42 and 46 of rule 5, and until they do there is no occasion or justification for entering a decree or judgment restraining or prohibiting them from recognizing the validity of such sections and enforcing them in other cases. The decision of the Circuit Court of Appeals is not *res adjudicata* as to them, and if occasion arises they will be at liberty to assert the validity of rule 5 and have the question submitted for adjudication. That question is not involved here, as we shall see.

In obedience to the decree of the Circuit Court entered in pursuance of the decision of the Circuit Court of Appeals on the 29th day of April, 1912, the plaintiff, Frank R. Williams, appeared before the then local inspectors Charles R. Potter, successor to Molther, and Robert Chestnut, and applied for an examination pursuant to and by virtue of the said decree. On the 30th day of April, 1912, Williams was notified by said board of inspectors to appear for examination on May 2, 1912, at which time he did appear and was given an examination on the written application made as above stated. This examination was continued for two days and was conducted by propounding to the applicant, Williams, both written and oral questions. The written questions were answered by Williams in his own handwriting. Upon the conclusion of that examination, and after due consideration, said board of inspectors adjudged and determined that the applicant, Williams, was not competent or a proper person to have granted to him the license applied for, and thereupon such application was denied. From that decision Williams appealed to Niles B. Nelson, the supervising inspector of steam vessels at Cleveland, Ohio, who examined the record of such examination before Potter and Chestnut and approved their decision. Williams asserted and claimed that he had not received fair treatment before Potter and Chestnut, and thereupon Nelson gave Williams another examination conducted by himself at Cleveland, Ohio. This examination commenced on the 10th day of July, 1912, and was concluded on the 13th day of July, 1912, and was both written and oral. On the conclusion of that examination and after due deliberation, Nelson determined that Williams did not possess the experience and qualifications which fitted him for the duties of a pilot, and he

was denied a license accordingly. These written examinations, questions, and answers are in evidence and have been examined by the court with all criticisms made thereon and in reference thereto and in connection with the evidence of Williams himself given on the trial of this action.

In October, 1912, Mr. Williams applied to the local board of inspectors at Buffalo, composed of Frederic L. R. Pope and William B. Nolan, for an examination for a first-class pilot's license. That board had been notified of and was advised of the examinations given Williams in July, and of the result, and under regulation 7, above referred to, and which provides that "any applicant for license who has been duly examined and refused may come before any local board for examination after one year has expired," refused an examination. This refusal was based solely upon the fact that 12 months had not expired since the examination of Williams in Oswego and Cleveland and the refusal of a license.

The plaintiff, Frank R. Williams, alleges in his complaint, in substance, that the inspectors Potter and Chestnut and Nelson, in determining upon the examinations held that the plaintiff was incompetent and not a qualified person to have granted to him a pilot's license, and, in refusing to grant to him the license asked for, acted arbitrarily and refused such application knowing and believing that the plaintiff had shown his competency and that he was entitled to a license. The plaintiff also alleges and claims that the regulation referred to and which denies to him the right to a second examination before the expiration of 12 months is an invalid regulation and provision. The plaintiff also alleges and claims that these inspectors were acting in combination and conspiring together to arbitrarily prevent him from obtaining a pilot's license and also to injure the plaintiff and deprive him of his rights as a citizen in this regard.

[1] I fail to find evidence in this case of any combination or conspiracy between Chestnut and Potter, or between Chestnut and Molther, or between Potter and Chestnut, inspectors at Oswego, and Pope and Nolan, inspectors at Buffalo, or these persons or any of them and Nolan at Cleveland, or between any of these persons, to arbitrarily or improperly deny a pilot's license to the plaintiff or to injure the plaintiff or deprive him of any right as a citizen. After the examination given by Potter and Chestnut, their decision was approved and affirmed on appeal, and then, to obviate all cause of complaint, the inspector at Cleveland, Niles B. Nelson, extended the unusual courtesy of an examination before himself, which extended over a period of three days and covered the whole subject. The written questions and the written answers appear in the record, and upon the margin of these examinations is written some of the comments and reasons for refusing a license given by the inspectors. This court is of the opinion that these examinations were fair and that the conclusions reached by the respective inspectors were justified and not an arbitrary denial of any right or an arbitrary holding that Williams was not a competent and proper person to receive a pilot's license. I fail to find evidence that the decision was affected in any way by malice, prejudice, or ill will.

If Mr. Williams had answered all the written questions or substantially all of them fully, clearly, and correctly, this court would unhesitatingly hold that the license should have issued; but such is not this case. There were many failures, and this court has no right to substitute itself for the board of inspectors and pass upon the competency of Williams and the propriety of granting him a pilot's license when in point of fact a fair question of fact was presented for the decision of the inspectors. This court cannot say that the decision was contrary to the evidence. Section 4442 of the Revised Statutes (U. S.) provides:

"Whenever any person claiming to be a skillful pilot of steam vessels offers himself for a license, the inspectors shall make diligent inquiry as to his character and merits, and if satisfied, from personal examination of the applicant, with the proof that he possesses the requisite knowledge and skill, and is trustworthy and faithful, they shall grant him a license for the term of one year to pilot any such vessel within the limits prescribed in the license."

The board of local inspectors is to determine the applicant's qualifications, and that board is to determine, as it did in this case, whether the applicant has sufficient knowledge of signals, of shoals and obstructions to navigation, of the location of buoys and lights and ranges and aids to navigation. All this, with many other things, is to be determined by the board of inspectors, and it must be that the decision of the inspectors is final so far as the courts are concerned, unless it appears that such inspectors acted arbitrarily or with malice in denying a license when on the examination one should have been granted. If on the evidence adduced before the inspectors and the examination a question of fact as to fitness is presented, it seems to me that their finding cannot be disturbed. If Mr. Williams had answered all questions correctly, thus showing himself to be competent, and the inspectors had then refused a license, it not appearing that he was untrustworthy or of improper character, such act of refusal would have been arbitrary, and such decision would not have been a judicial finding and decision, and same could be set aside by the court. The inspectors were acting within their powers, and so far as appears were acting fairly and discharging the duties confided to them and exercising the powers conferred upon them by law. In the absence of evidence to the contrary, this court is bound to assume that these inspectors were competent and that they performed their duty honestly and faithfully. This is the presumption. In granting pilot's licenses these inspectors perform an important duty and they are called upon to exercise the highest degree of intelligence. They have no discretion when satisfied that an applicant for a license is incompetent to grant him a license.

[2] Here the local board acted, and then the supervising inspector of the district reviewed that action, and finally to settle all question gave a full and complete examination of his own. It seems to me that this plaintiff was fairly treated. The supervising inspector certainly had no prejudice and exercised apparently and so far as this court can see his honest judgment in the premises. Mr. Williams is no longer young, and it was demonstrated that his memory is many times

at fault, and that his experience has been limited mainly to the operation of small motor boats and canal boats, and that he was not thoroughly familiar with pilot's rules as to lights carried and how placed on steam vessels when under way. He is not thoroughly familiar with the signals used between pilots and engineers for working the engines, and he was not thoroughly familiar with fog signals when used by sailing vessels, and he lacked knowledge of courses, distances, shoals, buoys, ranges, etc. Mr. Williams knows much on these subjects, but it was for the inspectors to determine whether or not his lack of knowledge on these subjects rendered him an unfit person to possess a pilot's license such as he applied for. This brings us to the question whether or not Pope and Nolan, constituting the board of local inspectors at Buffalo, were justified in refusing the plaintiff an examination for a pilot's license in October, 1912.

The regulation referred to, subdivision 7 of rule 5 of the general rules and regulations, makes it necessary for an applicant for a pilot's license to wait one year after having been examined for such a license before applying again. It is true that section 4442 of the Revised Statutes provides that:

"Whenever any person claiming to be a skillful pilot of steam vessels offers himself for a license, the inspectors shall make diligent inquiry as to his character and merits," etc.

If this means and is to be construed as meaning that every person claiming to be a skillful pilot of steam vessels may offer himself for examination as often as he pleases and that the board of inspectors is bound to give him an examination, then such person may present himself for examination every week and keep the board in constant session. This would be a most unreasonable construction of this statute. The rule or regulation adopted gives to such an applicant one year for study and preparation after having been examined and rejected. I see nothing unreasonable in the provision. Here in July Mr. Williams was thoroughly examined and rejected. In October, he presented himself again before the board at Buffalo. His prior examination had been before first the local board at Oswego, and second before the supervising inspector at Cleveland. Mr. Williams had been examined within the year, not once but twice, not by one board but by two. I do not think these boards of inspectors are to be annoyed by repeated and it might be incessant examinations of the same person. The statute referred to should have a reasonable and not an absurd interpretation. By the provisions of section 4442 Revised Statutes, the applicant for a pilot's license is to have the requisite knowledge and skill to enable him to perform the duties of a pilot, and it seems to me that the supervising inspectors by proper rules and regulations have the right to provide that an applicant for a license before one local board, if rejected there, must wait at least a year before being examined by another local board for a pilot's license. Section 4403 of the Revised Statutes requires the supervising inspector general to "produce a correct and uniform administration of the inspection laws, rules and regulations." U. S. Comp. St. 1901, p. 3017. The supervising inspectors with the Supervising Inspector General

constitute the board of supervising inspectors, and the board is expressly empowered to establish "all necessary regulations required to carry out in the most effective manner" the provisions of the law relating to inspections and the granting of licenses. Is the court to say that a regulation requiring that a person who has had two examinations and been refused a license must wait a year before being again examined is not calculated to carry out in the most effective manner the provision requiring that pilots must be trustworthy and persons possessed of the requisite knowledge and skill? It seems to me that this regulation is consistent with the statute and a means appropriate and plainly adapted to the successful administration of the affairs of the executive department concerned. Assume that every person applying for a license as pilot on the Great Lakes and navigable rivers connected therewith is entitled to an examination even should it affirmatively appear from the application that the applicant had never seen one of the lakes or rivers on which he seeks to act as pilot on such a boat or steamer or vessel as is used in navigating those waters, still this has nothing to do with the regulation of times and places when and where examinations are to be held or the frequency of such examination.

[3] "Whenever" strictly construed means "at whatever time; at what time soever." Construe the statute in this strict sense, and the applicant would be entitled to repeated examinations night or day so often as he should apply. There would be no discretion whatever residing in the board of inspectors. It is obvious that a reasonable construction should be given this statute, and, if the applicant for a pilot's license is given a fair examination once each year, it seems to me the intent and spirit of the sections is fully complied with.

The power of Congress to delegate the right to make and enforce rules and regulations is quite fully discussed in *United States v. Grimaud*, 220 U. S. 506, 517-521, 31 Sup. Ct. 480, 55 L. Ed. 563, and in other cases there referred to. The power to make rules and regulations cannot be denied and, it seems to me, the whole question is: Was this rule 7, referred to, a reasonable one? I think the regulation not only reasonable but necessary in order to carry out in an effective manner the provisions of law in regard to inspections and the granting of pilot's licenses.

This court is not prepared to hold that the applicant for a pilot's license on being examined and rejected is entitled to a new examination as often and whenever he sees fit to apply to the same or to another board in the same jurisdiction.

There will be a decree dismissing the bill of complaint, but without costs.

In re MUNROE.

(District Court, D. Massachusetts. December 22, 1913.)

No. 710.

1. WITNESSES (§ 21*) — SUBPŒNA DUCES TECUM — EFFORT TO PERFORM — CONTEMPT.

On a petition to punish respondent for contempt in failing to obey a subpoena duces tecum requiring him, as partner of a French firm of bankers and in charge of its New York office, to obtain and bring with him, to be introduced in evidence before the grand jury sitting in Massachusetts, certain checks alleged to have been drawn by one D., paid by the Paris house of the firm, and retained by them, evidence *held* to require a finding that respondent did not in good faith make an honest effort to obtain the checks.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 37-41; Dec. Dig. § 21.*]

2. WITNESSES (§ 21*)—SUBPŒNA DUCES TECUM—PRODUCTION OF DOCUMENTS—DUTY—POSSESSION.

Where respondent, as American managing partner of a firm engaged in banking in Paris and New York, was served with a subpoena duces tecum requiring him to produce before a federal grand jury certain checks alleged to have been drawn by one D. on the firm's Paris branch, which had been paid and were retained there, respondent, notwithstanding that the possession of the checks was joint and not solely in himself, was bound to make a reasonable effort to obtain the same from his Paris partners and produce them, and his failure and refusal to make such effort constituted a contempt.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 37-41; Dec. Dig. § 21.*]

3. WITNESSES (§ 21*)—SUBPŒNA DUCES TECUM—DISOBEDIENCE—DEFENSES—ADVICE OF COUNSEL.

That respondent, in refusing to produce certain paid checks in response to a subpoena duces tecum, acted throughout on the advice of counsel was no defense to a proceeding against him for contempt in deliberately disobeying the court's order requiring him to comply with the subpoena.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 37-41; Dec. Dig. § 21.*]

Petition for attachment of Henry Whitney Munroe for contempt, on complaint of the grand jury sitting in the District of Massachusetts. Granted.

Asa P. French, U. S. Atty., and William H. Garland, Asst. U. S. Atty., both of Boston, Mass., for petitioners.

Rushmore, Bisbee & Stern, of New York City, and Boyd B. Jones, of Boston, Mass., for defendant.

MORTON, District Judge. I find the material facts to be as follows: The defendant is a member of a partnership (Munroe & Co.) which consists of five partners and has been in existence at least ten years. It is organized under the laws of France and is engaged in the business of banking and foreign exchange. The defendant has been a member of the firm since its organization, and is now the senior partner, and has the largest individual interest; he is a citizen of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

United States. The principal place of business of the firm is in Paris, where three of the partners are resident, of whom one is a French citizen, and another is a brother of the defendant. It has also had, for ten years at least, a place of business in New York, in or near which city the defendant and one other partner reside. This place of business is carried on under the name of John Munroe & Co. Although the partnership is, as stated, organized under the French law, the rights of the partners inter se do not appear, as to the matters and papers concerned in these proceedings, to be different from what they would be under the law of this district. At times the defendant went to Paris and participated in the business there, and one of the Paris partners came to New York and participated in the business there.

In May, 1913, the United States officers had reason to believe that one Mary A. Dolan, of Brookline, Mass., might have been guilty of offenses against the criminal laws of the United States by smuggling merchandise imported by her from Paris, France, into the district of Massachusetts, and her conduct in relation thereto was under investigation by the grand jury for this district at the times herein referred to. She had had a deposit with Munroe & Co. at its Paris establishment, against which she had drawn checks which had been delivered to various persons in Paris in payment of accounts due them. These checks had been paid by Munroe & Co. at their Paris branch, and the paid checks were retained there.

In this state of facts, an agent of the treasury department called upon the defendant Munroe at the New York office of Munroe & Co. some time in May, 1913, explained the circumstances to Mr. Munroe, and requested that Munroe & Co. would obtain from the Paris house the checks in question so that they could be reached by process in this country. The defendant resented both the request itself and the manner in which the request was made. He told the officer that he would inquire whether the Paris branch was willing to forward the checks. He did so, putting his inquiry into a letter dealing with other subjects, and so phrasing it as to suggest a refusal rather than a compliance with the suggestion. The Paris house replied declining to forward the checks. Mr. Munroe at this time took the position, which he has ever since maintained, that he preferred rather to shield a customer of his firm, whose conduct was under investigation by the grand jury, than to assist the officers of justice in ascertaining whether the customer had probably committed a crime.

On September 19, 1913, the defendant and the other New York partner of Munroe & Co. were duly served with a subpoena duces tecum of this court, commanding them to appear before the United States grand jury in Boston, and to produce certain papers and documents therein specified, among which were certain paid checks drawn by Mary A. Dolan upon Munroe & Co. at their Paris house. Other papers were called for by the subpoena, the production of which is not now insisted upon, and as to which the defendant was informed by the United States officers that they need not be produced. A correct copy of said subpoena and returns of service thereon is annexed to the presentment of the grand jury for contempt. No question has

at any time been raised by the defendant that the subpoena required the production of an unreasonable number of documents or insufficiently described the documents which were required. The checks called for by it were material and important evidence upon the matters which the grand jury were investigating. At the time of the service of this subpoena, said checks were, and they still are, in Paris, in the possession of the firm of Munroe & Co., of which the defendant, as has been stated, was and is a member. In other words, the possession of the checks was in the defendant and his four partners as joint tenants.

This subpoena the defendant, under advice of counsel, entirely disregarded in so far as it required the production of papers or documents. He did not communicate to his partners in Paris the fact that the subpoena had been served upon him. He made no request upon the Paris house to forward the papers called for by it, and made no effort whatever to obtain any of the papers specified in it. He appeared before the grand jury October 22d and testified that he had not the papers called for, that he had made no effort whatever to obtain them since the service of the subpoena, and that he was under no obligation to make any effort to obtain said papers or checks. The other New York partner was excused from appearing before the grand jury, and no proceedings are pending against him.

Thereupon the defendant was presented by the grand jury for contempt, and these proceedings were instituted. The statements of fact in the presentment of the grand jury are true.

A hearing was had before me upon said presentment on October 29th, at which the defendant was present with counsel, and such evidence was taken as either party desired to offer. At said hearing the facts appeared to be as above stated, and at the conclusion of the hearing I said:

"I think, when the government required evidence for use in prosecutions, that as a citizen of the country he was bound to make a reasonable and honest and diligent effort, not to pass into unreasonable bounds (and plainly to procure a few checks was nothing unreasonable to ask of a man), to get the evidence requested when he was a joint owner of it. I do not think it is particularly important that the papers in this case are in Paris. They might be in Chicago; they might be in San Francisco. The fact is that a joint owner of documents called for by a subpoena duces tecum, without making any effort whatever to procure them, comes into court and says, 'I am not bound to make any effort.' I think he is. I haven't any doubt that upon the facts here the defendant is in contempt."

The district attorney thereupon moved that the defendant stand committed until the contempt was purged. Under the circumstances, I felt that such a course was too drastic. I called the defendant to the bench and put the following question to him:

"Mr. Munroe, you may step forward. Are you willing to make a real and honest effort to get these papers? I don't mean an effort, honest in one letter and covered by another letter that goes under another cover; but are you willing to make an honest effort upon your honor to do your best to get these papers over here?"

To which Mr. Munroe replied:

"I am perfectly willing to make that effort."

Somewhat later I said:

"I will leave it to Mr. Munroe this way: That you are to use, Mr. Munroe, your best efforts to get this information as promptly as possible. I will let it stand over upon your assurance that you will do all you can to expedite it. * * *

"Now, Mr. Munroe has said that he will do honestly, not only exactly honestly but honorably, his very best to get these papers here. I will let this case stand continued on that assurance without disposition for a month. It may stand over."

The district attorney suggested that the defendant be directed to cable for the papers. I said that I thought it unnecessary to put the defendant to that expense, but I understood, and the defendant understood, that it was essential to get the papers here as soon as possible, and that he was to endeavor to obtain them, in absolute good faith, as quickly as he could without the use of the cable.

At the conclusion of the hearing on October 29th, the situation of the case was that the court, without having formally adjudged the defendant in contempt, had expressed the opinion that he was in contempt, and had adjourned the matter without action, in order to give him an opportunity to purge or diminish the contempt by carrying out the agreement which he had entered into with the court, and making a sincere, though belated, effort to obtain the checks. Has he done so?

[1] Instead of promptly writing a personal letter requesting that the checks be forwarded to him, which would have been promptly complied with by his partners, the defendant delayed five days before writing at all. During those five days he had several consultations with his counsel in reference to the matter, and finally wrote, under their advice, a letter which was in part drafted by them, and which is now relied upon as being a performance of his agreement with the court. I do not so regard it. It was of a purely formal character; several other matters besides this one being referred to in it. With its inclosure it informed his partners that he was making the request under coercion, and it indicated plainly his hope and desire that the request be refused. It is not a real effort to get the papers.

During the five or six days which elapsed between the hearing on October 29th and the sending of this letter, Mr. Munroe's counsel had conferred with counsel for Mrs. Dolan, and had informed him of their attitude in the matter and of what Mr. Munroe was likely to do. From what was said, counsel for Mrs. Dolan inferred rightly that the Paris house would probably honor Mr. Munroe's request and forward the checks unless prevented by proceedings in France. The day after this interview, on November 1st, Mrs. Dolan sailed from New York for Paris. Mr. Munroe's letter to his partners, dated November 3d, with its inclosure, did not leave New York until November 5th, one week after the hearing before me. Subsequent to the interview between Mr. Munroe's counsel and Mrs. Dolan's counsel, Mr. Munroe sent a cablegram to his partners in Paris on November 3d, saying:

"Don't part with checks Mary A. Dolan. See our letter of November 3d."

At the time when Mr. Munroe's letter of November 3d, written, as he informed his partners, only because of his promise to the court, reached his partners in Paris, Mrs. Dolan had already been a day or more in

that city. Under date of November 14th, while Mrs. Dolan was in Paris, the Paris house wrote to the New York house, in a letter which referred to a number of other matters, as follows:

"In re matter of Mary A. Dolan. We deplore the great annoyance your Mr. Munroe was submitted to in this case. Acquiescing to your request we have given orders to have all the vouchers relating to this account from September 14, 1902, to the date of the subpoena searched and put together to be forwarded to you as soon as possible. We may, however, decide to consult our lawyer as to the channel through which we had better send them, for instance, if it would not be wise to transmit them through the French foreign office and embassy."

And again under date of November 21st the Paris house wrote to the New York house as follows:

"We inclose for your perusal the official injunction not to part with any documents pertaining to Mrs. Dolan's account, also a letter from our counsel, M. J. Moreau, who strongly urges us not to give up the vouchers. We therefore consider ourselves bound by the legal instrument and our lawyer's advice."

The language of this letter, "*the official injunction*," when no injunction, so far as appears, had theretofore been referred to, and "not to part with," exactly the language of Mr. Munroe's cable of November 3d, is worth noticing. No injunction had in fact been served upon the Paris house at this time. The only thing which had been served upon it was a notice from Mrs. Dolan which had no effect upon the rights of the Paris house to forward firm papers to the New York house. The letter from the French advocate which was inclosed explicitly referred to voluntary disclosure to third parties. The suggestion that the Paris house might forward partnership papers to the New York house through the French embassy seems plainly insincere.

The refusal of the Paris house to forward the checks to New York was communicated to the United States attorney, and an assignment was made to resume hearings on the contempt proceedings. Other counsel came into the case, and under his advice Mr. Munroe cabled on December 5th to his brother, George Munroe, one of the Paris partners:

"Commence proceedings immediately. Procure order of court give permission to send Dolan checks. Answer."

This was the first and only real effort which the defendant ever made to obtain the checks, and it was too late. The following cable reply was received:

"Have taken proceedings. For your guidance we inform you that a judgment will probably be delayed five months according to French law for distant case. Personal application was refused."

The last sentence refers to Mrs. Dolan's application for the delivery of the checks to her.

I am inclined to believe, although I do not find it necessary so to find, that the letter of November 14th, from the Paris house to the New York house, in reply to the letter dated November 3d, was disingenuous, written at a time when the firm knew that legal proceedings were about to be instituted there by Mrs. Dolan to furnish them

with an excuse for withholding the checks, and that it was written to give an appearance of good faith to Mr. Munroe's conduct.

The respondent contended that under the French law the Paris partners were forbidden from sending these checks to the New York house on the ground that to do so would be a violation of professional confidence. Upon the evidence introduced before me I find that this is not the fact, and that the French partners at all times had, and still have, the right to forward these checks to the New York partners, in whose hands they could have been reached by this subpoena.

At any time prior to the notice of November 15th the Paris partners would have sent the checks in question to the defendant upon his real request therefor. The making of such a request involved no unreasonable exertion or expense on his part. He has not in good faith endeavored to perform his agreement of October 29th with the court, and he certainly has not done honestly and honorably "his very best to get the papers here." The result of his inaction and bad faith is that important evidence appears to have been lost to the United States, the result which he has at all times desired to bring about. This disposes of the questions of fact, as to which only two matters were seriously in controversy: (1) The French law; (2) whether the defendant had endeavored in good faith to carry out his agreement made with the court.

[2] As to the law, no decision very close to the case at bar has been called to my attention. Obviously every subpoena duces tecum requires a certain amount of effort on the part of the person subpoenaed to get together the books and papers called for and take them to court. It appears to be settled that where the person subpoenaed is the sole owner, or is solely entitled to the possession of such books and papers, he is required to make very considerable efforts to obtain and produce them. See *In re Storrer* (D. C.) 63 Fed. 564. If the defendant were the sole owner of the checks in question, or solely entitled to the possession of them, there can be no doubt, I think, that it would have been his duty to obtain them from France and produce them as directed.

As to the duty of a person subpoenaed duces tecum with respect to books and papers which he owns, or to the possession of which he is entitled jointly with other persons, the law appears to be unsettled. In *U. S. v. Collins* (D. C.) 145 Fed. 709, it was held that one of several partners who had been served with a subpoena duces tecum, requiring him to bring into court certain books and papers belonging to the firm of which he was a member, was in contempt, for not doing so; it not appearing that he had been prevented from obeying the precept by his partners. Some of the English cases appear to take a rather different view, and there may be a valid distinction between the production of partnership books, which would naturally be required for the daily business of the firm, and the production of other papers, like those in this case, which are not necessary for daily use.

The question is of much practical importance, because, although in this case it arises between the United States and a foreign country, a similar question might arise in the state courts in respect to partner-

ships which have places of business in more than one state. It ought not to be necessary, in order to secure the production of books and papers jointly owned or possessed, to serve subpoenas upon all the joint owners or possessors. It is, I think, sufficient if one of them can be reached by process. It then becomes his duty to make an effort, reasonable under all the circumstances, to obtain the books or documents called for and to produce them. If, in fact, he is prevented from doing so by persons against whom he has no right to enforce his claim to the possession of such books or documents, he has a valid excuse for not complying with the directions in the subpoena. It is not, it seems to me, material whether the boundary line of a state or of a country lies between him and the books or documents. The test is his control. If, having a right of ownership or possession (either sole or joint), the person subpoenaed is in fact able to obtain and produce the books or documents called for by making a reasonable effort, he is bound to make that effort in entire good faith. This view seems to me in accord with many established principles in our law, wherein a single person of several jointly entitled to the possession of personal property may treat himself, and be treated by the court, as the owner thereof. The justification for putting a witness to such trouble and expense rests upon the same fundamental principle of law that permits a third person to be compelled to appear and testify, often at great inconvenience and loss, in a controversy which does not concern him. While the partnership of Munroe & Co. is organized under French law and does business in Paris, it also does business in the United States. It is subject to the laws of both countries. The fact that the checks in question are in Paris instead of San Francisco seems to me, as I said at the former hearing, to be without special significance.

[3] The result is that Mr. Munroe was in contempt on October 3d for having made no effort to obtain the checks in question, and that his position before the court is at present no better, to say the least, than it was at that time. He has acted throughout under the advice of his counsel, but that is no excuse for deliberate disobedience to an order of court and, under the circumstances here disclosed, little mitigation of his offense.

UNITED STATES v. PRIEST.

(District Court, D. Massachusetts. January 19, 1914.)

No. 19 (C. C. 195).

1. INTERNAL REVENUE (§ 8*)—LEGACY TAXES—WAR REVENUE ACT—NATURE OF TAX.

The tax on legacies imposed by War Revenue Act June 13, 1898, c. 448, 30 Stat. 448 (U. S. Comp. St. 1901, p. 2286), is not a tax on property, but an excise tax or duty on the passing of an absolute right in property from the dead to the living, and is a charge or lien placed on the property so transmitted for the payment of the tax; the primary duty to pay the same resting on the executor.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 11, 12; Dec. Dig. § 8.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. INTERNAL REVENUE (§ 28*)—LEGACY TAXES—COLLECTION.

Where an executor fails to pay the legacy tax imposed by War Revenue Act June 13, 1898, c. 448, 30 Stat. 448 (U. S. Comp. St. 1901, p. 2286), the United States may bring an appropriate proceeding against him as provided by section 29 to have the tax made a lien on the property constituting the legacy in the executor's possession or control and to have the property sold to pay the tax, or, if the executor has parted with the possession and control of the property constituting the legacy, the proceeding may be instituted and maintained against any person having possession and control of the property to assert and foreclose the lien.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 76-81; Dec. Dig. § 28.*]

3. INTERNAL REVENUE (§ 28*)—TAXATION—LEGACY TAXES—RECOVERY—REMEDY.

Under War Revenue Act June 13, 1898, c. 448, § 30, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2308), providing that on an executor's failure to pay the tax the collector shall commence proceedings against such person or persons who may have the custody or possession of the property subject to the tax and to have the same sold, and from the proceeds the amount of the tax, together with costs, etc., shall be first paid, and the balance deposited subject to payment to those persons entitled thereto, the remedy so provided was exclusive, so that on payment of the balance of the legacy, subject to the tax, to the legatee by the executor without payment of the tax in full, the legatee was not liable in assumpsit for the balance of the tax, which could be recovered only by a proceeding to impose and foreclose a lien on the property.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 76-81; Dec. Dig. § 28.*]

Action by the United States against Fannie A. Priest to recover the legacy tax under the War Revenue Act of 1898. On demurrer to plaintiff's declaration. Sustained; action dismissed.

The United States Attorney.

Frank L. Simpson, of Boston, Mass., for defendant.

BINGHAM, Circuit Judge. This is an action of assumpsit brought by the United States against the defendant, a legatee under the will of Mary Ann Cox, to recover a legacy tax under the War Revenue Act of 1898, approved June 13, 1898, 30 Stat. L. pp. 464-466, c. 448, §§ 29, 30, 31 (U. S. Comp. St. 1901, pp. 2307-2310). The writ is dated September 24, 1906.

The plaintiff's declaration contains two counts, which read as follows:

"Count 1. And the plaintiff says that one Mary Ann Cox of Malden in said district of Massachusetts, deceased on August 22, 1898, testate; that by the third clause of her will, which was duly admitted to probate in the county of Middlesex, she bequeathed personal property valued at \$4,100 to the defendant, Fannie A. Priest, for her own use for life which said life interest was of the present value of \$2,045.13; that by the fourth clause of said will, said Cox bequeathed the sum of \$50,000, to the said Fannie A. Priest; that by the eleventh clause of said will, said Cox authorized and empowered her executors to sell the whole or any part of the residue of her estate, and of the proceeds thereof, together with all the rest and residue of her estate, she bequeathed five-nineteenths to the said Fannie A. Priest; and the plaintiff says that five-nineteenths of the proceeds of the sales of such residue has amounted to the sum of \$47,182.70, all of which bequests of personal property to the said Fannie A. Priest have amounted to the total of \$99,227.83, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

have been paid over to the said defendant by the executor and administrator of said estate, and the plaintiff says that the said Fannie A. Priest was an adopted daughter of, and a stranger in blood to, the said testatrix, Mary Ann Cox.

"Wherefore, under the provisions of the statutes of the United States applicable thereto, an internal revenue tax became due to the plaintiff upon said bequests at the rate of \$7.50 per \$100, amounting in the whole to the sum of \$7,442.09; that of said amount the sum of \$1,421.90 has been paid by the executor of the said Cox, leaving a balance due of \$6,020.19, which amount the executor and administrator of the estate of said Cox and the said defendant have refused and neglected to pay.

"And the plaintiff says that the collector of internal revenue for the district of Massachusetts, acting on behalf of the plaintiff, in September, 1904, duly assessed a tax or duty upon the administrator of said estate in the sum of \$8,604.32, which tax included said tax upon the legacies hereinabove set forth, and on or about the 14th of June, 1906, he made demand in writing upon the administrator of said estate to pay said tax before June 30, 1906.

"And the plaintiff says that the executor and administrator of the estate of said Cox have paid over to the defendant the legacies hereinabove mentioned, under the provisions of the will of said Cox, and that the defendant is the person who now has the actual possession of such legacies, property, and personal estate.

"Wherefore the plaintiff says the defendant owes it the balance of said tax, namely, the sum of \$6,020.19, with interest thereon from the 30th of June, 1906.

"Count 2 for the same cause of action:

"And the plaintiff says the defendant owes it the sum of \$6,020.19 and interest thereon, according to the account annexed:

"Account Annexed.

Fannie A. Priest, Legatee under the Will of Mary Ann Cox, Deceased, to the United States of America, Dr.

(1) To internal tax due on present worth of trust of \$4,100, to wit, \$2,045.13 at \$7.50 per \$100.....	\$ 153.39
(2) To internal tax due on legacy of \$50,000 at \$7.50 per \$100.....	3,750.00
(3) To internal tax due on $\frac{5}{10}$ of residuary estate, amounting to \$47,182.70 at \$7.50 per \$100.....	3,538.70
Total	7,442.09
(4) By internal taxes heretofore paid on interests of said Fannie A. Priest under the said will.....	1,421.90
Balance due.....	6,020.19"

To this declaration the defendant demurred, and assigned as grounds of demurrer the following:

"1. No facts are sufficiently set forth in the plaintiff's declaration whereby the taxes alleged in the plaintiff's declaration to be due to the plaintiff or any tax is due it as a matter of law.

"2. The plaintiff's declaration does not allege any acts done by the plaintiff or its agents whereby any tax became due and payable from the defendant to the plaintiff.

"3. No assessment by the plaintiff of any tax as is required by the provisions of the War Revenue Act of June 13, 1898, chapter 448, and acts in amendment thereof and in addition thereto, is alleged to have been made upon the defendant and in the absence of such assessment no tax is due from the defendant to the plaintiff.

"4. The plaintiff is not entitled to maintain the present action to recover a tax under the provisions of the War Revenue Act of June 13, 1898, chapter 448, and acts in amendment thereof, in addition thereto, and in repeal thereof.

"5. An action on an account annexed cannot be maintained to recover a tax under the provisions of the Act of June 13, 1898, chapter 448.

"6. The plaintiff's declaration contains no allegation of the time when the

administrator of the estate of the said Cox paid over to the defendant the legacies alleged in the plaintiff's declaration, nor of any demand upon the defendant for the payment of any tax to the plaintiff; and, without such allegation, the plaintiff is not entitled to recover any tax from the defendant nor any interest upon any tax assessed upon the administrator of said estate of said Cox.

"7. Because the interest of the defendant under the said eleventh clause of the said will of said Cox was a contingent interest, and there is no allegation that said interest became vested in possession in the defendant on or before July 1, 1902; and in the absence of such allegation the plaintiff is not entitled to recover any tax upon said interest from said defendant under the provisions of the Act of June 27, 1902 [c. 1160] 32 U. S. Stat. L. 406 [U. S. Comp. St. Supp. 1911, p. 983]."

[1] It appears from the allegations in the declaration that the defendant was a legatee under the will of Mary Ann Cox, a resident of the district of Massachusetts, who died August 22, 1898; that by said will certain bequests were made to the defendant amounting in all to the sum of \$99,227.83, upon which a legacy tax amounting to \$7,442.09 was imposed under the statute of June 13, 1898, and became due to the plaintiff; that of this tax the executor of the will paid the sum of \$1,421.90, and paid over to the defendant her legacy without paying the balance of the tax, amounting to \$6,020.19. This suit is brought against the legatee to recover this balance. The material questions raised by the demurrer are whether the tax can be recovered in this form of action, and whether the statute or the common law creates a personal liability on the part of the legatee to pay the tax.

Section 29 of the Act of June 13, 1898, provides in substance:

"That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the interstate laws of any state or territory, * * * shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be: * * *

"Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: Provided, that all legacies or property passing by will, or by the laws of any state or territory, to husband or wife of the person died possessed, as aforesaid, shall be exempt from tax or duty.

"Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half. * * *

"Sec. 30. That the tax or duty aforesaid shall be * * * a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee * * * before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, * * * the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a

schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list or statement, shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list, or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. * * * And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property, or personal estate, under oath as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual and constructive custody or possession of such property or personal estate, * * * or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. * * *

"Sec. 31. That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed are hereby made applicable to this act."

The question arises whether the tax is the personal tax of the executor or of the legatee, or is a tax in rem.

In *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, and in *Hertz v. Woodman*, 218 U. S. 205, 30 Sup. Ct. 621, 54 L. Ed. 1001, the nature of the tax, the circumstances under which and the time when it is imposed were considered. In the latter case the action was brought by the executors and legatees under a will to recover back an inheritance tax which had been paid to the government under protest. It appeared that the testator died prior to July 1, 1902, and that section 29 of the Act of June 13, 1898, was repealed by the Act of April 12, 1902, c. 500, § 7, 32 Stat. 97 (U. S. Comp. St. 1901, p. 980). The act of 1902 did not go into effect until July 1, 1902, and section 8 of the act contained a saving clause. The question presented was whether a liability or obligation to pay the inheritance tax had been imposed before section 29 was repealed, so that it was a subsisting liability or obligation and was preserved by the saving clause. It was held: (1) That section 29 imposed "a tax upon the transmission, or

the right to succeed to a legacy or distributive share * * * passing after the act," following the decision in *Knowlton v. Moore*, 178 U. S. 41, 56, 20 Sup. Ct. 747, 44 L. Ed. 969; (2) "that the tax or duty does not attach to legacies or distributive shares until the right of succession becomes an absolute right to the immediate possession or enjoyment;" that if a legacy is given upon conditions that may never happen the legacy will not be subject to a tax or duty until the right of possession or enjoyment becomes absolute, following *Vanderbilt v. Eidman*, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563; (3) that in the case under consideration "the right of succession which passed by the death of the testator was an absolute right to the immediate possession and enjoyment;" (4) that "the law * * * operated to fasten, at the moment this right of succession passed by death, a liability for the tax," and "the occurrence of no other fact or event was essential to the imposition of a liability for the statutory tax upon the interest thus acquired;" (5) that the fact that the tax was not due and payable at the time the repealing clause took effect and would not become due until "one year after the death of the testator" (section 30 as amended by the Act of March 2, 1901 [c. 806, § 11, 31 Stat. 948 (U. S. Comp. St. 1901, p. 2310)]), did not alter the situation; and (6) that the lien given by section 30 attached when the obligation or liability for the tax arose, and not when it became due and payable.

While it was held in this case that the tax was in the nature of an excise upon the transmission of property from the dead to the living, and that where the right to the possession and enjoyment of the legacy was absolute and not conditional, the obligation to pay the tax arose immediately on the death of the testator, and that the lien given to secure the tax attached at the same time, it is apparent that the case did not involve the questions here raised, namely, whether the tax is a debt of the executor or of the legatee, and, if it is neither, whether the common law imposes a liability upon the legatee, in the nature of an implied contract, to pay the tax upon receipt of the legacy, the executor having neglected to pay it.

It would seem that the fair meaning of section 29, when read in the light of the foregoing opinion, is that the tax there imposed is not a tax upon property, but is an excise tax or duty imposed upon the passing of an absolute right in property from the dead to the living, and that a charge or lien is placed upon the property thus transmitted for the payment of the tax, and that under the statute it is primarily the duty of the executor to pay the tax out of the legacies, and that if he does so he is protected by having the payments thus made allowed in the settlement of his account as executor.

[2] If the executor fails or neglects to pay the tax when due, then, in case he has the property constituting the legacy in his possession or control, the United States is authorized to bring an appropriate proceeding against him and have the property on which the tax is made a lien levied upon to satisfy the tax.

If the executor has not only failed to pay the tax, but has parted with the possession and control of the property constituting the legacy, then a like proceeding is authorized to be brought against any

person, whoever he may be, having possession or control of the property, for the purpose of asserting the lien and satisfying the tax thereon.

[3] The provisions contained in the acts of 1862, 1864, and 1898, with reference to the matters we are considering, are practically the same, and in all the cases which have been called to my attention construing the provisions in these statutes it has been held that the government could not maintain an action at law against the executor in his representative capacity, for the reason that the tax is not a debt of the decedent's estate; and that such an action could not be maintained against him in his individual capacity, as the only proceeding authorized by the statute to be brought against him is one to subject the property constituting the legacy to the payment of the tax while it is still in his hands. *United States v. Trucks*, Adm. (C. C.) 28 Fed. 846; *United States v. Fitts* (D. C.) 197 Fed. 1007.

In the *Fitts* Case it appeared that F. P. Fitts died leaving surviving him his wife, Mary E. Fitts, and his son, W. B. Fitts, and that in his will he named his wife and his son as executrix and executor. Mrs. Fitts' legacy was exempt from the tax. All the legacies were distributed without the tax having been paid upon them. An action at law was brought by the United States against W. B. Fitts and Mrs. Fitts as executor and executrix to collect the tax. W. B. Fitts was defaulted. It was held that Mrs. Fitts in her representative capacity could not be holden for the tax, as it was not a debt of the decedent, and was therefore not due from her as executrix. Some discussion was indulged in as to whether the executrix and executor, prior to the distribution of the estate, could be held liable for the tax in an action at law. No conclusion, however, was reached upon the question. The conclusion of the court was that as Mrs. Fitts had parted with the possession of the property of the estate, except the legacy which she received and which was exempt from taxation, she could not be held responsible for the tax, either in her representative or individual capacity.

It has also been held that a legatee into whose hands a legacy has come, without the tax having first been paid, is not personally liable for the tax; that under such circumstances the only proceeding that can be had against him, or any person into whose hands the estate has come, is one whereby the tax can be collected out of the property on which it is a lien. *United States v. Allen*, 9 Ben. 154, s. c., 24 Fed. Cas. 770.

The *Allen* Case arose under the Act of July 1, 1862, c. 119, 12 Stat. 485. There the defendant took the position that he was not liable as legatee under the will, or as receiver of the legacy, to pay the tax; and that no tax or duty became due or payable from him to the United States by force of any statute of the United States. It was there said that:

The provisions of the act, "so far as they impose a tax in personam, impose it only on the executor or trustee. They do not impose it on the legatee or cestui que trust. The executor is to pay the tax, not the legatee. * * * The executor is to make the statement, not the legatee. The executor is to receive the receipt from the collector, not the legatee. If the ex-

ecutor neglects to pay the tax, or to deliver the statement, or violates the requirements of the statute, it is not provided that a suit shall lie against the legatee in personam, to recover the tax, but that there shall be proceedings to enforce and realize the lien on the property or personal estate of the deceased. Those proceedings are to be in the nature of proceedings in rem, to subject the property of the deceased in the hands of any person who may have the custody or possession of it, to sale, to pay the tax. The present suit is not a proceeding of that character. * * * The complaint is based on the personal liability of the defendant, and no such liability is created by the statute."

While the case is authority for the proposition that the statute does not impose a personal obligation upon the legatee to pay the tax, and the order dismissing the suit may have been a denial of the plaintiff's claim that the receipt of the legacy imposed an obligation upon him to pay the tax, the question does not appear to have been given any consideration in the opinion. The question therefore remains whether the defendant, having received her legacy, consisting largely of cash on which the tax is charged, will be held liable as upon an implied obligation to pay the tax.

In *Montague, Ex'r v. State*, 54 Md. 481, the court said:

"In our opinion, if an administrator or executor actually pays over money of his decedent to a collateral distributee or legatee without retaining therefrom this tax, it becomes, to the extent of the tax, money had and received by him for the use of the state, and an action like the present may be maintained against such distributee or legatee therefor"—citing *Mayor, etc., of Baltimore v. Howard*, 6 Har. & J. (Md.) 383, and *Dashiell v. Mayor, etc., of Baltimore*, 45 Md. 615.

If it be assumed that such an implied obligation would arise, the defendant contends that the United States, in view of the provisions of the act imposing the tax, cannot maintain an action at common law to recover it from the defendant; that it is a rule of the common law that when a statute creates a right, and provides a particular remedy for its enforcement, the remedy provided is exclusive of all common-law remedies. The government's answer to this is that this rule is not applicable to the United States, unless the statute, expressly or impliedly, prohibits the use of the common-law remedy. This is the very question that was decided in *United States v. Trucks, Adm., supra*. It was there held that the language used in that clause of the "act of 1862, its supplements and substitutes," wherein it was provided that "proceedings shall be commenced before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such personal estate or property, or any part thereof; and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court," was "imperative that this remedy shall be pursued if payment of the tax is not made, and that it shall be in the name of the United States;" and that "the common-law rule above stated applies, and a common-law action cannot be maintained." In this opinion it is pointed out that the United States is specially named in the statute as the party by whom the action shall be brought, and that it is impliedly prohibited from enforcing its right in any other way. See *Bank v. United States*, 19 Wall.

(86 U. S.) 227, 232, 22 L. Ed. 80; *United States v. Chamberlin*, 219 U. S. 250, 31 Sup. Ct. 155, 55 L. Ed. 204.

This was the recognized meaning of the clause at the time of its reenactment in the act of 1898, and it must be assumed that Congress, by using the same language, intended to exclude the government from using any other remedy for the collection of the tax.

The demurrer is sustained, and the action is dismissed.

COOK v. HALE & WARD.

(District Court, W. D. Kentucky, at Paducah. April 18, 1912.)

1. JUDGMENT (§ 199*)—JUDGMENT ON PLEADINGS—JUDGMENT NON OBSTANTE VEREDICTO.

Judgment non obstante veredicto will not be entered on the pleadings under Civ. Code Prac. Ky. § 386, providing that judgment shall be given for the party whom the pleadings may entitle thereto, though there may have been a verdict against him, unless the verdict does not cure the defect in the pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

2. FRAUD (§ 9*)—DECEIT—MISREPRESENTATIONS—ACTION—ELEMENTS.

In an action for fraud in the sale of certain timber, the burden is on plaintiff to prove the misrepresentations; that defendant knew they were false, but intended that plaintiff should believe them to be true and act upon them; that neither plaintiff nor those acting for him knew of the falsity of any of the representations so made; that they were material; that plaintiff was ignorant at the time of their falsity and relied on defendant's statements as true; that, but for such reliance, plaintiff would not have entered into the contract at all; and that he was deceived and defrauded to his injury.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. § 9.*]

3. BOUNDARIES (§ 54*)—LOCATION—STATE LINE—CHANGE.

Lands in Kentucky lying west of the Tennessee river having been surveyed and divided into townships and sections by a survey by the state surveyor under Act Dec. 26, 1820 (2 Morehead & Brown's St. Ky. p. 1042), such survey fixed the lines as between private owners of the soil, which boundaries were not affected by subsequent changes in the boundary line between Kentucky and Tennessee.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 263, 268-277; Dec. Dig. § 54.*]

4. FRAUD (§ 59*)—SALE OF TIMBER—DAMAGES.

In an action for fraudulent representations in the sale of timber on certain land 12 inches and up at the stump, for which plaintiff paid \$8,000, the measure of damages was the difference between such sum and the value of the timber 12 inches and up at the stump actually on the land described in the contract.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.*]

5. FRAUD (§ 34*)—FALSE REPRESENTATIONS—NECESSITY OF TENDER.

Where plaintiff elected to affirm a contract for the purchase of certain timber which he had been induced to make by defendant's fraudulent representations, he was not required to tender a reconveyance of the timber as a condition precedent to his right to recover the difference between the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

consideration and the value of the timber on the land, in an action for fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 29; Dec. Dig. § 34.*]

At Law. Action by A. D. Cook against Hale & Ward. On motion by defendant for judgment non obstante veredicto and for new trial. Overruled.

Wheeler & Hughes, of Paducah, Ky., for plaintiff.

W. J. Webb, of Mayfield, Ky., and W. M. Smith, of Louisville, Ky., for defendants.

EVANS, District Judge. The court is entirely satisfied with the verdict of the jury, especially as the plaintiff at the hearing of the motion for a new trial agreed to, and no doubt will, execute and place in the hands of the clerk a reconveyance to the defendants of all the timber sold to him by the defendants under the terms of the contract described in the petition (none of which has been removed by the plaintiff), which reconveyance is to be delivered to the defendants upon the payment and satisfaction of the judgment herein. Undoubtedly there was either false misrepresentation or palpable mistake of material facts in the transaction between the parties. The resulting injury would have been rectified, had the plaintiff brought his suit in equity, by a rescission of the contract and a restitution of the \$8,000. Practically the same just result will be achieved by the satisfaction of the judgment herein and a reconveyance of the timber to the defendants whereby the status quo will be restored, and if, as the defendants insist, the timber is valuable, they will get the full benefit of that fact. With these general preliminary observations we proceed to the consideration of the questions raised on the two motions which have been made by the defendants.

Motion for Judgment Non Obstante Veredicto.

[1] Section 386 of the Civil Code of Practice provides for this very old motion in this language:

"Judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him."

As at the common law, a motion of this character depends upon the pleadings, and in disposing of it no notice can be taken of the evidence or any matter occurring at the trial. A construction of section 386 may be found in many cases. Pfeifer v. Ahrens, 4 Ky. Law Rep. 829; Arnold v. Arnold, 5 Ky. Law Rep. 696; Evans v. Stone, 80 Ky. 78. The old and very general rule stated in these cases may, however, be regarded, in a certain sense, as having been modified by the ruling of the court in Hill v. Ragland, 114 Ky. 209, 218, et seq., 70 S. W. 634, 637, where it was held that such a motion should only prevail in cases where the evidence heard and issues submitted to the jury and their verdict thereon do not cure the defective pleading. The opinion is quite instructive in this connection, but we extract only the part of it which is in this language, viz.:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"The rule as laid down by Chitty, viz., 'When the verdict can be fairly considered as establishing between the parties the very fact which should have been, but is not, precisely averred in the declaration, and especially when it clearly appears that the particular fact was understood by the parties to be the point in issue to be decided by the jury, it would be unnecessary for the ends of justice, and would be more than useless, to remand the case, that it should again be presented for the consideration of the jury,' has been approved and applied in terms by this court in numerous cases."

[2] We have no doubt the petition as amended was perfectly sufficient; but if it could be conceived that the facts were not precisely averred, yet if, as will be obviously shown, the particular facts were clearly understood by the parties to be the points in issue, the verdict cured the defect, and the motion should not prevail. We say this because the court explicitly charged the jury as follows:

"Comprehensively stated, the plaintiff in substance charges: (1) That the defendants, prior to and at the time of making the contract, falsely misrepresented to the plaintiff and to his agents then acting in his behalf the facts pertaining to the location and boundaries of the land on which the timber stood, and the quantity and character of that timber. (2) That the defendants at the time knew the representations so made by them to be false, but nevertheless intended that the plaintiff and those acting for him at the time should believe them to be true and thereby be induced to act upon them. (3) That neither the plaintiff nor those acting for him knew of the falsity of any of the representations so made by the defendants. (4) That the representations so made were upon matters that were material. (5) That plaintiff and his agents were at the time ignorant of the falsity of said representations, and relied upon the statements of the defendants as true. (6) That, but for such reliance upon the truth of said representations made by defendants, plaintiff would not have entered into the contract at all. (7) That he was deceived and defrauded by the defendants in respect to said matters greatly to his injury."

The jury were also told that these charges were explicitly denied and that the issues presented to them was thus raised. That this was an accurate statement of the issues to be tried by the jury is clearly shown by the fact that the defendants took no manner of exception to this part of the charge which submitted all these matters to the jury. Those indicated in the charge constituted every element to be considered in an action for damages for deceit and fraudulent misrepresentation as this is. The authorities are explicit and abundant. *Lehigh Zinc, etc., Co. v. Bamford*, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215; *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382; *Stewart v. Wyoming Ranch Co.*, 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439; *Trimble v. Reid*, 97 Ky. 713, 31 S. W. 861; *Ball v. Lively*, 4 Dana (Ky.) 369; 8 *Encyclopedia of Pleading & Practice*, pp. 897, 902, 903, 905; 14 *Am. & Eng. Encyc. of Law* (2d Ed.) 23.

Without further discussion, we conclude: (1) That the plaintiff's petition as amended states a good cause of action; or (2) that if the facts are not all precisely stated, yet that issues covering everything that should have been more fully averred were understood by the defendants to be those raised by the pleadings as charged by the court, and (3) that any possible defect in the pleadings was cured by the verdict. It therefore results that the motion for a judgment notwithstanding the verdict must be overruled. And what was said by the

Circuit Court of Appeals in *C. J. Huebel Co. v. Leaper*, 188 Fed. at page 772, 110 C. C. A. 475, may throw light on the situation, if indeed it needs any.

Motion for a New Trial.

The jury alone were to determine the facts. They did so, and their finding (we think properly) was adverse to the defendants. There was little if any objection to the admission of testimony. The parties were given liberal scope in this regard. The court charged the jury with laborious care, and no exception thereto was taken, except as shown at the foot of the charge; the exception actually taken being much expanded by defendants in their motion for a new trial.

[3] It will serve to elucidate the only exception taken by the defendants to recall that by the contract the defendants sold to the plaintiff all the ash timber "12 inches and up at the stump" on lands in Fulton county, Ky., described in the contract as follows, viz.:

"The southwest quarter of section 34, T. 1, R. 6 West, and being bounded on the north and west and south by the lands of Hale and Ward and on the east by B. H. Hale's land, also northwest quarter of sec. 34, the northeast southeast and southwest of section 33 and the fractional sections south of sec. 32, 33, and 34 all in T. 1, R. 6 W. containing about twelve hundred acres more or less, except $1\frac{1}{4}$ acres heretofore conveyed as right of way to C. M. & C. R. R. Co."

This, as plainly appears from reading the contract, is the only description given of the lands. That the exact lines of these sections and fractional sections had not been definitely ascertained by accurate surveys was not the fault of the court, who, since the first trial at the last term, had urged upon counsel the wisdom, if not the necessity, for such ascertainment.

But whether the exception actually taken to the charge would or would not be available elsewhere the court, on this motion, would not hesitate in its discretion to grant a new trial if convinced it had erred whether or not a ruling had been excepted to. Hence we proceed to consider the matter somewhat broadly.

We all know that in all compilations of the laws of Kentucky up to a recent period those respecting the lands west of the Tennessee river were placed in a separate article, and we all understand the reason for this. While in a general way at and before Virginia gave her consent to the creation of the new state, she claimed that her boundaries extended to the Mississippi river, the Chickasaw Indians had such claims to that portion of her territory which lies west of the Tennessee that neither Virginia, previous to the admission of Kentucky in 1792, nor Kentucky thereafter, exercised much sovereign power or right over that territory before 1818. However, Virginia had at an early day granted to many of her officers and soldiers considerable parts of the land in that territory. By the seventh article of the compact between the two states these military grants were protected. By section 1 of an act approved December 22, 1818, it was provided:

"That no entry or survey should be made upon any portion of the land lying within the late Chickasaw Indian boundary for the extinguishment of whose title a treaty has been lately negotiated by Isaac Shelby and Andrew Jackson,

commissioners appointed by the United States." 2 Morehead & Brown, Stats. p. 1040.

Since that treaty the territory west of the Tennessee river has been popularly called "The Purchase," or "Jackson's Purchase."

We know, too, that none of the lands in Kentucky east of the Tennessee river were ever sectionized in the correct and businesslike fashion of the states north and west of us, with the result that it took over 50 years of judicial effort to reduce the titles of land in our state to order.

An act entitled "An act for laying off the lands west of the Tennessee river into townships and sections" was approved February 14, 1820. Its first section is in this language:

"That there shall be appointed by a joint vote of both houses of the General Assembly, some fit person as superintendent in surveying the lands situate west of the Tennessee river in this state." 2 Morehead & Brown, Stats. p. 1040.

William T. Henderson was appointed by the Legislature as superintendent or surveyor for the state of this work, as distinguished from the surveyor of the lands which had been set apart for the various officers and soldiers of Virginia.

It will probably serve a useful purpose to insert section 1 of the Act of December 26, 1820, which, as appears from 2 Morehead & Brown's Statutes, p. 1042, is as follows:

"That the surveyor of the lands set apart for the satisfaction of the legal bounties of the officers and soldiers of the Virginia line on state establishment, be, and he is hereby authorized and required by himself or his deputies, to procure chain carriers and markers, and to survey without delay, all entries made in his office, prior to the first day of May, one thousand seven hundred and ninety-two, on warrants for military services aforesaid; and shall make out a full and fair connection of the surveys so made, showing where and how they interfere with the townships and sections of the land as laid off by William T. Henderson, surveyor for the State, and record one copy in his office, and return another copy to the register's office, on or before the first day of December next; and there shall be, and is hereby allowed to said surveyor as a compensation for the employment of chain carriers and markers, a fee at the rate of six cents for each one hundred poles of the boundary of such running for each chain carrier and marker."

In an act to further regulate the sale of lands west of the Tennessee river, approved January 16, 1827 (Acts 1826-27, c. 38) all persons were forbidden to enter any quarter section or fractional quarter section of land within said district. Very similar language was used in the fourth section of an act approved January 8, 1829 (Acts 1828-29, c. 46), entitled "An act to reduce the price of vacant lands west of the Tennessee river." And we can trace somewhat similar phraseology down to a very recent period. Much the same language is used in the contract in suit.

On December 19, 1820 (Acts 1820, c. 120), there was approved "An act to authorize the printing and publishing a map of the lands west of the Tennessee river," which was in this language:

"Sec. 1. Be it enacted by the General Assembly of the commonwealth of Kentucky, that William T. Henderson be, and he is hereby authorized to print and publish, at his own expense and costs, and for his own benefit, the map

and survey of the land west of the Tennessee river, to which he may add any notes of explanation which to him shall be deemed necessary.

"Sec. 2. Be it further enacted, that the said Henderson shall have the exclusive right, so far as this commonwealth have the power to grant it, of publishing and vending the maps by him so made and printed, for the term of ten years."

Doubtless it was upon this map that the lines of the sections and townships appear, and doubtless the southern line shown thereon would be the "Henderson line," spoken of in the testimony, which showed that no land south thereof in Kentucky had ever been sectionized.

In its opinion in *Ray v. Barker's Heirs*, 1 B. Mon. (Ky.) at pages 367 and 368, the Court of Appeals, after speaking of the provisions of the compact between Virginia and Tennessee, which was intended to protect the grants to officers and soldiers, said:

"The Legislature of Kentucky, as the means of restricting them to the boundaries of their entries, by the act of 1820, has given specific directions to the surveyor as to the manner of executing the surveys, the bearing and distance of each corner, from the nearest corner of a township or section, as surveyed by Henderson, the state surveyor, and has required him to embrace in the survey the quantity of land only embraced in the entry."

In 1820, with the approval of Congress, the states of Tennessee and Kentucky entered into an agreement by which the line between them was run by Alexander and Munsell, and it was supposed the matter was settled. Later there was a revival of the disputes. This resulted in another survey in 1858-59, and the report of this last survey is the one read in evidence at the trial. Always the line between the Tennessee and Mississippi rivers was supposed to be 36 degrees 30 minutes north latitude, but just where it actually ran on the land itself appears to have been difficult to ascertain and locate. And so we found at the trial that there was one line called the Painted line, another, probably nearly the same, called the Tyler Rock line, another shown by an actual survey recently made located the state line according to the Tennessee Code, and another survey recently made located the state line by the courses indicated by the Kentucky copy of the report of the survey in 1858-59. An error or discrepancy of five degrees between the Tennessee Code copy and the Kentucky copy of the report of 1859 caused the difference between the two last surveys between Puckett's Rock to the east and the Brushy Pond Rock on the west, both of which could be located. Both of the two last-named lines were north of the Tyler Rock and the Painted lines, the one ran according to the Tennessee Code being 794 feet north of the Tyler Rock and Painted lines, and that ran according to the Kentucky copy of the 1859 report being about 2,084 feet north of the Tyler Rock line. It is altogether probable that the "Henderson line," so called, was practically the same as that shown on the Kentucky copy of the report of 1859, which ran, as we have seen, about 2,084 feet north of the Tyler Rock line. The definite and accurate ascertainment of the boundary line between the two states was necessary only for the purpose of settling where the sovereign jurisdiction of the two states respectively ended. It had nothing to do with the settlement of the lines of the lands of private owners of the soil, and in no manner affected

such ownership upon one side or the other of the boundary line of the states. Any citizen might have owned or acquired land upon either side or upon both sides of that boundary. It must be obvious that ascertaining at this late day or in 1859 that the state line was some distance south of the lands sectionized in 1819 did not and could not result in the automatic elongation or enlargement of the sections and fractional sections as surveyed and fixed by Henderson. The lines of these sections and all fractions thereof remained the same, however much the state by treaty or otherwise may have extended its own line southwardly. The land embraced in such extension of territory would remain in the same private ownership, but would not be embraced in any sections previously surveyed and laid off which did not extend to the new state line. This can hardly be controverted. Nor could the owners of lands embraced in the sections and fractions of sections described in the contract in litigation and in previous conveyances on which that description was based, shove back the owners of the lands south of those sections, upon the ground that the two states had agreed upon a new boundary line between themselves. The lines of private owners did not readjust themselves upon new lines made for the states. They had no concern with such new state lines. It was upon plain and, as the court supposed, palpable reasons like these that it charged the jury as it did. The rights of the parties to this suit depended upon what took place between themselves, and in no way upon what took place between the two sovereign states.

[4] In considering the contract and the issues made by the pleadings as to whether the defendants knowingly and fraudulently misrepresented the facts, testimony as to all the surrounding circumstances, including testimony as to what was supposed to be the various lines, was heard without objection, and the jury were told to consider it all. But the court pointed out that the importance of that testimony had relation mainly to these issues because none was really made as to what was the actual and true state line. But when it came to stating the measure of damages in the event the jury should find for the plaintiff, then it seemed entirely clear to the court that it should say that the measure was the difference between the \$8,000 paid for the timber, and the value of the ash timber 12 inches and up at the stump actually on the lands described in the contract, which were the sections and fractional sections therein specifically named. They were the only lands, and that was the only timber to which the contract related in any possible way. It would have been palpable error for the court to say anything else upon that particular phase of the case. Yet this was all that was really excepted to by the defendants.

The court pointed out that the uncontradicted testimony showed that no part of the land in Fulton county (which is in the extreme southwest end of the state and was wholly or for the most part taken from what was originally Hickman county) had ever been sectionized south of what was called the Henderson line. We have shown that Henderson's work was done in 1819, before the states undertook to settle the state line. If the land south of the Henderson line was never sectionized, it could not be within the sections described in the

contract, and if not covered by the contract could not be considered in estimating the damages. Nothing could be plainer than this.

If, we repeat, the timber on the land covered by the contract has any value (as defendants insist), they will get the benefit of it, if they accept the reconveyance. If it is of no value, as the jury concluded, then the \$8,000 verdict was proper. The court was convinced by the evidence that most of the timber referred to in the testimony was located south of the land embraced in the sections and fractional sections named in the contract, and consequently that it did not and could not pass by the terms of that instrument.

[5] Some contention was heard at the argument that there was no sufficient allegation of a tender back of the timber or a reconveyance thereof before the action was brought to make the petition good. This contention goes upon the assumption that before suing a tender back of the thing purchased was necessary. We think this is a misapprehension. If the plaintiff had sued in equity for a rescission of the contract upon discovering the fraud, he would, of course, have been required to tender back what he had received, as he could not retain it and also recover what he had paid. But when, as here, he affirms the contract and only seeks to recover the damages resulting from the alleged deceit and false representations, no tender back was necessary, for he had a right to retain the timber and recover the damages resulting from the deceit, namely, the difference between what the timber actually was and what it would have been if the representations had been true. The authorities are very explicit. *Gregg v. Woods*, 3 Ky. Law Rep. 526; *Webb v. Milford Shoe Co.*, 128 Ky. 311, 312, 108 S. W. 229; 8 *Encyclopedia of Pleading & Practice*, 895.

The motion for a new trial must also be overruled.

ATLAS UNDERWEAR CO. v. COOPER UNDERWEAR CO.

(District Court, E. D. Wisconsin. December 3, 1913.)

1. INJUNCTION (§ 98*)—GROUNDS—INJURY TO TRADE OR BUSINESS.

While the owner of a patent may protect his interests by notifying the world in general or any person in particular of his rights and cautioning against infringement, he may not seek to enforce such rights by terrorizing the trade or customers of a competitor through a succession of threats which he never attempts to carry out, and a court of equity will enjoin such acts.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 169-171; Dec. Dig. § 98.*]

2. INJUNCTION (§ 98*)—GROUNDS—INJURY TO TRADE OR BUSINESS.

Defendant as owner of a patent for a union suit of underwear of the "closed crotch" style, which it manufactured, claiming that the patent was of a pioneer character and so broad as to cover all garments of that style, through trade circulars and advertisements in trade papers announced its claims, and its intention to enforce its rights, intimated that the United States would stop the business of all infringers and in effect advised dealers not to handle articles which might get them into trouble. It also referred to claims in pending patent applications and endeavored to con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vey the impression that they had the effect of claims in an issued patent. It brought no suit, although complainant and other competitors of defendant had for a year or more been openly making and marketing garments of the closed crotch style, denying infringement. *Held*, that such acts were not within defendant's rights, but were unfair and tortious and would be enjoined at suit of any manufacturer injured thereby.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 169–171; Dec. Dig. § 98.*]

3. INJUNCTION (§ 107*)—RIGHT OF ACTION—INJURY TO TRADE OR BUSINESS.

That such circulars and advertisements did not explicitly refer to complainant, but were general in their terms and with a single exception referred to all infringing manufacturers as a class, did not relieve defendant from liability to suit by complainant, where they in fact influenced its customers to its injury in common with those of other manufacturers, as they were calculated and intended to do.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 181–183; Dec. Dig. § 107.*]

4. COURTS (§ 343*)—PARTIES—INTERVENTION.

New Equity Rules 30 and 37 (201 Fed. v, 198 Fed. xxviii) do not entitle one not a necessary nor proper party to a suit to intervene to set up a counterclaim which has no bearing on the issues.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916, 919, 920; Dec. Dig. § 343.*]

In Equity. Suit by the Atlas Underwear Company against the Cooper Underwear Company. On motion for preliminary injunction. Granted.

The case comes before the court upon a motion for a preliminary injunction. The complainant is a corporation located at Piqua, Ohio, and manufactures underwear, particularly of the type commonly known as union suits. Its product is averred to be of high quality, received with general favor in the trade throughout the United States, and as a consequence thereof the complainant enjoys a high reputation, and has established a profitable business. The defendant is a competitor, located at Kenosha, Wis. It has also made a specialty of the manufacture and sale of the style of underwear known as union suits.

The bill charges that the defendant has endeavored by unlawful and malicious means and representations to injure the complainant's business and reputation, to drive it from the field of manufacture as a competitor, by circulating letters addressed and mailed to the customers and agents of the complainant, maliciously and untruthfully informing them that the union suits of complainant's manufacture which are or may be handled or used by such customers of agents are infringements upon letters patent owned or controlled by the defendant; that, to further such unlawful and unfair policy, the defendant has circulated letters and notices intended to reach, and which have actually reached, complainant's customers and agents, maliciously and falsely stating that the defendants expected to enjoin under Canadian letters patent No. 148,011 the manufacture of such garments as the "Atlas" (being one of the complainant's styles of underwear) in this country. That by like letters and circulars, the customers of complainant, and complainant, are maliciously threatened with infringement litigation, by reason of the alleged infringement by complainant's said underwear, of the subject-matter of an application for United States letters patent; the purpose of such threat being to obtain exclusive rights under letters patent before issue thereof.

The defendant, to further carry out its policy of maliciously injuring the complainant and its trade, has advertised in trade publications of general circulation in the trade, and among the agents and customers of the complainant, wherein false and malicious advertisements have been published, directed against the product of manufacturers, including the complainant,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and containing misleading statements and innuendo respecting the course pursued by the United States government in summarily dealing with infringers of patent rights. That such articles are published under circumstances and are given circulation, which necessarily convey an impression that the defendant has particular reference to the product of the complainant and to the complainant's agents and customers, and that such agents and customers to construe them. That defendant has, by printed words and illustrations, and with intent to injure and ruin the lawful business of complainant, sought to and has intimidated the trade, and especially the complainant's customers and agents.

To further carry out its attempt, the defendant on November 18, 1912, threatened the complainant with a suit for infringement of letters patent No. 973,200, issued October 18, 1910, in and by reason of complainant's manufacture and sale of its said product. That the complainant on November 23, 1912, denied alleged infringement. That thereupon the defendant, by circulation of letters and notices addressed and mailed to the customers and agents of the complainant, reiterated the charge that all closed crotch garments not bearing the words and figures "Patented October 18, 1910" (which mark is not borne by the closed crotch garment made and sold by complainant) are infringements upon the defendant's product, and has repeatedly continued to do so up to the time of the filing of the bill, but has not instituted any suit against complainant nor any agent or customer thereof. Hence, it is charged, that the threats of suit, and charges of infringement made against complainant, its customers and agents, were and are not made in good faith, nor with any intention of instituting suit.

The defendant by its answer challenges the right of complainant to proceed in equity to obtain relief because of the acts charged to have been committed by the defendant. The allegations respecting the attempts to break up and destroy the underwear business of complainant, to drive it from the field of manufacture of closed crotch union suits; the circulation among customers and agents of the complainant of letters addressed and mailed to the customers, whereby defendant maliciously or untruthfully informed customers and agents of complainant that union suits of complainant's manufacture are infringements of letters patent owned or controlled by the defendant; the circulation of letters and notices intended to reach the knowledge of complainant's customers, and by which the defendant maliciously and falsely stated that defendant expects to enjoin under Canadian letters patent No. 148,011, the manufacture of garments such as "Atlas" (complainant's trade designation of its garments); and, generally, all of the allegations of the bill respecting the malicious and unlawful conduct of the defendant in the respects detailed in the bill—are severally and expressly denied.

The parties respectively offered voluminous affidavits in support of and in opposition to the motion. The facts developed through such affidavits and accompanying exhibits will be referred to in the opinion.

Duell, Warfield & Duell, of New York City, for complainant.

Offield, Towle, Graves & Offield, of Chicago, Ill., and Lines, Spooner, Ellis & Quarles, of Milwaukee, Wis., for defendant.

GEIGER, District Judge (after stating the facts as above). There are two questions presented upon this motion: First, whether the defendant has been guilty of conduct which, if directed against the complainant, is tortious, and of such a character that a court of equity will take cognizance thereof and give injunctive relief; secondly, whether the facts sufficiently disclose an attack by the defendant upon the plaintiff, so that the latter can invoke the jurisdiction for the purpose of the relief which a court of equity can give.

[1] The first of these questions involves the consideration of the facts to determine the applicability of settled principles frequently recognized in this circuit, and particularly in the cases of Commercial

Acetylene Co. v. Avery (C. C.) 152 Fed. 642; *Warren Featherbone Co. v. Landauer* (C. C.) 151 Fed. 130; *Emack v. Kane* (C. C.) 34 Fed. 46; *Dittgen v. Racine Paper Goods Co.* (C. C.) 164 Fed. 85; *United Electric Co. v. Creamery Package Mfg. Co.* (D. C.) 203 Fed. 53.

These cases, while all recognizing the elementary principle that a patentee has a right to protect his interest under a patent by notifying the world in general, or any person in particular, of his rights—cautioning against infringement thereof—recognize and enforce with equal vigor the principle that a patentee cannot, under cover of his patent and his incidental rights, harass and annoy his competitors, seek to destroy their trade, and thereby accomplish results legitimately to be accomplished through the orderly processes of infringement suits. He may not terrorize the trade by calling attention to his rights, and seek to enforce such rights through a succession of threats which he never attempts to effectuate. Does the complainant show that the defendant has pursued a policy which calls for recognition and enforcement of this latter principle? It is my judgment that it does.

[2] It may be noted preliminarily to the manufacture and sale of the style of underwear known as union suits, and more particularly the "closed crotch" garment, has developed with great rapidity in the past few years; that, while there are different types and styles, the demand for the garment has been enormous, taxing the capacity of manufacturers to meet it. The defendant claims that, under a patent owned, it originated a type of garment so greatly superior to anything previously produced that it instantly commanded favor, and, being placed upon the market, resulted in attempted appropriation by many other manufacturers. Upon the hearing its attitude approached that of charging, broadly, wholesale piracy. The complainant, on the other hand—and it seems to be representative of many other competitors of the defendant—as stoutly insists noninfringement. The warfare which has thus arisen in the trade has been spirited, ill tempered, and, as appears from trade publications and affidavits presented, carried on unceasingly; so that, without doubt, the trade, so far as it includes dealers and retailers, has been in a state of alarm and panic, no one apparently knowing what, if any, immunity there was in purchasing any type of underwear claimed to be covered by letters patent. In this situation the defendant has insisted that it was the possessor of a pioneer patent; that by virtue thereof its rights were unquestioned and were perfectly clear, and it has, through repeated circulars, called attention to its claim respecting the pioneer character of its patent, and has pointed out to the whole trade the dire consequences which must ensue from the purchase by any one, without its license, of underwear not bearing the date of its patent. In view of the widespread infringement, according to the view of the defendant, and particularly in view of the rapid development which confessedly has taken place in the last two years, it would seem that the duty rested peculiarly upon the defendant promptly to assert its right by instituting suits to restrain wrongful infringement of its patent, rather than by inaugurating and carrying on a system of terrorizing the trade.

In the consideration of the questions presented in this suit, obviously the merits of the infringement controversy are not before us. It will be assumed that the defendant herein is a patentee; that the complainant is charged to be an infringer; and, as indicated, that the defendant, as a patentee, may assert and protect its rights in the manner hereinbefore indicated. For the purpose of determining, as it must be determined upon this motion, the issue of fact whether the defendant has used, or attempted to use, its privilege as a patentee as a cover or cloak to wage competitive warfare, seeking to advertise its own and destroy the trade for its rival's wares, the following considerations are pertinent:

In the first place, if the complainant is an infringer, its acts have been open, long-continued, and clearly defiant. The whole situation appears as one in which the defendant asserts its ownership of a pioneer invention and complainant and a dozen or score of other manufacturers have been in an attitude of open hostility and defiance to and against the broad claim made by defendant that the former, in so far as they make a "closed crotch" garment, are guilty of piracy. This appears to have been the situation for about a year prior to the filing of this bill. It is abundantly shown that the defendant, through a repetition of circulars sent to the trade by mail, or through trade journals, apprised every one interested in the sale of the garment in question, of the defendant's claim as patentee, and, as will hereafter be shown, has made use of such circulars to accomplish results obviously beyond the mere assertion of its rights as patentee. The question at once arises, if there is merit in defendant's contention respecting the pioneer and comprehensive character of its invention, why has it permitted the complainant and the other manufacturers to gain great headway in establishing in the trade, garments made by them, when recourse to an infringement suit would instantly have brought the situation to a point where the defendant's rights could not only have been asserted, but, if meritorious, enforced, and further infringement prevented and past wrongs redressed?

In the next place, what has just been referred to is peculiarly significant in view of the fact that all the defendant's circulars, notices, and advertisements, make, or attempt to make or intimate, the broad claim that by virtue of the patent which was issued to the defendant, it has within its exclusive control every shape of men's closed crotch garment suit. Whereas, the complainant—and probably other competitors—make the definite claim that the garment of their manufacture is not covered by the claims granted to the defendant in its patent.

In support of this attitude the complainant calls attention to a circular sent by the defendant, either to the trade, or to persons who were in a position through its use to influence prospective purchasers of garments, wherein attention is called to a suit instituted by the defendant against Browning, King & Co. for infringement of letters patent No. 973,200, and in which the defendant calls attention to a Canadian patent in the following language:

"Kenosha, Wis., June 18, 1913. This is to notify you that we have brought suit against Browning, King & Co. for infringement of our patent No. 973,200. We also have other infringement suits started under other patents. It is our

intention to protect these patents fully and would call your attention to a recently issued Canadian patent, their number, 148,011.

"We would call your attention to this Canadian patent for the reason that it is the same as the patent that we have now pending in the United States, and which we expect to have issued to us at an early date.

"If you send for the Canadian patent, we would call your attention particularly to claim No. 4, which you see will stop the manufacture of every form of a practical imitation closed crotch union suit. We expect, under this patent, to stop the manufacture of such garments as the Atlas, the Clark, the Globe, and others of the same character.

"We are writing you this in order to keep you posted, and for the reason that we think you can use the information to advantage in the marketing of your goods."

The garment referred to as "Atlas" is of complainant's manufacture.

A third fact—and one whose significance it is quite impossible adequately to disclose in an opinion—is found in an advertisement in a well-known trade journal. In part it is a picture, at one side of which appears a large factory building, over which, in bold type, is the word "Genuine." At the other side of the page appears another building over which in large type is the word "Imitation." This latter building is apparently being destroyed, crushed, or crumbled, through the power of an enormous hand which is labeled "U. S."—doubtless intending to symbolize the strong arm of the law. Below this picture, in large bold-faced type, is the following:

"Look Out for Uncle Sam.

"Right now Uncle Sam is busy unmaking vast businesses because they have violated his laws. He unmakes businesses that infringe patent rights even more readily than he dissolves a trust.

"Kenosha—Klosed—Krotch.

"Uncle Sam is no respecter of persons. If you own an automobile, you will remember the recent famous case of the Weed Tire Chain Co., and how Uncle Sam handled this case, putting the infringer out of business and saddling him with a heavy fine.

"We make this point, because if you are so unfortunate as to be handling one of the number of closed-in-the-crotch union suits that infringe the patents that Uncle Sam gave us Oct. 18, 1910, there is a very fair chance of a court order suddenly legislating your source of supply out of existence.

"This means that your sincere effort to build up a closed-in-the-crotch union suit business would all go for naught.

"Uncle Sam has expressed his opinion on this subject. His patent office granted us an exclusive patent for pioneer invention, the Kenosha-Klosed-Krotch, which is found in all White Cat union suits.

"This means that not only every infringing manufacturer lays himself open to an entire loss of business, based on the infringement, but that every dealer and jobber who handles his goods may have his supply cut off by an order of the United States Supreme Court, while he, the dealer, may be made the 'goat' of an expensive law suit."

This advertisement, which covers two large pages of a trade journal, in addition to the literature above quoted, urges dealers not to handle an article which may get them into trouble.

The circulars also deal with pending patents and the claims therein involved, and in fact assert a purpose to enforce the claims as made, even though they have not been allowed and covered by an issued patent; and, as I read them, they are framed to convey the impression, not that the claims are now in the Patent Office subject

to proceedings there pending, but that they in reality have the effect of an issued patent. This is done particularly by quotation of conclusions expressed by the Board of Examiners upon a patent appeal; but inasmuch as the character of the proceeding is not disclosed in the article, the layman, as I view it, necessarily regards the expression as a conclusion of a tribunal upon the precise question of infringement which is in controversy between the complainant, other manufacturers, and the defendant.

The defendant has not, in my judgment, met the inferences, legitimately to be drawn from its conduct thus disclosed. Upon argument of the motion, it was claimed that the failure for so long a time to institute infringement suits which the complainant and other manufacturers had, either directly or by their open defiance invited, was due to a desire on the part of defendant to await full disclosure by its rivals of the attitude of certain parties to interference proceedings pending in the Patent Office. This clearly would not justify the circularizing of the trade in the manner noted. It was the privilege of the defendant to defer institution of suits for any reason or for any length of time it saw fit; but it could not, at its option, either sue or adopt a policy of annoying its competitors.

With respect to the publication of the picture and its accompanying threats that the government "unmakes businesses that infringe patent rights even more readily than he (it) dissolves a trust," referred to, counsel for defendant, instead of attempting seriously to justify it, sought to minimize its importance and to treat it as harmless because of its obvious grotesqueness. It may be conceded that when subjected to proper standards it would not be awarded high artistic or literary merit. The award of such merit, however, is not primarily, what is sought to be attained in expensive advertising. Though not possessing other qualities, the advertisement was unquestionably calculated to be, as it is, an effective agency to "scare" defendant's rivals. No other view can reasonably be entertained.

Further reference to, or discussion of, the facts is not needed to justify the conclusion that the defendant's conduct has been unfair and tortious within the principles of the cases referred to.

[3] This brings us to a consideration of defendant's contention that the motion for an injunction must be denied because the proofs fail to disclose a course of conduct which involves, or is directed at, the plaintiff, specially; that whatever defendant has done was done respecting a class, no member of which can claim to have been specially wronged to enable him or it to invoke individually the equitable jurisdiction. This is supported by reference to the analogous rule found in the law of libel and slander, that statements made regarding the public, or a class generally, do not and cannot by way of inducement or innuendo apply to particular individuals who constitute such class, or the public.

It will be noted that, howsoever general are the terms of the literature sent out by the defendant, the complainant was doubtless a manufacturer and an alleged infringer specially in mind as one to be conquered in the campaign which was being or to be conducted. In the

circular already quoted (which defendant claims was in fact confidential and sent only to licensees or jobbers, but which, upon the prompting of some one found its way into the trade publications) it is stated:

"If you send for the Canadian patent, we would call your attention particularly to claim No. 4, which you see will stop the manufacture of every form of a practical imitation closed crotch union suit. We expect, under this patent, to stop the manufacture of such garments as the Atlas, the Clark, the Globe, and others of the same character."

Granting that this circular was sent out for limited purposes; that it was not intended to serve (directly, at least) the same purpose as the others—it shows the defendant pointing out complainant as one of an ascertained or ascertainable number or class whom or which it intended to reach. However, the broad view upon all of the facts disclosed does not, in my judgment, permit escape for the defendant upon the contention thus advanced. This may be taken as illustrative of the situation presented: A., a manufacturer, conceives B., C., and D. to be infringers. He can, of course, deal with them individually or regard them as a class—as constituting a body each of whom is trespassing upon his rights. He opens a campaign of sending threatening circulars and publishing threatening advertisements which are received by or come to the attention of E., F., and G., customers respectively of B., C., and D. Although the latter are not named or referred to specifically, their respective patrons are at once put in a state of alarm, and a situation threatens such as that described in the Dittgen Case (C. C.) 164 Fed. 85.

"His orders are countermanded, old customers desert him through fear of litigation, or demand bond of indemnity as a condition of placing orders. His business is melting away. Everywhere the trade is apprehensive of 'peremptory measures' if they buy goods of an infringer. * * * Customers will not listen to his explanation or denials, and unless he can get relief in a court of equity, his business, which represents 20 years of effort, will be entirely ruined by a competition which is malicious and unfair."

In the present case, the proofs are abundant that the customers of complainant, and also other manufacturers, in fact, the whole closed crotch garment trade, have been thrown into a state of alarm and panic, and that complainant and the other manufacturers have had to face a situation threatening many of the serious consequences above indicated. To recur to the illustration which we have used: Can or ought A. to be heard to say that the threatened consequences of his acts were not intended? Should he be heard to say that, if B. has suffered wrong, it is irremediable because his (A.'s) conduct was directed against a "class" which includes also C. and D.? If he can, then the wholesome doctrine of the cases to which we have referred will be of academic value only. The choice of another equally effective method of achieving the same results will render it inapplicable. The wrongdoer goes acquit because he proceeded by indirection. If this view were entertained, then the defendant before us may be permitted to say that complainant's customers were not justified in becoming panic stricken because the circulars referred to no one in particular. Yet, if these customers, instead of evincing a desire to

remain loyal to complainant, had turned their patronage to the defendant, could the latter in fairness deny that it had achieved against the plaintiff, at least one of the very victories for which its campaign was carried on? Manifestly it could not; and when the defendant's conduct is as directed, not against a class or body not resolvable into individuals, but merely against a large number of individuals whose identity and individuality is rendered certain by sending circulars and the like to their respective customers; and when the conduct is such as at once inculcates the belief that each of the individuals whose identity is thus disclosed, was and is intended to be reached, then the analogy drawn from the law of libel fails. The situation, it seems, is then either well within the exceptional rule in libel, where the surrounding circumstances may be shown to make certain the libel of an individual; or it is within a broader elementary principle which requires the patentee to respond for the conduct which is wrongful, whenever it is shown that injury to an individual is a consequence attributable thereto.

[4] Pending the motion for an injunction, Henry S. Cooper asked leave to intervene herein, also, for an order making Horace G. Johnson a party, to the end that, with such parties in the suit, they, or such of them as so desired, could by counterclaim set up a cause of action against complainant for infringement of the letters patent No. 973,200—being the infringement asserted by the defendant in its conduct which is the subject-matter of the bill before us.

Justification for the motion is sought in New Equity Rules, Nos. 30 (201 Fed. v) and 37 (198 Fed. xxviii), the latter embodying the familiar doctrine of adding as parties those whose presence is necessary or proper to a "complete determination of a cause," and permitting intervention by any one claiming "an interest in the litigation," while the former relates to counterclaims. If the defendant Cooper Underwear Company were alone seeking to assert a counterclaim of the character noted, it might present the interesting question whether it should be allowed in view of the ruling of this court in the recent case of *Adamson v. Shaler* (D. C. Wis. filed November 10, 1913) 208 Fed. 566, wherein the scope of rule 30 respecting counterclaims is considered. But the filing of the counterclaim in the present case depends upon first admitting new parties. Now, as we have indicated, the controversy tendered by complainant's bill must be settled irrespective of the merits of any infringement issue which the defendant may at any time or place tender against complainant. The latter may be an infringer and still prevail in the suit. Therefore, though Cooper and Johnson may each have such an interest in the patent as makes him a necessary or proper party to an infringement suit, which concerns only the defendant's alleged unfair conduct, neither can be said to be necessary or proper to its determination. These considerations are alone sufficient for a denial of the motion.

The conclusions are that a temporary injunction be awarded to complainant; that the motion for admission of Cooper and Johnson as parties be denied.

SCHLOTTMAN v. E. I. DU PONT DE NEMOURS POWDER CO.

(District Court, S. D. New York. December 22, 1913.)

1. CONTRACTS (§ 220*)—IMPLIED TERMS—ACTION FOR BREACH.

During the pendency of a deal for the purchase by defendant of the stock of a competing fuse manufacturing company defendant promised in writing that if the deal was made, and if after defendant had owned the property for a year it was able to make fuse and powder in the plant at a stated cost, it would pay the seller \$25,000 in addition to the price to be named in the contract. The contract was made and performed by the seller. *Held*, that such agreement was based on a valuable consideration, and impliedly bound defendant to keep the property for at least a year, and to make a fair effort to produce fuse and powder at the cost named, and that its failure to use the plant for that purpose, and its sale within the year to be used for other purposes, constituted a breach of the agreement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1013; Dec. Dig. § 220.*]

2. CONTRACTS (§ 324*)—REMEDIES FOR BREACH—MEASURE OF DAMAGES.

Where defendant, in a contract for the purchase of property, agreed to pay an additional consideration named, contingent on certain events the happening of which was made impossible by the wrongful acts of defendant, the seller is not limited to an action to recover such stated sum, but may maintain a suit on a quantum valebat, to recover the actual value of the property above the consideration received.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1549-1557; Dec. Dig. § 324.*]

3. TRIAL (§ 177*)—DIRECTION OF VERDICT—EFFECT OF REQUESTS BY BOTH PARTIES.

Where at the close of the evidence both parties request a directed verdict, if there is any question of fact, it is for the court to decide.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. § 177.*]

At Law. Action by William H. Schlottman against the E. I. Du Pont de Nemours Powder Company. On motion by defendant to set aside the verdict and for new trial. Denied.

Kellogg & Rose, L. Laflin Kellogg, and Abram J. Rose, all of New York City, for plaintiff.

Townsend, Avery & Button, William H. Button, and F. H. Button, all of New York City, and J. P. Laffey, of Wilmington, Del., for defendant.

RAY, District Judge. On the 24th day of July, 1908, one Charles G. Grubb of the city of Pittsburgh, Pa., and the defendant here, E. I. Du Pont de Nemours Powder Company, entered into a written agreement of which the following is a copy:

"This agreement, made the 24 day of July, 1908, between Chas. G. Grubb of the city of Pittsburgh, Pennsylvania, party of the first part and E. I. du Pont de Nemours Powder Company, a corporation of the state of New Jersey, having its principal office in the city of Wilmington, Delaware, party of the second part: Whereas, the party of the second part is desirous of purchasing the stock of the Pittsburgh Fuse Manufacturing Company, and whereas, the Pittsburgh Fuse Manufacturing Company is a corporation of the state of Pennsylvania, having an authorized capital stock of seventy-five thousand

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(\$75,000) dollars, divided into seven thousand five hundred (7,500), shares of the par value of ten (\$10) dollars each, all of which stock is now issued and outstanding and is full paid and nonassessable, and said company owns and operates a manufacturing plant, situate at Callery, Butler county, Pennsylvania, located on a farm containing about (80) acres, and which is and has been operated as a plant for the manufacture of commercial fuse: Now this agreement witnesseth, that the party of the first part, in consideration of the payments hereinafter mentioned, agree to sell, assign, transfer and set over unto the party of the second part, within ten days from the date of this agreement, all of the capital stock of the Pittsburgh Fuse Manufacturing Company.

"The parties of the first part agree that when said stock shall be transferred by them, the real estate and plant of the Pittsburgh Fuse Manufacturing Company shall be free from all mortgages, judgments, and other encumbrances, except a lease for oil and gas purposes held by the South Penn Oil Company, under which lease two wells are now in operation, and the party of the first part agrees that the royalties from said wells shall be assigned to such persons as may be indicated by the party of the second part, and that all accounts and bills and debts of every kind will be paid.

"The party of the first part agrees that the party of the second part may, within five (5) days from the date of this agreement, send to the plant of the Pittsburgh Fuse Manufacturing Company, one or two representatives, whose names shall be satisfactory to the parties of the first part, which persons shall have the right to inspect said plant, under the supervision and direction of the first party, but said persons will not be permitted to approach the fuse machine within a distance of six (6) or seven (7) feet. If the report of such persons is satisfactory to the party of the second part, it will notify the party of the first part to that effect within fifteen (15) days after such inspection, and shall also notify the parties of the first part within the same period of time if said report is not satisfactory, in which case this agreement shall be null and void, and all rights of the parties hereunder shall cease and determine.

"The parties of the first part agree that at the time of the delivery by them of the stock of the Pittsburgh Fuse Manufacturing Company, they will turn over and deliver to the party of the second part, all originals, tracings, blue prints and specifications, including those showing each part of the fuse and tape machines, as operated at the plant of the Pittsburgh Fuse Manufacturing Company, and also drawings showing the construction of said machines, together with all books, stock ledger and minute book of the company.

"It is understood that all open accounts, all notes and moneys due or in bank, on books of the Pittsburgh Fuse Manufacturing Company shall be assigned, transferred and delivered by said company to the party of the first part, or to whoever he may nominate.

"In consideration thereof, the party of the second part agrees to pay to the parties of the first part the sum of one hundred fifty thousand (\$150,000) dollars, payable as follows: Seven hundred and fifty (750) shares of the par value of one hundred (\$100) dollars each of the preferred stock of the party of the second part and seven hundred and fifty (750) shares of the par value of one hundred (\$100) dollars each of the common stock of the party of the second part, making a total par value of said stock of one hundred fifty thousand (\$150,000) dollars.

"Chas. G. Grubb agrees to deliver resignations of all officers and directors to take effect when desired, who will agree to act until resignations are accepted.

"In witness whereof, the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by its president, and its corporate seal to be hereunto affixed, duly attested by its secretary, the day and year first above written."

The Pittsburgh Fuse Manufacturing Company was or had been engaged in the manufacture and sale of commercial fuse. The defendant here, the purchasing company, was interested in the same busi-

ness. On the 20th day of July, 1908, and while negotiations were pending between Grubb and the Du Pont Company, so called for brevity, the president of the defendant company, T. C. Du Pont, as an inducement to the said Grubb to make such sale and enter into such agreement, wrote and delivered to Grubb the following:

"Mr. Chas. G. Grubb, Building.—Dear Sir: Should the deal now under discussion for the Pittsburgh Fuse Mfg. Co. go through and after we have had the property a year, it is understood that if in my judgment the property has for any reason been worth \$175,000 to our company and we manufactured double tape fuse at \$2.00 per thousand with powder \$3.60 per keg, we are to pay you \$25,000 in either bonds, preferred or common stock of our company as we may elect.

"Yours truly,

"T. C. Du Pont, President."

July 20, 1908, T. C. Du Pont also wrote Grubb the following:

"Mr. Chas. G. Grubb, Building.—Dear Sir: Referring to agreement of even date, we agree to buy from you or from those whom you may designate, \$10,000 worth of either preferred or common stock of E. I. du Pont de Nemours Powder Co. as we may elect at eighty.

"This offer to be left open fifteen days from date of transfer.

"Yours truly,

"T. C. Du Pont, President."

Thereupon and thereafter Grubb fully complied with the terms of the agreement dated July 24, 1908, and the property was transferred and delivered to the defendant. The defendant company turned the plant of the Pittsburgh Fuse Manufacturing Company over to W. B. Lewis, who ran it a short time. It kept the plant a few months only, and then transferred it to the Ensign-Bickford Company for the sum of \$150,723.22, the \$723.22 representing some added raw material. The defendant company took possession of this plant July 30, 1908, and turned it over to the Ensign-Bickford Company February 5, 1909. It was dismantled and its use discontinued. In short the defendant company put it out of its power to make double tape fuse or powder, or cause it to be done in this plant; did not make any, or cause any to be made, and refused to pay the \$25,000 or any sum. August 19, 1909, Grubb assigned his claim and cause of action to this plaintiff, Schlottman.

[1] The defendant contends that the communications of July 20, 1908, in connection with the agreement in writing of July 24, 1908, imposed no obligation on the Du Pont Company, and asserts that it expresses no consideration. It is of course necessary to go outside of that letter and show just what the "deal now under consideration for the Fuse Mfg. Co." mentioned or referred to therein was. However, it refers to a deal now under consideration for the purchase of that property, and identifies the property and contains an implied promise that the Du Pont Company will keep it a year or more if necessary and manufacture double tape fuse therein and powder, and that, if it is able to make such fuse at \$2 per thousand and powder at \$3.60 per keg, and if in the judgment of the president of that company the property has for any reason been worth \$175,000 to it, that then the Du Pont Company will pay Grubb an additional compensation or consideration for such property of \$25,000 in either bonds, or preferred or common stock of that company. This was a valid promise, based

on a good and a valuable consideration, viz., the making and execution and performance by Grubb of the deal then under consideration by which Grubb was to transfer the Pittsburgh Fuse Manufacturing Company property or stock to the defendant company, the E. I. Du Pont de Nemours Powder Company. There is nothing illegal, or immoral, or indefinite or uncertain, in the agreement. If Grubb will sell and dispose of his property to the Du Pont Company for a certain consideration, then in consideration thereof the Du Pont Company will keep that property at least a year, put it to a test in manufacturing fuse and powder, and if able to make such articles at a certain cost in the plant purchased, will pay Grubb the \$25,000 in the bonds or stock mentioned. It was an undertaking capable of performance. Whether the Du Pont Company could make fuse and powder at the cost mentioned was not known, and is not now known, but it could have been determined by the defendant and known. The company did nothing to ascertain whether or not it could be done, made no effort to perform its agreement with Grubb, but, on the other hand, voluntarily disabled itself to perform, put it out of its power to perform, or determine whether fuse and powder could be made in that plant at the prices named. *Horton v. Clark Mfg. Co.*, 94 App. Div. 404, 88 N. Y. Supp. 73; *Pritchard v. McLeod* (C. C. A.) 205 Fed. 24; *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; *Wilson v. Mechanical OrguINETTE Co.*, 170 N. Y. 542, 63 N. E. 550; *Hearn v. Stevens & Bros.*, 111 App. Div. 101, 97 N. Y. Supp. 566.

In *Wells v. Alexandre*, supra, Wells proposed to furnish defendants coal for its two steamers named for the year 1888, at a price per ton and Alexandre & Sons accepted the offer. Coal was delivered for a time, when Alexandre & Sons, the defendants *sold their steamers* and refused to take more coal. Held that this sale of the steamers was immaterial, and did not relieve defendants from the obligation to take the coal required in the ordinary and accustomed use of the steamers for the year.

In *Wilson v. OrguINETTE Co.*, supra, the owner of patents granted an exclusive license, and the licensee was to pay certain royalties on all articles sold by it. The licensee transferred the license to a corporation formed by the consolidation of itself and another corporation, and discontinued business. Held that defendant, the licensee, was still liable for royalties to the same extent it would have been had it continued business.

In *Horten et al. v. Hall & Clark Mfg. Co.*, defendant applied to plaintiff to become its agent in selling cotton wadding, which it was about to manufacture. Plaintiffs agreed to take the business, and did for 1899. January 2, 1900, the defendant's president called on the plaintiff and expressed satisfaction, and said plaintiff should have the business for 1900 on the same terms, and that they would not sell out (the business). The plaintiff accepted the offer. Defendant sold out and discontinued business, and plaintiff sued for damages. The court said, citing cases:

"We think it clear that in making this contract there was an implied agreement on the part of the defendant to continue manufacturing throughout the

year, and that in suspending manufacture and transferring its business it was guilty of a breach of its contract."

In *Hearn v. Stevens & Bro.*, 111 App. Div. 101, 97 N. Y. Supp. 566, it was held:

"A contract of employment for a fixed time, which gives to the plaintiff certain commissions on the sales of 'cloaks and suits now known as Department Nos. 21 and 18,' entitled such plaintiff to commissions on cloaks and suits which at the time of contract were sold in these departments, but which during the term of the contract were transferred by the defendant to other departments. Such contract must be interpreted in view of the conditions existing at the time of contract. A plaintiff is not precluded from asserting his rights under such contract by not objecting to the transfer of portions of said goods to other departments."

In *Pritchard v. McLeod* (C. C. A.) 205 Fed. 24, it was held:

"Where the balance of the purchase price of certain mining claims was payable only out of the gross output of the claims, defendant could not escape performance by willfully neglecting to work the claims and produce the fund from which the payments were to be made, though there was no clause in the agreement binding him to do so.

"Where a contract for the sale of mining claims provided that the purchaser should pay a balance of the price only by application of 25 per cent. of the gross output of the claims, it was his duty to use reasonable diligence to create the fund by working the mines, and his failure to do so for more than four years was sufficient to raise a rebuttable presumption of breach.

"Where a contract for the sale of mining claims provided that a balance of the price should be paid out of the proceeds of the mines, it would be presumed that the claims contained mineral; and the burden was on the defendants to rebut such presumption, and show that they were barren in defense, if such was the fact."

It cannot be doubted that when the defendant company induced Grubb to part with his property as he did, on the promise that if it made fuse and powder at the prices named it would pay the \$25,000 additional compensation, it impliedly promised to keep the property for at least a year, and make a fair effort to make fuse and powder at the cost named. Otherwise the promise in that communication was meaningless.

Damages.

[2] The plaintiff here has not sued to recover the \$25,000 falling due under the terms of the contract and according to its terms, but has sued to recover as damages for the breach the actual value of the property, less payments made thereon. If suit had been brought for the \$25,000 agreed to be paid according to the terms of the agreement, then it would have been incumbent on the plaintiff to prove that the premises or property transferred were reasonably worth \$175,000, and that fuse and powder could be made therein at the prices named. These were conditions precedent to recovery of that sum as the fixed consideration. *Hopedale, etc., v. Electric, etc.*, 132 App. Div. 348, 116 N. Y. Supp. 859, affirmed 198 N. Y. 588, 92 N. E. 1036. But the absence of such proof does not preclude the recovery of damages for the breach of the agreement, such damages as the plaintiff has proved.

Here the defendant by its own wrongful acts made the performance of the conditions impossible. In *Humaston v. Telegraph Co.*, 87 U. S. (20 Wall.) 20, 22 L. Ed. 279, it is held:

"When a person on a given contract covenants to pay a sum whose amount is to be contingent on certain events and is to be ascertained by arbitrators, such person, if he prevent an arbitration, may be sued at law on a quantum valebat, and the sum due may be ascertained by a jury under instructions from the court."

Here the *amount* to be paid was not to be contingent on certain events, but the payment of a *fixed sum* was contingent on certain events the happening of which were made impossible by the wrong of the defendant. Hence suit may be maintained on a quantum valebat; that is, for what the property was worth. Defendant by its acts not only deprived Grubb of the right to have a test made which would determine the value of the property in the judgment of the president of the Du Pont Company, and one which would determine whether fuse and powder could be made at the cost named, but by its wrongful act in violating the contract, also put it out of its own power to make the tests and determine the value of such property in the judgment of its president, and whether or not fuse and powder could be made at the cost specified, all of which it had agreed to do. In the opinion of this court, this plaintiff, the assignee of Grubb, cannot be relegated to proof that the president of the defendant company should have been satisfied the property was worth \$175,000, and that fuse and powder could have been made at the cost named in the agreement in order to recover. There was abundant evidence that the value of the property transferred by Grubb was at least \$150,000; and, as the value of the property transferred to him was proved to be \$122,625 on a quantum valebat, the plaintiff was entitled to a verdict of \$27,375. The amended complaint, prior to the trial, alleged that the property sold and delivered was of the fair and reasonable value of \$175,000, and by the defendant's wrongful acts in depriving said Grubb of the opportunity to have a test made of the property as provided in said contract the said Grubb was damaged in the amount of the difference between the fair and reasonable value of said stock, i. e., the sum of \$175,000, and the amount paid by the defendant on account of the purchase thereof under said contract; i. e., the sum of \$150,000, viz., the sum of \$25,000.

On the trial to conform to the facts and proof the plaintiff was permitted to change the amount alleged to have been received from \$150,000 to \$120,000. I think this must be treated as an action to recover damages for the breach of the contract, and not one on the contract to recover the sum agreed to be paid.

[3] It was claimed on the trial that Grubb assented to the sale of the property made by the Du Pont Company to the Ensign-Bickford Company, and so was estopped to claim any damages. The facts on that subject with the correspondence subsequent to the breach of the contract do not sustain such contention. At the close of the evidence both parties requested the court to direct a verdict in its favor, thus conceding there was no question of fact for the jury. For this reason the court did not submit the question of the value of the plant, etc., to the jury. Under the well-settled rules if there was any question of fact it was for the court to decide.

There will be an order denying the motion for an order setting aside the verdict and granting a new trial.

ADAMS et al. v. CHICAGO GREAT WESTERN R. CO. et al.

(District Court, N. D. Iowa, E. D. February 3, 1914.)

No. 61.

1. REMOVAL OF CAUSES (§ 25*)—GROUNDS—PETITION.

A suit or action cannot be removed to a federal court as arising under a law of the United States unless such fact appears from plaintiff's petition, and, if it fails so to appear, the omission cannot be supplied by the petition for removal or any subsequent pleading.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25.*]

2. REMOVAL OF CAUSES (§ 19*)—ACTIONS ARISING UNDER FEDERAL LAW—CARRIERS.

Where a petition against several carriers for loss of an interstate shipment of wool alleged that defendants carried the wool to destination but failed to deliver the same to plaintiffs or notify them of its arrival and failed to account therefor, having either appropriated the wool to their own use or delivered it to some person not authorized to receive the same, did not state a cause of action arising under a law of the United States so as to confer federal jurisdiction because Carmack Amendment, § 7 (Act June 29, 1906, c. 3591, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]), authorized a recovery against the initial carrier for loss sustained through the fault of any carrier whose line formed a part of the through route.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37-46, 48, 52, 53; Dec. Dig. § 19.*]

3. COURTS (§ 327*)—FEDERAL COURTS—JURISDICTION.

Where suit was instituted against certain connecting carriers for loss of goods shipped in interstate commerce, the fact that the initial carrier's liability arose solely because of Carmack Amendment, § 7 (Act June 29, 1906, c. 3591, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]), making an initial carrier liable for the default of connecting carriers forming a part of a through route in interstate commerce, was insufficient to confer federal jurisdiction of the controversy between plaintiff and such initial carrier, where the amount in controversy did not exceed the sum or value of \$3,000 as provided by Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [U. S. Comp. St. Supp. 1911, p. 135]) § 24a.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 889; Dec. Dig. § 327.*]

At Law. Action by B. H. Adams and others, copartners doing business as the Adams Seed Company, against the Chicago Great Western Railroad Company and others. On motion to remand. Sustained.

This action was commenced in a state court of Iowa by the plaintiffs as copartners, doing business under the name of the Adams Seed Company, against the Chicago Great Western Railroad Company, the Philadelphia & Reading Railway Company, and the Wabash Railroad Company, November 10, 1913, to recover from them jointly \$1,500 as damages for the alleged loss of certain goods which the plaintiffs say they delivered to the defendants as common carriers to be carried from a point in Iowa to Philadelphia, Pa.; there to be delivered to the plaintiffs. The suit was removed to this court upon separate petitions of the defendants Chicago Great Western Railroad Company and the Wabash Railroad Company, alleging that the "cause of action sued upon is one arising under the act to regulate commerce." The plaintiffs move to remand upon various grounds, one of which is that the cause of action alleged in the petition is not one arising under the "act to regulate com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

merce," or any other law of Congress; that the amount involved is less than \$3,000 exclusive of interest and costs; and that this court has no jurisdiction of the controversy.

John McCook, of Cresco, Iowa, for plaintiffs.

Reed & Pergler, of Cresco, Iowa, and Carr, Carr & Evans and Miller & Wallingford, all of Des Moines, Iowa, for defendants.

REED, District Judge (after stating the facts as above). The plaintiffs in their petition allege, in substance: That in May, 1909, they delivered to the defendants therein named a quantity of wool of the value of \$1,500 at McIntire, Iowa, a station on the line of the Chicago Great Western Railroad Company, without any written agreement or bill of lading issued therefor, to be shipped by the defendants from said station to Philadelphia, Pa., there to be delivered to the plaintiffs; that defendants carried said wool to its destination, but failed to deliver the same to the plaintiffs or notify them of its arrival at Philadelphia, and have failed to account to them therefor, and have either appropriated the said wool to their own use, or have delivered the same to some person not authorized to receive the same. Judgment is asked against the defendants for the value of the wool, viz., \$1,500, with interest and costs. The defendants Chicago Great Western Railroad Company and the Wabash Railroad Company in due time filed separate petitions to remove the action to this court upon the ground, as alleged therein, that the plaintiffs were, when the suit was commenced, citizens of the state of Iowa, and the defendants corporations of Illinois and Missouri, respectively; and "that the cause of action alleged by plaintiffs in their petition is one arising under a law regulating commerce, to wit, section 20 of the Interstate Commerce Act as amended by the Act of June 29, 1906."

The defendant Philadelphia & Reading Company filed a motion in the state court to dismiss the action as to it upon the ground that it had not been served with notice of the action within the state of Iowa, and that it was not doing business in said state, but subsequently withdrew said motion; and it was not ruled upon in the state court. After such withdrawal the state court ordered the removal of the cause to this court upon the petitions of the Chicago Great Western Railroad Company and the Wabash Railroad Company. The Philadelphia & Reading Company did not join in either of said petitions, nor file a separate petition to remove the action and does not appear in this court.

The plaintiffs move to remand upon the grounds, among others:

"That the cause of action alleged in the petition is not one arising under the act to regulate commerce," or any other law of the United States."

[1] It is settled by numerous decisions of the Supreme Court of the United States that a suit or action cannot be removed from a state court to the United States court upon the ground that it arises under a law of the United States unless such fact appears from the plaintiff's petition; and, if it fails to so appear, the omission cannot be supplied by the petition for removal, or in any subsequent pleading in the

case. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, and subsequent cases.

[2] It may not be necessary to refer in the petition to any particular law of the United States under which the cause of action is claimed to arise, for the court takes notice of the laws of the United States; but it is necessary to allege facts, and not mere conclusions, by which the court may know from the facts alleged that the cause of action is one that arises under some law of the United States. There is nothing in the plaintiff's petition in this case that indicates even remotely that the cause of action there alleged arises under the "act to regulate commerce" or under the Constitution, or any law or treaty of the United States; nor does it appear that the wool which it claims to have delivered to the railroad companies at McIntire, Iowa, to be carried to Philadelphia, was lost in transit, for it is alleged that the wool was carried to its destination by the defendants, that they failed to deliver the same to the plaintiffs after its arrival there, failed to notify them of such arrival, and that they have either appropriated the same to their own use, or delivered it to some one not authorized to receive it. The cause of action therefore, as alleged by the plaintiffs, cannot rightly be held to be one arising under the "act to regulate commerce" or any other law of the United States.

But if it did appear from the plaintiff's petition that the wool was delivered by them to the Chicago Great Western Railroad Company at McIntire, Iowa, to be carried in interstate commerce to its destination in Pennsylvania, a point beyond its own line through connecting carriers as its agents, and was lost or damaged in transit either upon its own line or that of the connecting carriers, such loss or injury could not be attributed to any violation of the act to regulate commerce; and an action to recover for such loss would not therefore be one arising under that act as amended by that part of section 7 of the act of June 29, 1906 (34 Stat. 593) commonly called the "Carmack amendment," as claimed by the removing defendants in their respective petitions for removal; but would only be one to recover from the primary carrier upon its common-law carrier liability for an injury to or loss of the property occurring upon its own line or that of a connecting carrier as its agent in carrying the property to its destination. *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 490, 32 Sup. Ct. 205, 56 L. Ed. 516.

The so-called Carmack amendment, as construed by the Supreme Court, declares only that a common carrier engaged in interstate commerce, who receives property for transportation from a point on its own line to a point in another state beyond its line, shall be deemed to have contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents; and forbids such carrier from making any contract, receipt, rule, or regulation which shall exempt it from the liability thereby imposed. In *Atlantic Coast Line Ry. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, the Supreme Court said:

"The general doctrine accepted by this court, in the absence of legislation, is that a carrier, unless there be a special contract, is only bound to carry over its own line and then deliver to a connecting carrier. That such an

initial carrier might contract to carry over the whole route was never doubted. It is equally indisputable that, if it does so contract, its common-law carrier liability will extend over the entire route."

It then holds that an action to recover damages for an injury to or loss of property so received by an interstate carrier is a loss or injury in no way attributable to any violation of the provisions of the act to regulate commerce; but is one only to recover upon its common-law liability as such carrier.

In *Galveston, H. & S. A. Ry. Co. v. Wallace*, above, the court in speaking of the Carmack amendment said:

"Wherever the carrier voluntarily accepts goods for shipment (under that amendment) to a point on another line in another state, it is conclusively treated as having made a through contract. It thereby elected to treat the connecting carriers as its agents, for all purposes of transportation and delivery," and must "be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice, and presumption as would have applied if the shipment had been between stations in different states, but both on the company's railroad. * * * But damages caused by a failure to deliver goods is in no way traceable to a violation of the statute, and is not therefore within the provisions of sections 8 and 9 of the act to regulate commerce. * * *"

The cases of *Schlemmer v. Buffalo, Rochester, etc., Ry.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681, and *Macon Grocery Co. v. Atlantic Coast Line R. Co.*, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300, do not support the contention of the defendants. The *Schlemmer Case* was to recover damages resulting from a failure to equip a car, upon which the plaintiff's intestate was killed, with a coupler as required by the safety appliance act of Congress. It was therefore a cause of action directly arising from a violation of that act.

The *Macon Grocery Co. Case* was a suit in equity to restrain the interstate carriers named as defendants from putting into effect upon their respective roads advances in freight rates, which it was alleged would be in direct violation of the act to regulate commerce. In each case, therefore, the cause of action alleged was directly traceable to an alleged violation of a law of the United States, viz., (1) the safety appliance law of Congress (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), and (2) the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).

In the *Macon Grocery Co. Case*, however, it was held that the Circuit Court was without jurisdiction of the suit because it was not brought in a district of which some of the defendants were inhabitants (it not being founded alone upon the diverse citizenship of the parties); but the decree of the Court of Appeals was affirmed, because that court had directed the dismissal of the bill without prejudice.

It seems entirely clear, therefore, that a failure of the initial carrier in interstate commerce to pay for the alleged loss of goods occurring upon its own line or the line of a connecting carrier while in transit violates no provisions of the act to regulate commerce, any more than its failure to pay any other obligation it might owe not arising from some violation of such act; and an action to recover for such loss is not one arising under that act.

[3] It may be said that this only goes to the merits of the controversy, or the right of the shipper to recover, and not to the jurisdiction of the federal courts to determine the controversy; and in behalf of the Chicago Great Western Company it is urged that the Carmack amendment, so called, imposes upon it a liability for the loss of the property in question occurring upon the line or lines of the other defendants as its agents in carrying the property to its destination and for which it would not be liable but for that amendment, and that the action is therefore one arising under the Carmack amendment to recover from it for the alleged loss of the wool, though such loss may not be attributable to any violation of the act to regulate commerce, and is therefore one arising under that amendment as a law of the United States to recover upon its liability for the loss of the wool. If this appeared from the plaintiff's petition, the contention would be forceful; but in that event the amount in controversy must exceed the sum or value of \$3,000 to confer jurisdiction upon this court of the action. Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [U. S. Comp. St. Supp. 1911, p. 135]) § 24a. This section but re-enacts the judiciary act of 1887-88 upon the question of jurisdiction of the federal courts as construed by the Supreme Court in *United States v. Sayward*, 160 U. S. 493, 16 Sup. Ct. 371, 40 L. Ed. 508, and in substantially the language of the court in that case, save only the proviso "that the sum or value of the amount in controversy shall not apply to the cases mentioned in the succeeding paragraphs of the section" including the eighth. But the cases mentioned in paragraph 8 do not apply to causes of action that are not attributable to some violation of the act to regulate commerce. *Storm Lake Tub & Tank Factory v. M. & St. L. Ry. Co.*, 209 Fed. 895.

Inasmuch therefore as it does not appear from plaintiff's petition that recovery is sought for any violation of the act to regulate commerce, and the amount involved is not sufficient to confer jurisdiction upon this court of a cause of action arising under any other applicable law of Congress, the motion to remand must be sustained, and the action remanded to the state court from which it was removed. It is accordingly so ordered.

J. I. CASE THRESHING MACH. CO. v. ROAD IMPROVEMENT DIST. NO. 3 OF PULASKI COUNTY, ARK.

(District Court, E. D. Arkansas, W. D. January 27, 1914.)

1. COURTS (§ 312*)—UNITED STATES COURTS—JURISDICTION DEPENDENT ON CITIZENSHIP—ASSIGNMENT OR NOVATION.

A contractor for the building of a road under a contract with defendant, which provided that 10 per cent. of the contract price should be retained until completion and acceptance of the work, assigned the sum so retained to a creditor to whom the contractor was indebted in an amount exceeding such 10 per cent. Defendant in writing consented to such assignment, and agreed to pay the assignee such part of the 10 per cent. so retained as might be due upon final settlement with the contractor after the completion of the work up to the amount due to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the assignee from the contractor. *Held* that, in determining the jurisdiction of a United States court over an action by the assignee against defendant on the ground of diverse citizenship, the citizenship of the contractor was immaterial, and the complaint was not demurrable for failure to allege that she was a citizen of a state other than that of the defendant, since the action was not upon an assigned chose in action, but was on a novation by which defendant was exonerated from liability to the contractor and became directly liable to the assignee.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865-875; Dec. Dig. § 312.*]

2. NOVATION (§ 1*)—NATURE AND REQUISITES.

A "novation" is the substitution by mutual agreement of one debtor or one creditor for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one which is to be extinguished, and its requisites are a valid prior obligation to be displaced, the consent of all parties to the substitution, a sufficient consideration, the extinguishment of the old obligation, and the creation of a valid new one.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4848-4851; vol. 8, p. 7733.]

At Law. Action by the J. I. Case Threshing Machine Company against Road Improvement District No. 3 of Pulaski County, Ark. On demurrer to the jurisdiction of the court. Demurrer overruled.

The complaint, in so far as it is necessary to set it out for the purpose of understanding the jurisdictional questions involved, states that the plaintiff is a corporation existing under the laws of the state of Wisconsin, and the defendant is a corporation created by the state of Arkansas, having its domicile within the jurisdiction of this court; that the defendant and one Mary V. Wiegel, the latter doing business under the firm name of Pulaski Stone Company, entered into a contract whereby Mrs. Wiegel was to build a certain road for the defendant; that the payments were to be made by the defendant to her on estimates of the engineer in charge as the work progressed; that 10 per cent. was to be retained until the contract was completed and accepted by the defendant, whereupon that sum was to be paid; that she performed the work, which amounted to \$32,561.40, of which 90 per cent. has been paid, and 10 per cent., amounting to \$3,256.14, is still unpaid; that while the work was being performed by Mrs. Wiegel, she being indebted to the plaintiff in the sum of \$3,800, as evidenced by her note, assigned to it all of the 10 per cent. retained estimates to the extent of \$3,800 and the interest on the note; that upon presentation of this assignment to the defendant it consented in writing thereto and agreed to pay the same to the plaintiff. This agreement is as follows:

"We hereby consent to the within assignment to the J. I. Case Threshing Machine Company by the Pulaski Stone Company and Mary V. Wiegel, and agree to pay the said assignee such part of the 10 per cent. retained by us in accordance with our contract with said assignors as may be due upon final settlement with the said assignors after the completion of the work called for by said contract up to the amount due upon the \$3,800.00 note, with interest at the time of payment.

"[Signed]

O. P. Robinson, President."

The contract having been completed by Mrs. Wiegel, and accepted by the engineer, the plaintiff demanded payment of the 10 per cent. retained sum, which was refused.

The defendant demurs to the jurisdiction of the court on the ground that the complaint fails to allege that Mrs. Wiegel, plaintiff's assignor, was a citizen of a state other than that of the defendant, and that she could have maintained an action for this money in this court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. A. Comer, of Little Rock, Ark., for plaintiff.
Ratcliffe & Ratcliffe, of Little Rock, Ark., for defendant.

TRIEBER, District Judge (after stating the facts as above). [1] It is conceded by counsel for the plaintiff that, if this action is merely upon an assigned chose in action, the failure of plaintiff to allege in its complaint that its assignor, Mrs. Wiegel, could have maintained the suit in this court would have been fatal; but it is claimed that the defendant made an express promise to pay this sum of money to the plaintiff, and that this action is upon that express promise, and for that reason the citizenship of Mrs. Wiegel is immaterial.

If this is a new promise to pay to the plaintiff this specific money due from the defendant to Mrs. Wiegel, agreed to by all the parties, it extinguished the liability of the defendant to Mrs. Wiegel, and created an obligation on the part of the defendant to the plaintiff. This is clearly a novation of the original indebtedness, and in such a case the jurisdiction of this court is controlled by the citizenship of the plaintiff and the defendant, regardless of that of Mrs. Wiegel.

[2] "Novation" has been properly defined as:

"The substitution by mutual agreement of one debtor or of one creditor for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one which is to be extinguished. The requisites of a novation are: (1) A valid prior obligation to be displaced; (2) the consent of all the parties to the substitution; (3) a sufficient consideration; (4) the extinguishment of the old obligation, and (5) the creation of a valid new one." In *re Ransford*, 194 Fed. 658, 662, 115 C. C. A. 560, 564, and authorities there cited.

In the instant case all of these requisites exist. It is true that Mrs. Wiegel's indebtedness to the plaintiff has not been extinguished, and will not be until the defendant makes the payment, as the plaintiff has accepted the assignment from her as collateral security only. But the defendant, when it accepted the order of Mrs. Wiegel, was exonerated from liability to her to the extent of the \$3,800 and interest thereon, and, as it appears from the complaint that its liability is less than the indebtedness due plaintiff from Mrs. Wiegel, her claim is entirely extinguished, and she cannot maintain an action for the recovery of the retained 10 per cent. The contract between the plaintiff and the defendant is a new contract between them; the consideration for the promise to pay plaintiff being the extinguishment of Mrs. Wiegel's claim to this retained 10 per cent. The agreement of the defendant to pay this money to the plaintiff was, in effect, an acceptance of an order on it, and from the moment of acceptance it became the primary debtor, and Mrs. Wiegel only contingently liable in case of nonpayment by the defendant. *Derby v. Sanford*, 9 Cush. (Mass.) 263.

In *Superior City v. Ripley*, 138 U. S. 93, 11 Sup. Ct. 288, 34 L. Ed. 914, the facts were very much like those in this case. In that case the city had entered into a contract with S. K. Felton & Co. for the construction of a system of waterworks for the sum of \$25,000; Felton & Co. built and completed the waterworks, which were accepted by the city and a part of the contract price paid. Felton & Co., being indebt-

ed to plaintiffs Ripley and Brunson in the sum of \$5,750, gave them an order which read as follows:

"Upon final completion and acceptance of waterworks by the city of Superior, Nebraska, pay to the order of Ripley and Brunson \$5,750.00, and charge same to contract price and on contract for erection of said waterworks.

"S. K. Felton & Company.

"To the Mayor and City Council of the City of Superior, Nebraska."

This order was presented to the city council and accepted. The acceptance indorsed on the order was as follows:

"The city of Superior, Nebraska, hereby accepts the within written order, provided the waterworks are fully completed according to plans and specifications and are duly accepted by the city, and then, in that event, the city of Superior will withhold from the final payment of contract price that may be due S. K. Felton & Company the amount of this acceptance or such part thereof as may be due said S. K. Felton & Company thereon, and will pay over such amount in city warrants to Ripley and Brunson in lieu of S. K. Felton & Company, such amount to be credited on said contract price for said waterworks as if the same was paid to S. K. Felton & Company.

"Dated Superior, Nebraska, December 24, 1888.

"By order of the City Council:

"[Seal of the City.]

C. E. Davis, City Clerk.

"C. E. Adams, Mayor."

The waterworks having been completed and accepted by the city, and the amount due S. K. Felton & Co. being in excess of the sum for which the order was drawn, Ripley and Brunson demanded payment, which was refused, and thereupon they instituted an action against the city in the federal court. The complaint failed to allege the citizenship of Felton & Co. On behalf of the city it was claimed that the court was without jurisdiction, as the complaint failed to show that Felton & Co., the drawers of the order, were citizens of a state other than that of the defendant; but this contention was overruled, the court saying:

"This acceptance was a contract directly between the city and the plaintiff below, upon which the city was immediately chargeable as promisor to the plaintiff. Nothing is better settled in the law of commercial paper than that the acceptance of a draft to order in favor of a certain payee constitutes a new contract between the acceptor and such payee, and that the latter may bring suit upon it without tracing title from the drawer. From the moment of acceptance the acceptor becomes the primary debtor, and the drawer is only contingently liable in case of nonpayment by the acceptor."

It will be noticed that the order was not an instrument negotiable under the law merchant, as the date when it was payable was not certain, nor was the acceptance an unconditional one. It was practically the same as the order in the case at bar.

In *Ingersoll v. Coram*, 211 U. S. 335, 361, 29 Sup. Ct. 92; 53 L. Ed. 208, a similar question arose. In that case one Root had employed an attorney to attend to litigation, and a lien was claimed on the share recovered for Root. Some of the property being in the state of Massachusetts, *Ingersoll's* administratrix instituted a suit in the federal court of Massachusetts to subject Root's share to the lien of her intestate, making citizens of Massachusetts and of Montana parties defendant. Root, who was not made a party to the suit, being also a citizen of the state of Massachusetts, it was claimed that as she was seeking to en-

force a right of Root against the administrator, arising under an equitable assignment by Root to her intestate, she was suing to recover as assignee of a chose in action upon which the assignor could not sue, there being no diversity of citizenship between him and some of the other defendants; but this contention was by the court overruled and the jurisdiction of the court maintained.

To the same effect are *American Color Type Co. v. Continental Co.*, 188 U. S. 104, 23 Sup. Ct. 265, 47 L. Ed. 404; *City of Seymour v. Farmers' Loan & Trust Co.*, 128 Fed. 907, 63 C. C. A. 633; *H. G. Holloway & Bro. v. White-Dunham Shoe Co.*, 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704; *Peacock v. Thaggard* (C. C.) 128 Fed. 1005, 1009.

In *Castle v. Persons*, 117 Fed. 835, 838, 844, 54 C. C. A. 133, 136, 142, it was held by the Circuit Court of Appeals for this circuit that even a verbal request is sufficient, when accepted, to constitute a novation. The court said:

"We see no difference between a verbal order or request and a written order or request, there being no law requiring either to be in writing. Neither need the acceptance be in writing. If the defendant in error owed Thomas Persons, and Thomas Persons requested him to pay the debt to Maria Persons, and he, upon such request, promised to pay it to Maria Persons, thereby extinguishing his debt to Thomas Persons, Maria Persons could sue and recover upon the promise, and, if this could be done, then all control over the chose in action would be in Maria Persons. She had complete power to reduce it to possession."

In that case Judge Sanborn, in a concurring opinion, said:

"If a creditor orally directs his debtor to pay his debt to a third party, and the debtor verbally agrees with the third party to do so, the latter is substituted for the first party as his creditor, the first party is estopped from collecting the debt, the debtor is released from paying to him, and is legally bound to pay it to the third party. A complete novation and assignment have been effected."

As this is an action upon an express promise of the defendant to pay to the plaintiff the retained money due on the contract to Mrs. Wiegel, and the requisite diversity of citizenship of the plaintiff and defendant exists, the demurrer to the jurisdiction is overruled.

In re CHEATHAM.

(District Court. W. D. Kentucky. January 19, 1914.)

1. BANKRUPTCY (§ 400*)—EXEMPTIONS—SETTING APART.

Generally a trustee in bankruptcy can only allot to the bankrupt the property exempt under the state law, and thereafter neither the trustee nor the bankruptcy court has any further authority over it, and creditors having lawful liens thereon must enforce them in the state courts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. § 400.*]

2. BANKRUPTCY (§ 400*)—EXEMPTIONS—SETTING APART.

The action of the trustee in bankruptcy, in allotting to the bankrupt the property exempt under the state law, may be excepted to, and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

propriety of his action, either as to whether the exemption was lawful or whether too much or too little was set apart, may be finally determined by the bankruptcy courts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. § 400.*]

3. BANKRUPTCY (§ 400*)—SALES OF PROPERTY—SETTING ASIDE.

Where it appeared that confusion resulted on a sale by a trustee in bankruptcy from the acceptance of one bid and the subsequent acceptance of another, and possibly even more confusion from the advertisement indicating an intention under certain conditions to sell the homestead, the referee did not err in setting aside the sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. § 400.*]

4. BANKRUPTCY (§ 400*)—EXEMPTIONS—SETTING APART.

Under Ky. St. § 1702, providing that there shall be exempt from sale for the debts of the owner so much land, including the dwelling house and appurtenances owned by the debtor, as shall not exceed in value \$1,000, section 1703 providing that, before a sale under execution, attachment, or judgment of land occupied as a homestead, the officer shall cause such part thereof which may be selected by the debtor, as shall not exceed in value \$1,000, to be valued under oath and set apart to the debtor, and section 1705 providing that, where real estate levied on, or sought to be subjected to the payment of any debt, or liability, is of greater value than \$1,000, and not divisible without great diminution of its value, it shall be sold and \$1,000 of the proceeds paid to the debtor to enable him to purchase another homestead, a referee in bankruptcy had no power to order the sale as a whole of over 180 acres of land, in which the bankrupt had a homestead exemption, on the ground that to lay off a homestead in kind would materially impair the vendible value of the land.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. § 400.*]

In Bankruptcy. Proceeding in the matter of Joe K. Cheatham, bankrupt. On petitions for a review of orders of the referee setting aside a sale by the trustee and ordering a resale. Order setting aside sale affirmed, and case remanded, with directions.

W. C. McChord, of Springfield, Ky., for creditors.

S. A. Russell, of Lebanon, Ky., for bankrupt.

EVANS, District Judge. This case comes before us upon two petitions for a review by the court: First, of an order of the referee entered on December 13, 1913, setting aside the sale made by the trustee on November 22, 1913, to Mrs. Zadia Cheatham, wife of the bankrupt, of 160½ acres of land scheduled by him, and ordering the trustee again to sell not only the 160½ acres but also 28 acres which had been set apart by the trustee to the bankrupt as a homestead; and, second, for the review by the court of the order of the referee made and entered on said date in effect setting aside and vacating the action of the trustee and the appraisers in the allotment to the bankrupt of the 28 acres. We will dispose of both petitions in this opinion.

The chief source of the troubles which have arisen has been the attempt to sell that part of the lands which was allotted by the trustee to the bankrupt as a homestead, and which is exempt from his debts under the law of Kentucky. Section 1702 of the Kentucky Statutes,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

among other things, provides that there shall be exempt from sale for the debts of the owner so much of the land, including the dwelling house and appurtenances owned by the debtor, as shall not exceed in value \$1,000; and section 1703 provides that the officer who is to sell the land of the bankrupt for the payment of any debt shall cause such part of the land, which may be selected by the defendant not to exceed in value \$1,000, to be valued under oath and set apart to him.

The bankrupt in due form set up his claim to what is usually and compendiously called his homestead exemption in the lands described in his schedules in this proceeding. The trustee, with the assistance of three appraisers duly sworn, allotted and set apart to the bankrupt 28 acres of the land; the dwelling house being upon the land thus allotted. After this was done, 160½ acres of the land remained to be sold. Instead of limiting his sale to the 160½ acres, the trustee, doubtless in accordance with the referee's order, in his advertisement stated that:

"Said property will be offered in two tracts and as a whole after first laying off the homestead of \$1,000 in value, including the house and appurtenances, and, if the property does not bring a sufficient amount to pay the lien debts, it will then be offered in two tracts, and then as a whole, including the homestead, and sold in the manner so as to realize the most money."

This advertisement fixed the date of the sale on November 22, 1913. On the day before, namely, on the 21st of November, the homestead had been set apart to the bankrupt by the trustee and the appraisers.

[1, 2] Since the Supreme Court decided the case of *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, there has been no doubt that a sale of a homestead by a trustee is rarely warranted. Generally speaking, all the trustee can do is to allot to the bankrupt the property exempt under the state law. Of course the action of the trustee in doing this may be excepted to, and the propriety of his action, either as to whether the exemption was lawful or whether too much or too little of the property of the bankrupt had been set apart, is open to final determination by the bankruptcy courts; but, after the property is set apart as exempt, neither the trustee nor the bankruptcy court has any further authority over it. So that here, while any controversy respecting the right to the homestead or as to whether too much or too little land was set apart as being worth more or less than \$1,000 may be settled in this proceeding, in no event could the trustee sell the homestead unless in the one contingency provided for by section 1705 of the Kentucky Statutes, which will presently be considered. If certain creditors, as claimed, have a lawful lien upon the land to be allotted to the bankrupt as a homestead, they must enforce that lien, if enforceable at all, in the state court having jurisdiction; and the latter part of the opinion in *Lockwood v. Exchange Bank*, above cited, points out the right, under appropriate conditions, to delay the bankrupt's discharge for a reasonable time. So that, if the 160½ acres does not bring enough to pay the secured creditors, the homestead may be open to their assertion of a lien thereon in a state court.

[3, 4] Should the sale of the 160½ acres have been set aside by the referee? is one of the questions to be considered. The court has very carefully examined this phase of the case, and as it appears to be clearly shown that confusion resulted from accepting at first the bid of \$20 per acre therefor made by Tobin and afterwards accepting another bid from the bankrupt's wife, and as there was possibly even more confusion resulting from the advertisement of the trustee's purpose, under certain conditions, to sell the homestead, we have concluded that those parts of the order of the referee which set aside the sale of the 160½ acres made on November 22, 1913, should be affirmed, and it will be so ordered. But those parts of the referee's order of December 13, 1913, which direct "the trustee to resell this property on January 17, 1914, as a whole, it appearing that to lay off a homestead in kind would materially impair the vendible value of the land" being beyond his power, should be reversed and set aside, and any order for a sale of the bankrupt's lands must altogether omit any provision for the sale of any part of the homestead as the same may be finally allotted and assigned to the bankrupt.

2. It remains to be considered whether the referee's order, which set aside the allotment to the bankrupt of the 28 acres as a homestead, was erroneous. In reaching his conclusion, the referee did not act upon the idea that the testimony showed that the 28 acres exceeded in value the sum of \$1,000, but he put his ruling upon the sole ground, as we have seen, that it appeared that to lay off a homestead in kind would materially impair the vendible value of the land.

Counsel for the opposing interests contends that the referee's order should be upheld under section 1705 of the Kentucky Statutes, which is in this language:

"Where the defendant in the execution, attachment or action owns real estate which is levied on or sought to be subjected to the payment of any debt or liability, and the same, in the opinion of the appraisers, is of greater value than one thousand dollars, and not divisible without great diminution of its value, then the same shall be sold under the execution, attachment or judgment, and one thousand dollars, of the money arising from the sale shall be paid to the defendant to enable him to purchase another homestead. But there shall be no sale if the land, when offered, does not bring more than one thousand dollars."

And counsel cites *Sansberry v. Simms*, 79 Ky. 527, and *Warren's Adm'r v. Warren*, 126 Ky. 692, 104 S. W. 754, 1199. We have examined both of these cases and find that in each the property consisted of a house and lot. In neither case was the property divisible; its very nature precluding such treatment of it. We do not, therefore, find anything helpful in either of the cases just named, but in *Duff v. Duff*, 145 Ky. 376, 140 S. W. 540, the Court of Appeals dealt with a case where the property involved was 177 acres of land. After setting forth in *hæc verba* section 1705 of the Kentucky Statutes, as we have copied it above, the court, noting that exceptions had been filed to the allotment of the homestead upon the ground that to allot the homestead in the way the appraisers had done would depreciate the value of the land, said:

"It will be observed that the statute does not allow a sale of the property unless it is 'not divisible without great diminution of its value.' The statute which gives the homestead right was so framed for the reason that the homestead is the home of the family, and it was intended that the home should not be broken up unless necessary to prevent great loss. The law favors the partition of land rather than its sale for a division of the proceeds, and there are peculiar reasons why this rule should be applied to the home of a widow and infant children. The proof shows the land is worth \$1,500 or \$2,000, and no particular facts appear requiring a sale. If a sale may be ordered of a tract of 177 acres of land when the improvements are worth only \$300, then it is hard to imagine a case where the whole tract may not be sold, and the widow required to take \$1,000 in money instead of the homestead which the law gives her. On the face of the record, we see no objection to the division which the commissioners made. The two tracts are left in good shape, and the adult heirs will be entitled to their interest in the homestead at the termination of the particular estate of the widow and infant child."

It will be seen from reading the opinion that that case, except that the husband was dead, very closely resembled the one before us, and we have concluded that the referee was in error in setting aside the allotment of the homestead upon the grounds stated by him in his order. We think the Duff Case is conclusive of this one, and that the right of selection given the debtor by section 1702 ought not to be destroyed by any construction of section 1705, unless in cases where the stress is much stronger than it is in this instance. But, as a wrong reason may not make erroneous an order which is sustainable upon other grounds, we proceed to consider whether the allotment was improper upon any reason apparent in the record. Certainly the testimony is conflicting on the question of the value of the 28 acres, and it is not altogether clear upon which side the preponderance rests. It may be that further testimony will be helpful, and as the referee does not seem to have considered this phase of the matter at all, notwithstanding his better opportunities for knowing the witnesses, we have concluded, pending the petition for a review of the orders respecting the allotment of the homestead, to remand the case to the referee, with directions to consider the testimony bearing on the value of the 28 acres, and also to hear any further testimony offered by either side on that subject. Whether his conclusions be one way or the other, his report, with any new evidence heard, will enable us to determine the questions remaining to be disposed of under the pending petition. If the 28 acres be found not to exceed \$1,000 in value, there will be no difficulty in passing on the petition for a review. If, however, its value is found to exceed \$1,000, it may be that the acreage can be reduced sufficiently by taking off the number of acres requisite to that end along the southern line of the 28 acres as shown on the plat.

An order will be entered in accordance with this opinion.

VESTAL v. DUCKTOWN SULPHUR, COPPER & IRON CO., Limited.

(District Court, E. D. Tennessee, S. D. December 9, 1911.)

No. 1098.

1. REMOVAL OF CAUSES (§ 86*)—CITIZENSHIP OF PARTIES—SUFFICIENCY OF AVERMENT—CORPORATION.

The averment in a petition for removal that a defendant corporation is a resident of a given state, domestic or foreign, is equivalent to an averment that it is a corporation under the laws of that state and a citizen thereof, within the meaning of the statutes relating to the jurisdiction of the federal courts.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

2. REMOVAL OF CAUSES (§ 86*)—DIVERSITY OF CITIZENSHIP—HOW SHOWN.

To render a cause removable on the ground of diversity of citizenship, it is not essential that such diversity be specifically alleged in the pleadings, or, if alleged, that it should be in the language of the statute; but it is sufficient if facts from which such diversity follows as a legal conclusion appear from the record.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

3. REMOVAL OF CAUSES (§ 107*)—PETITION FOR REMOVAL—AMENDMENT.

Where a petition for removal contains a general statement of jurisdictional facts, but in an informal way, an amendment may be allowed to make the allegations of such facts specific.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225-232, 234; Dec. Dig. § 107.*]

4. COURTS (§ 272*)—JURISDICTION OF FEDERAL COURTS—SUIT AGAINST ALIEN.

A suit in a federal court by a citizen of a state against an alien defendant may be brought and maintained in any district in which service can be had on the alien defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 811; Dec. Dig. § 272.*]

At Law. Action by J. H. Vestal against the Ducktown Sulphur, Copper & Iron Company, Limited. On motion to remand to state court. Denied.

This suit was commenced in the Circuit Court of Polk County, Tennessee, by the issuance of a summons requiring the defendant, "a mining corporation," to appear and answer the plaintiff in an action of damages for injury to property in the sum of \$7,500.00. The defendant seasonably filed in the State court its petition for the removal of the case to this court, in which, after making proper averments as to the jurisdictional amount involved, it further alleged "that at the time of the institution of this suit and ever since that time it was, and still is, a nonresident of the State of Tennessee and a resident of the United Kingdom of Great Britain and Ireland, and of no other State," and "that the plaintiff herein was at the time of the institution of this suit, and still is, a citizen of the State of Georgia and of no other State." An order of removal having been made by the State court and a transcript of the record filed in this court, the plaintiff moved to remand the cause to the State court, because, 1st, the necessary diversity of citizenship of the parties was not shown to exist; and, 2nd, neither of the parties was shown to be a citizen or resident of the Eastern District of Tennessee. The defendant thereupon moved for leave to amend its petition for removal so as to specifically allege that it was a corporation created and existing under the laws of Great Britain and Ireland, and a citizen thereof.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Mayfield & Mayfield, of Cleveland, Tenn., and J. B. Sizer, of Chattanooga, Tenn., for plaintiff.

W. B. Miller, of Chattanooga, Tenn., for defendant.

SANFORD, District Judge. [1, 2] 1. The sole ground upon which the defendant bases the right of removal is that this suit presents a controversy between the plaintiff, a citizen of the State of Georgia, and the defendant corporation, a citizen of Great Britain and Ireland, which is removable to the Federal Court by the defendant, being a non-resident of Tennessee, under sections 1 and 2 of the Act of March 3, 1875, c. 137, 18 Stat. 470, as amended by the Act of August 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508).

The theory of the first ground of the motion to remand is that while the petition for removal averred that the defendant is and was a non-resident of Tennessee and a resident of Great Britain and Ireland and of no other State, it did not aver that the defendant is and was a citizen of Great Britain and Ireland. In support of this contention the plaintiff relies upon the general rule that citizenship is not the same as residence, and that where Federal jurisdiction depends upon the citizenship of the parties, their citizenship and not their residence, must be distinctly shown by the record. *Robertson v. Cease*, 97 U. S. 647, 24 L. Ed. 1057, and other cases. Upon examining these cases, however, it appears that this rule has only been stated in cases involving the citizenship of natural persons, which may clearly, in many instances, be different from their residence. In the present case, however, it appears from the original summons that the defendant is a corporation. And the question is thus directly presented as to whether or not the averment in a petition for removal that a defendant corporation is a resident of a given State, domestic or foreign, is equivalent to an averment that it is a corporation under the laws of that State and a citizen thereof within the meaning of the statutes relating to the jurisdiction of the Federal courts. There appears to be no direct authority upon this precise question. As said, however, in *Shaw v. Quincy Co.*, 145 U. S. 444, 450, 12 Sup. Ct. 935, 937 (36 L. Ed. 768), the doctrine has been often re-affirmed by the Supreme Court "that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the State by which it was created, although it may do business in other States whose laws permit it." While this rule has only been applied to the extent of holding that the residence of a corporation necessarily follows its citizenship, that is, that it is by necessary inference of law, a resident of the State under whose laws it is created, it appears to follow conversely, that an averment that a corporation is a resident of a certain State necessarily implies, as a conclusive inference of law, that it is a corporation created and existing under the laws of that State, or, as it is termed, a citizen of that State, since otherwise it would be impossible for it, under the doctrine repeatedly recognized by the Supreme Court, to be a resident of that State. I therefore conclude that under the whole record, including the summons and the averment of the petition for removal, as it appears that the defendant is and was a corporation,

which is and was a non-resident of Tennessee and a resident of Great Britain and Ireland and of no other State, it necessarily follows, as a conclusion of law, that it is and was a corporation created and existing under the laws of Great Britain and Ireland and a citizen thereof within the meaning of the jurisdictional Statutes in question. It is true that in cases where Federal jurisdiction depends upon diversity of citizenship this fact must distinctly appear. However, it is not essential that such diversity of citizenship be averred in the pleadings if it otherwise affirmatively appear in the formal record. *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Grace v. Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932. And further it is not necessary that the diversity of citizenship be alleged in the language of the Statute, provided the facts appear from which diversity of citizenship follows as a legal conclusion. *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078.

I am therefore of opinion that the first ground of the motion to remand is not well taken.

[3] 2. And while for the reasons above stated I am of opinion that the citizenship of the defendant as an alien corporation sufficiently appeared from the record, I, nevertheless, think it proper to allow the petition for removal to be amended so as to specifically aver that the defendant is and was a corporation created and existing under the laws of Great Britain and Ireland and a citizen thereof, as prayed by the defendant; such amendment being permissible by analogy to the general rule that where a petition for removal contains a general statement of jurisdictional facts, but in an informal way, an amendment may be allowed so as to make sufficient specific allegations establishing the same jurisdictional facts. *Ayres v. Watson*, 113 U. S. 595, 5 Sup. Ct. 641, 28 L. Ed. 1093; *Robertson v. Ins. Co. (C. C.)* 68 Fed. 173; *Johnson v. Mfg. Co. (C. C.)* 76 Fed. 616.

[4] 3. The second ground of the motion to remand is that it does not appear that either the plaintiff or the defendant is a citizen or resident of the Eastern District of Tennessee. This ground of the motion is apparently based upon the theory that there would have been no jurisdiction of this controversy as an original suit unless either the plaintiff or defendant resided in the Eastern District of Tennessee, and that hence the cause was not removable to this court by analogy to the rule stated in cases of controversies between citizens of different States in *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. The condition precedent for the application of the rule of the *Wisner* case is, however, lacking in the present case, since the provisions of the Act of March 3, 1875, c. 137, as amended by the Act of August 3, 1888, c. 866, that no civil suit shall be brought in the Circuit Courts of the United States against any person in any other district than that whereof he is an inhabitant, and that where the jurisdiction is founded only upon the fact that the action is between citizens of different states, the suit shall be brought only in the district of the residence of either the plaintiff or the defendant, have no application to a suit by a citizen of a State against an alien defendant; but such suits may be brought and maintained in any Circuit Court of the United States in which service can be had upon the alien defend-

ant. In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; Barrow Steamship Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; Ladew v. Tenn. Copper Co. (C. C.) 179 Fed. 245, 253.

4. An order will accordingly be entered granting the defendant's motion to amend the petition for removal as prayed, and overruling the plaintiff's motion to remand the cause to the State court.

UNITED STATES ex rel. F. ZIMMERMAN & CO. v. OREGON-WASHINGTON R. & NAVIGATION CO. et al.

(District Court, D. Oregon. December 8, 1913.)

No. 6197.

1. INTOXICATING LIQUORS (§ 14*)—STATE REGULATIONS OF SHIPMENT—CONSTITUTIONALITY OF STATUTE.

Sess. Laws Idaho 1909, p. 9, which makes it a crime, inter alia, for any person or corporation within the state to accept for shipment or transport any intoxicating liquor to any person, club, corporation, etc., in any prohibition district or place in the state, except for certain specified purposes, although construed as its language warrants to make unlawful such shipments, even when the liquor is intended for the personal use of the consignee, is not unconstitutional, but a valid exercise of the police powers of the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 16; Dec. Dig. § 14.*]

2. COMMERCE (§ 61*)—INTERSTATE TRAFFIC IN INTOXICATING LIQUORS—CONSTITUTIONALITY OF STATUTE.

The Webb-Kenyon Act of March 1, 1913, c. 90, 37 Stat. 699, which prohibits the shipment or transportation of intoxicating liquors from one state into another when such liquor is intended to be received, possessed, sold, or in any manner used in violation of any law of such state, is not so clearly unconstitutional as to justify its being so declared by a federal court of original jurisdiction.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81-84, 89; Dec. Dig. § 61.*]

3. COMMERCE (§ 61*)—INTERSTATE TRAFFIC IN INTOXICATING LIQUORS—RIGHT OF CARRIER TO REFUSE SHIPMENTS.

Under such statute, where the law of a state prohibits the transportation of liquor into a prohibition district within the state, an interstate carrier may lawfully refuse to accept liquors for shipment from points in other states to points within such a prohibition district.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81-84, 89; Dec. Dig. § 61.*]

At Law. Petition of F. Zimmerman & Co. against the Oregon-Washington Railroad & Navigation Company and others for writ of mandamus. Writ denied.

Snow & McCamant, Geo. B. Guthrie, and Zera Snow, all of Portland, Or., for petitioner.

A. C. Spencer and E. L. McClure, both of Portland, Or., for respondents.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BEAN, District Judge. This is a petition for a writ of mandamus requiring the defendant railway companies to accept for transportation and to transport from Portland, Or., to Heyburn, in the state of Idaho, a gallon of whisky consigned to and intended for the personal use of one Charles Holsten.

Heyburn is within a prohibition district in Idaho, and by the laws of that state (Session Laws 1909, p. 9) it is made a crime for any person, either directly or by any device or subterfuge, to sell, furnish, deliver, give away or otherwise dispose of intoxicating liquor of any kind in any prohibition district, except for certain specified purposes not material here. And it is also made a crime for any person, firm, corporation, society, or club within the state to accept for shipment, transportation or delivery, or to ship, transport, or deliver any intoxicating liquors to any person, firm, corporation, society, or club in any prohibition district in the state, or to any point or place in the state where the sale of intoxicating liquors is prohibited, except for certain specified purposes (medicinal, mechanical, manufacturing, and scientific, or wine for sacramental purposes), or as permitted by the Interstate Commerce Laws of the United States. The recent act of Congress, known as the Webb-Kenyon Act, chapter 90, 37 Statutes at Large, 699, prohibits the shipment or transportation in any manner, or by any means whatever, of intoxicating liquor of any kind from one state into another, which liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state.

In obedience to and in conformity with the act of Congress and the laws of Idaho, the defendant companies have promulgated a rule to the effect that shipments of intoxicating liquor from points outside of the state of Idaho to points within a prohibition unit of such state shall be governed by the same rules as purely intrastate shipments, and therefore refused to accept the shipment in question. The point for decision is whether the regulation referred to is valid. The contentions of the petitioner are: (1) That the law of Idaho does not prohibit intrastate shipments of intoxicating liquors into dry territory for the personal use of the consignee; (2) that if it does, it is to that extent invalid because an unwarranted interference with the liberty and property of a citizen; and (3) that the act of Congress known as the Webb-Kenyon law is unconstitutional because it confers on a state the right to regulate and control interstate commerce.

[1] The language of the Idaho statute is manifestly broad enough to make unlawful all intrastate shipments of intoxicating liquors (except certain shipments not material here), although intended for the personal use of the consignee. And in my judgment it should be so treated and considered by a *nisi prius* court sitting in another jurisdiction until it is otherwise interpreted by the courts of Idaho, and especially in a case where it is sought by mandamus to compel a defendant to violate the terms of the statute. Nor am I prepared at this time to say that such a provision is unconstitutional. The Supreme Court of the United States held, in *Mugler v. Kansas*, 123 U. S. 662, 8 Sup. Ct. 273, 31 L. Ed. 205, that a state might lawfully prohibit the

manufacture of intoxicating liquors for the personal use of the manufacturer, if in the judgment of the lawmaking power such manufacture would tend to cripple or defeat the effort to guard the community against the evils arising from the excessive use of such liquors, and that the courts should not, upon their views of what is best and safest for the community, disregard the legislative determination of that question.

If, for the reason stated, a state may lawfully prohibit the manufacture of intoxicating liquors for the personal use of the manufacturer, why may it not for the same reason lawfully prohibit the transportation thereof for the individual use of the consignee? The question in either case would seem to be one of public policy, the determination of which belongs to the lawmaking power and not the courts. I, therefore, assume for the purposes of this case that the laws of Idaho prohibit the intrastate shipment of intoxicating liquors into dry territory for the individual use of the consignee, and that such legislation is valid.

[2, 3] The constitutionality of the Webb-Kenyon law was much discussed during its consideration by the legislative and executive departments of the government, and lawyers of eminent ability differed in regard thereto. Since its passage it has been the subject of judicial consideration in a few cases. It has been held unconstitutional by a nisi prius court in Iowa, and possibly has been so regarded by Judge Willard, United States District Judge for the District of Minnesota. The only court of last resort which has passed on the question to my knowledge is the Supreme Court of Delaware, which, in an able and exhaustive opinion, held the law to be constitutional and valid. *State v. Grier* (Del. Gen. Sess.) 88 Atl. 579.

The authorities bearing on the question are cited, referred to, and commented upon at length by the learned Chief Justice, and I can add nothing of value to the discussion. The question can be finally determined only by the Supreme Court of the United States, and until that court has passed upon it I conceive it to be the duty of courts of original jurisdiction, in view of the contrariety of opinion, to treat the legislation as valid, for, as said by Chief Justice Marshall, in *Fletcher v. Peck*, 6 Cranch. 87, 3 L. Ed. 162:

"The question whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. * * * It is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

I may add that it is difficult for me to distinguish in principle the legislation now under consideration from the act of Congress of August 8, 1890, making interstate shipments of liquor upon their arrival in a state subject to the operation and effect of the laws of such state or locality, to the same extent as though such liquors had been produced in such state, and which was challenged on the grounds now urged against the Webb-Kenyon law, but held valid by the Supreme Court. *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572.

In any event, the law is not so clearly unconstitutional as to justify this court in compelling the defendants to violate it.

The writ is therefore denied, and the petition dismissed.

In re SOUTHERN HARDWARE & SUPPLY CO.

(District Court, S. D. Alabama, S. D. December 5, 1913.)

No. 1,177.

1. BANKRUPTCY (§ 191*)—LIENS—STATUTORY LIEN FOR RENT.

Where, under the statutes of the state as construed by its courts, a landlord is given a lien on the property of the tenant on the premises, superior to all other liens except those for taxes, which attaches from the commencement of the tenancy and for the whole rent for the entire term, such lien may be enforced against the trustee in bankruptcy of the tenant for rent accruing after the adjudication and to the end of the term and attaches to the proceeds of the property sold by the trustee, although under an order of court making no provision therefor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286, 287, 290, 351; Dec. Dig. § 191.*]

2. BANKRUPTCY (§ 191*)—LIENS—STATUTORY LIEN FOR RENT.

An agreement for the extension of a lease "for an additional term * * * to commence at the expiration of said present lease" is not one for an extension of the term of the existing lease, but one for another term, and there can be no lien for rent thereunder, where the tenant is adjudicated a bankrupt and his property on the premises is sold before the expiration of the term of the first lease.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286, 287, 290, 351; Dec. Dig. § 191.*]

In the matter of the Southern Hardware & Supply Company, bankrupt. On review of order of referee denying the claim of the landlord to a lien for rent. Reversed.

Sullivan & Stallworth, of Mobile, Ala., for petitioner McGill Institute.

R. H. & R. M. Smith, of Mobile, Ala., for trustee.

TOULMIN, District Judge. After a careful consideration of the able and exhaustive opinion of the referee, and a like consideration of the thorough and able argument of the attorney for the trustee in support of the opinion and finding of the referee, I am constrained to differ with the referee in the conclusion reached by him, and in the decree rendered thereon.

[1] In view of what I consider the great weight of authority on the principal question involved in this case, and on which the right of the claimant rests, I think the referee erred in disallowing the claim under the original or first lease and in striking it from the file.

The later authorities I believe are substantially uniform on this subject.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The statute of the state of Alabama provides that:

"The landlord of any storehouse * * * or other building, shall have a lien on the goods, furniture, and effects belonging to the tenant, * * * for his rent which shall be superior to all other liens, except those for taxes." Code of Ala. 1907, § 4747.

A landlord's statutory lien for rent is entitled to priority of payment over claims of general creditors. *Collier on Bankruptcy* (9th Ed.) p. 945; *In re Burns* (D. C.) 175 Fed. 633; same case on appeal, *Burns' Trustee v. Mayer*, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233.

As against general creditors, the landlord has from the beginning of the tenancy the right to a statutory lien which had completely ripened and attached before the filing of the petition in bankruptcy. 225 U. S. 639, 32 Sup. Ct. 699, 56 L. Ed. 1233.

Where a lien is given for the current year, the landlord may enforce such lien against the trustee for rent due after the adjudication of the tenant, and for the remainder of such year. *Collier on Bankruptcy*, supra, 946; *In re V. D. L. Co.* (D. C.) 175 Fed. 635. And the lien attaches to the proceeds of the sale of the goods upon which it exists, even though the sale was had pursuant to a court order, and such order made no provision therefor. *In re Varley & Bauman Clothing Co.* (D. C.) 188 Fed. 761, 26 Am. Bankr. Rep. 104; *Martin v. Orgain*, 174 Fed. 772, 98 C. C. A. 246; *In re Sapinsky* (D. C.) 206 Fed. 523; *In re Scruggs* (D. C.) 205 Fed. 673; *McKleroy v. Cantey & Randolph*, 95 Ala. 295, 11 South. 258.

"The lien (given by the statute) enters into and forms part of every lease or contract" as if the terms of the statute were written into the lease. *Smith v. Huddleston*, 103 Ala. 223, 15 South. 521; *In re Scruggs* (D. C.) 205 Fed. 673.

The Bankrupt Act recognizes and allows the priority of payment of "debts owing to any person who by the laws of the states or the United States is entitled to priority." Section 64b (5), Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447).

The law of the state of Alabama provides that the lien on the goods, etc., belonging to the tenant shall be superior to all other liens, except those for taxes, and such "lien attaches from the commencement of the tenancy * * * and that it attaches for the whole rent, for the entire term." *Nicrosi v. Roswald*, 113 Ala. 592, 21 South. 338; *Shapiro v. Thompson*, 160 Ala. 363, 49 South. 391; *In re Scruggs*, supra; *Martin v. Orgain*, 174 Fed. 772, 98 C. C. A. 246.

Where a priority is sought under a state statute it must be determined under the laws of that state. *In re United States Lumber Co.* (D. C.) 206 Fed. 236, 30 Am. Bankr. Rep. 682.

If the state law gives a lien and it continues after bankruptcy of the tenant, the priority exists in effect, though not in name; the property becomes charged with the lien. Authorities cited supra.

[2] In the agreement between the McGill Institute and the Southern Hardware & Supply Company, made and contained in the lease of September 26, 1911, it is provided that the institute agrees and does hereby extend the term of the present lease for an additional term

of eight years to commence at the expiration of said present lease October 31, 1913.

Construing this agreement as a whole, I interpret it as providing for another term of lease to commence on the expiration of the original or present lease, and not as an extension of the term of the present lease; otherwise there would be no expiration of the said present lease until the termination of the extension, October 31, 1921. If the purpose of the agreement was to extend the term of the present lease for an additional term of eight years, it should have provided that the institute extends the term of the present lease for an additional eight years, thereby making the term of the present lease about ten years, instead of about two years, from September 26, 1911. The last clause in the agreement referred to, which states "an additional term of eight years to commence at the expiration of said present lease, October 31, 1913," in my opinion, qualifies and determines the true meaning of the agreement, and clearly shows that two different terms were provided for. Moreover, another provision in the agreement I think sustains this construction. It is this:

"The Southern Hardware & Supply Company has hired and taken from the institute its said building for an *additional* eight years, and agrees to pay the rent."

Furthermore, at the time the eight-year lease commenced, there were no goods belonging to the tenant in the building on which the lien for rent for that term could attach. Long before the eight-year lease commenced, bankrupt proceedings had intervened and the trustee had sold the goods.

Question No. 1 of referee answered in the affirmative.

Question No. 2 answered in the negative.

Question No. 3 answered in the affirmative.

The petitioner, the McGill Institute, is entitled to relief, which is an allowance of the petitioner's claim for rent from the date of the original lease to the expiration of said lease, to wit, October 31, 1913, less payments which have been made to petitioners on account of such rent; and is also entitled to a lien on the proceeds of the sale of the goods and effects of the bankrupt, the tenant, which were in the building leased at the time of the adjudication in bankruptcy of said tenant, and which were then possessed by the trustee in bankruptcy and by him sold.

It is ordered that the decree of the referee be reversed, and the case remanded, with directions to pay to the McGill Institute the amount found due to it for rent of said building, in accordance with this opinion.

**JOHN W. HOOD & CO. v. BOARD OF SCHOOL DIRECTORS OF
TANGIPAHOA PARISH et al.**

(District Court, E. D. Louisiana. January 20, 1914.)

No. 14,756.

1. MECHANICS' LIENS (§ 245*)—SCHOOL BUILDINGS—CONTRACTORS' CLAIMS—SETTLEMENT—RIGHT TO SUE.

Act La. No. 167 of 1912 provides that any person erecting a building in the rural districts, the price of which is over \$1,000 and less than \$100,000, must require a bond of the contractor, and if any person having a claim growing out of the building, shall file a statement with the owner, and if, 45 days after completion, such claims remain unpaid, the claimant shall file a petition in a court of competent jurisdiction, setting up his claim against the bond, and citing other claimants of the contractor and his surety to intervene and settle their claims. *Held*, that, where claims were filed against a contractor for a school building who also has a claim against the school board for the balance due under his contract, it was the duty of the board to take steps under the act to settle the claims, and, it not having done so, the contractor was entitled to sue for similar relief.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 427-430; Dec. Dig. § 245.*]

2. COURTS (§ 489*)—FEDERAL COURTS—CONCURRENT JURISDICTION.

A federal court has concurrent jurisdiction with the state courts of a proceeding by an owner or contractor to settle claims arising out of a building contract as provided by Act La. No. 167 of 1912, where the proceeding involves the requisite amount and diversity of citizenship is shown.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

3. COURTS (§ 328*) — FEDERAL COURTS — JURISDICTION — AMOUNT IN CONTROVERSY.

Where, in a suit by a contractor for a school building to settle liens and recover a balance due under the contract as authorized by Act La. No. 167 of 1912, the contractor's bond given to the school board to perform its contract was more than \$3,000 and the claims against it also were more than such sum, the total amount of claims filed against the bond might be properly considered as the matter in controversy for the purpose of establishing federal jurisdiction; the proceeding being one in equity to prevent a multiplicity of suits.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 890-896; Dec. Dig. § 328.*]

4. COURTS (§ 307*)—FEDERAL COURTS—PARTIES—DIVERSITY OF CITIZENSHIP.

Complainants, members of a partnership and citizens of states other than Louisiana, brought suit against the board of school directors of a Louisiana parish and the surety on their bond, a New York corporation, to settle liens and claims filed and to recover an alleged balance due on a contract for the construction of a school building in Louisiana as authorized by Act La. No. 167 of 1912. *Held*, that since the plaintiffs, contractors, and their surety, were properly on one side and the school board and the various claimants against the bond on the other, the parties, as so grouped, disclosed the requisite diversity of citizenship to sustain federal jurisdiction.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 850-854; Dec. Dig. § 307.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Bill by John W. Hood & Co. against the Board of School Directors of Tangipahoa Parish and others. On motion to dismiss. Denied.

Mize & Mize, of Gulfport, Miss., for plaintiffs.

W. H. McClendon, Dist. Atty., of Amite, La., R. G. Pleasant, Atty. Gen., and Daniel Wendling, of New Orleans, La., for School Board.

Grant & Grant, of New Orleans, La., for National Surety Co.

Robt. H. Marr, Lyle Saxon, Thilborger & Duffy, and Pierre D. Olivier, all of New Orleans, La., for various claimants.

FOSTER, District Judge. On September 18, 1913, John W. Hood, a citizen of Mississippi, and Martin W. Sansbury, a citizen of Arkansas, members of a copartnership styled John W. Hood & Co., filed their bill against the board of school directors of Tangipahoa parish, a Louisiana corporation.

The bill sets up substantially that the complainants entered into a contract with the school board for the erection of a school building for the sum of \$16,520 and gave bond for the faithful performance of the contract in the sum of \$8,360 with the National Surety Company, a New York corporation, as surety; that the building had been completed and was formally accepted on April 17, 1913; that there was a balance due them on the contract of \$2,380.24, but that the school board refuses to make payment of same because various parties have served it with notice of claims against complainants amounting to \$3,457.19; that it is necessary for the best interests of all concerned that the school board deposit the balance of the contract price and the bond in the registry of this court in order that all parties may interplead and their respective rights be determined with regard to the same. The bill then sets out the names of the various claimants, and prays that the school board be ordered to account for the balance of the contract price and to deposit it and the bond in the registry of the court, and that all of said claimants be ordered to appear and assert their respective claims.

The school board has filed a motion to dismiss the bill on the following grounds: First, that the court is without jurisdiction, *ratione materiae*, because the amount in dispute is the balance due on the contract, \$2,380.24; second, that the petitioners are without interest to bring the suit because the owner of the building, to wit, the school board, is the only person authorized to bring such a proceeding under the law of Louisiana; third, that the petition is too vague and indefinite to enable defendant to properly answer. In addition to these grounds, it was suggested in argument that the bill does not show the requisite diversity of citizenship, as the school board and all the material men who have filed claims are citizens of the state of Louisiana.

[1, 2] It will be noted that by the law of Louisiana (Act 167 of 1912) any person erecting a building in the rural districts, the contract price of which is over \$1,000 and less than \$100,000, must require of the contractor a bond, with good and sufficient surety, for not less than one-half of the contract price. Any person having a claim against the contractor growing out of the building is required to file a sworn

statement with the owner, and at the expiration of 45 days after the completion of the work, if any such claims have been filed and remain unpaid, the owner must file a petition in a court of competent jurisdiction, setting up his own claim against the bond, if he has one, and citing the other claimants and the contractor and his surety to come in and settle their claims in concurso. Of course, this court would have concurrent jurisdiction with the state courts of such a proceeding if the requisite amount and diversity of citizenship were shown.

Under the state of facts disclosed by the bill it was the duty of the school board to have taken the steps required by law long before the bill was filed. It has not done so, and, as plaintiffs had the right to compel the school board to perform its legal duty, there can be no objection to the procedure taken herein, as it will have the same effect exactly as if brought by the school board in the first instance.

[3] It is true that in this proceeding the plaintiffs can recover the sum of \$2,380.24 at most, but that does not necessarily fix the amount in controversy. The bond is for more than \$3,000 and the claims filed against it are for more than \$3,000. There are many cases holding that separate and distinct demands cannot be joined for convenience to make up the jurisdictional amount; but, while the claims here are separate, they are all necessarily against the bond and pending the concursus proceeding could not be litigated in separate suits. The proceeding is one to prevent a multiplicity of suits. It is for that reason cognizable in equity, and the total amount of the claims filed against the bond may be properly considered the matter in controversy. I am therefore of the opinion that the necessary jurisdictional amount exists.

[4] With regard to the parties, the plaintiffs and the National Surety Company are properly on one side, and on the other side are the school board and the various parties who have filed claims against the bond. As thus grouped, diversity of citizenship exists, as there could be no question of personal liability as between the school board and the material men in this proceeding.

With regard to the third ground urged, while the bill is inartificially drawn, it substantially sets up the averments necessary to plaintiffs' case and is not demurrable on the ground of vagueness.

The motion to dismiss will be denied.

In re ELK VALLEY COAL MINING CO.

(District Court, W. D. Kentucky. January 28, 1914.)

1. BANKRUPTCY (§ 342*)—ADMINISTRATION OF ESTATE—CLAIMS—RE-EXAMINATION—FEES.

General Bankruptcy Order 10 (89 Fed. vi, 32 C. C. A. xiii) provides that before incurring any expense in publishing or mailing notices, or in traveling or procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal, or referee may require from the bankrupt, or other person in whose behalf the duty is to be performed, indemnity for such expense, and that money advanced for such purpose by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bankrupt or other person shall be repaid him out of the estate as part of the cost of administration. *Held* that, where proceedings were instituted for the re-examination of certain labor claims filed against the estate, the referee was not authorized by such rule to require petitioner to deposit funds to indemnify the claimants for traveling expenses, hotel bills, etc., while in attendance on the hearing.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 529; Dec. Dig. § 342.*]

2. BANKRUPTCY (§ 342*)—CLAIMS—RE-EXAMINATION.

On re-examination of claims filed against a bankrupt's estate, the proofs of debt filed by the claimants constitute a prima facie case in favor of the claim sought to be re-examined and will be sufficient for its support unless the objector by positive testimony overcomes the same, and if she does so additional testimony in support of the claim may then be heard.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 529; Dec. Dig. § 342.*]

3. BANKRUPTCY (§ 342*)—CLAIMS—RE-EXAMINATION.

On proceedings for the re-examination of claims before a referee in bankruptcy, he is authorized to subpoena any person to appear for examination at the expense of the state by Bankruptcy Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 529; Dec. Dig. § 342.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Elk Valley Coal Mining Company. Mrs. Sallie J. Thompson having taken steps to have the claims of certain labor claimants re-examined, the referee entered an order requiring her to deposit money sufficient to reimburse certain named known resident claimants for their traveling and hotel expenses which they might incur while attending a meeting for the purpose of being examined as to their claims, and she files a petition for review. *Reversed*.

J. W. Linton, of Russellville, Ky., for Mrs. Thompson.

S. M. Russell, of Louisville, Ky., and Walker Wilkins, of Central City, Ky., for creditors.

EVANS, District Judge. Certain debts against the bankrupt asserted to be entitled to priority under the Kentucky Statutes were proved in due form and were allowed by the referee at the first meeting of creditors. Subsequently Mrs. Sallie J. Thompson took steps to have each of these claims re-examined by the referee. At the time appointed for the hearing, namely, on September 24, 1913, the referee entered an order the recitals and details of which will sufficiently explain the situation. The order is as follows:

"At a meeting of the creditors held at the office of Walker Wilkins, in Central City, county of Muhlenberg and state of Kentucky, pursuant to notice, on the 24th day of September, A. D. 1913, for the purpose of re-examining certain claims known as the labor claims, said claimants by their attorney Walker Wilkins moved the court to require Sallie J. Thompson to deposit with the court a sum of money sufficient in amount to pay all expenses, including mileage, hotel bill and attendance of each and all of the nonresident claim holders herein, namely, M. L. Goff, George Buckelew, Harrison Tett, W. D. Lyall, Ora Wyatt, Chester Wyatt, all now living in the state of Illinois, and also E. O. Brown and Robert Coleman now living in the state of Indiana, and also Chas. Cris who is now living in the state of Virginia.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Said claimants by their attorney Walker Wilkins filed an affidavit in support of said motion. Said motion having been fully considered, it is therefore ordered that said motion be and the same is hereby sustained, and Sallie J. Thompson is hereby ordered to deposit with the trustee S. F. Davis an amount of money sufficient to reimburse the above-named nonresident claimants for their traveling expenses and hotel expenses which said claimants may incur when attending a meeting for the purpose of being examined as to their claims filed in the above matter. Said amount to be ascertained by the trustee S. F. Davis."

In due course Mrs. Thompson filed her petition for a review by the court of this order, and on Saturday last the parties brought the matter before the court, and it was argued by their respective counsel. The referee reports that he based his ruling upon General Order in Bankruptcy No. 10 (89 Fed. vi, 32 C. C. A. xiii) and upon section 848 of Remington on Bankruptcy. Counsel for the creditors also cited *In re George Watkinson & Co.* (D. C.) 130 Fed. 218.

[1] General Order in Bankruptcy No. 21, cl. 6 (89 Fed. x, 32 C. C. A. xxiii), authorizes the re-examination of a claim filed against the bankrupt, and Mrs. Thompson exercised a right thus given. General Order in Bankruptcy No. 10 is as follows:

"Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same."

It seems entirely manifest that this general order in no way authorizes the order of the referee which Mrs. Thompson seeks to have reviewed. True the clerk, the marshal, or the referee, under that order, may, in advance of performing certain services required by the person for whom such services may be performed, demand indemnity for their expenses; but in no way does General Order No. 10 authorize the requirement that Mrs. Thompson should indemnify her opponents for traveling expenses or for hotel bills incurred in their own behalf should they come to the hearing, she never having requested them to do so, and never having had them subpoenaed as witnesses in her behalf.

[2] While we cannot approve the order of the referee, not to say more might be somewhat misleading. For that reason we add that, when the questions in respect to the re-examination of the claims come on to be heard before the referee, it must be remembered that under the rule laid down in *Whitney v. Dresser*, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584, the proofs of debt already filed have made a *prima facie* case in favor of each claim sought to be re-examined, and will be sufficient for their support respectively unless Mrs. Thompson, by positive testimony in her own behalf, shall overcome the *prima facie* case. If she does that, of course, other competent testimony may be heard on either side. But if no testimony is adduced by Mrs. Thompson in respect to any particular one of the claims, then there will be no ground shown for setting aside its allowance, and the petition for the re-examination of such claim should be dismissed.

[3] We may also add that under section 21a of the act the referee may order "any designated person" to appear for examination, and

may also order the expense thereof to be paid out of the estate or otherwise, in some cases, as may be proper. As General Order in Bankruptcy No. 10 is not mentioned in the report of the case *In re George Watkinson & Co.* (D. C.) 130 Fed. 218, and as the bankrupt in that case was expressly ordered to appear for examination, we have supposed the ruling there possibly had reference to section 21a rather than otherwise.

The order of September 24, 1913, complained of in the petition for a review, must be, and it is, reversed and set aside, and further proceedings must be had upon the petition for the re-examination of the claims mentioned therein.

In re PIERCE.

(District Court, W. D. Washington, N. D. January, 1914.)

No. 4709.

BANKRUPTCY (§ 415*)—DISCHARGE—APPLICATION—REFEREE'S REPORT—EXCEPTIONS—FILING—TIME.

Bankruptcy Orders, rule 12 (89 Fed. vii, 32 C. C. A. xvi), provides that applications for discharge may be referred to a referee to ascertain and report the facts, and rule 37 (89 Fed. xvi, 32 C. C. A. xxxvi) declares that, in proceedings in equity to enforce the rights and remedies given by the Bankruptcy Act, the rules of equity practice, established by the Supreme Court of the United States, shall be followed as nearly as may be. Equity rule 66 (198 Fed. xxxvii) provides that parties shall have 20 days from the time of filing the report of the master to file exceptions thereto, and, if none are filed within that period, the report shall stand confirmed. *Held* that, where an application for discharge of a bankrupt was referred to the referee as a special master to take testimony and report the same with his findings of fact, together with his recommendations in favor of or against the discharge, exceptions to the referee's report must be filed, if at all, within 20 days after the filing of the report.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698-708, 719, 723, 724, 726, 728; Dec. Dig. § 415.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Charles C. Pierce, Jr. On application by the bankrupt for his discharge. On recommendations of referee that the discharge be denied. Confirmed.

Million & Houser, of Seattle, Wash., for bankrupt.

Riddell & Ewing and Beechler & Batchelor, all of Seattle, Wash., for trustee.

NETERER, District Judge. The bankrupt filed a petition praying discharge. An order to show cause why discharge should not be granted was entered, and notice directed to be given. January 13, 1913, was appointed for the hearing. Notice was duly published in the *Post-Intelligencer*, proof of which was filed, and on January 6, 1913, appearance of trustee for the purpose of objecting to the discharge was filed, and on January 16, 1913, the trustee filed specifications and objections to discharge. On May 27, 1913, an order was entered by District Judge Cushman referring said petition to Hon. John P. Hoyt,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

referee in bankruptcy, as a special master "to take testimony and make due report thereof to the court and of his findings of fact, together with his recommendations in favor of or against said discharge." On September 10, 1913, the referee filed his report as special master, reported upon the facts, and recommended that the discharge be denied. September 12, 1913, notice and motion for an order confirming report of special master was served upon the attorneys for the bankrupt, stating that the trustee would move for the confirmation of said report on the 16th day of September, 1913. On October 1, 1913, a further notice was served upon the attorneys for the bankrupt that the motion to confirm would be brought on for trial before the court on the 6th day of October, 1913. The attorneys for the trustee moved the court to confirm the report of the special master, and, no exceptions having been filed, the attorneys for the bankrupt contended that under the procedure it was not necessary to file exceptions to this report, as provided by the equity rules, and requested the hearing to be continued until next motion day. On the 31st day of December, 1913, the matter was again called to the court's attention, and the attorneys for the bankrupt asked permission to file exceptions to the report of the referee, under the rules of practice in equity. Objection being made to the filing of such exceptions, it is now for the court to determine what procedure should control in matters of this kind.

Rule 12 of the orders in bankruptcy (89 Fed. vii, 32 C. C. A. xvi) provides that applications for a discharge may be referred "to the referee to ascertain and report the facts." The order of reference entered by Judge Cushman directed the referee "as special master to take testimony and make due report thereof to the court and of his findings of fact, together with his recommendations in favor of or against said discharge. The referee's duty under rule 12, and under the order of reference, is not merely to certify the evidence taken for the court's consideration but is "to ascertain and report the facts." It is manifest under rule 12 and also under the order of reference that the purpose of the reference is to give to the court every aid which the referee can afford to relieve the congested condition of the business which may be before the judge, and that, when the report is filed, the court's attention must be directed by exceptions to such parts of the report to which objections can be directed. General orders in bankruptcy, under rule 37 (89 Fed. xvi, 32 C. C. A. xxxvi), provide:

"In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or to enforce the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be."

No procedure with relation to exceptions to reports of referees or special masters upon petitions for discharge being provided, it would seem that the equity procedure should apply, as provided by rule 66 (198 Fed. xxxvii). Rule 66 of the practice in equity provides:

"The parties shall have 20 days from the time of filing of report to file exceptions thereto, and, if no exceptions are within that period filed by either party, the report shall stand confirmed."

This rule, of course, refers to masters in chancery, but there can be no difference in the capacity in which the parties act or the particular designation by which they may be known. The functions are the same. The order making the reference designates the referee as special master, and his report is made as special master. No exceptions having been filed within the time required by the rule or at all, the court would not be authorized under the status of this record to permit the filing of exceptions at this time.

The report and recommendations of the referee as special master should be confirmed.

In re BLEYER.

(District Court, S. D. New York. October 27, 1913.)

BANKRUPTCY (§ 408*)—DISCHARGE—OBJECTIONS—GROUNDS—FALSE FINANCIAL STATEMENT—ACTS AS OFFICER OF CORPORATION.

Where a bankrupt as president of a corporation made a materially false statement in writing of its assets and liabilities in order to obtain money on credit from a certain bank, and the bankrupt benefited financially by his misrepresentations as to the condition of the corporation, such misrepresentations constituted a valid ground of objection to his individual application for discharge in bankruptcy, under Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427 [§ 14b (3) added by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797, U. S. Comp. St. Supp. 1911, p. 1496]) providing that obtaining money on credit on a materially false statement in writing made by him to any person for the purpose of obtaining credit from such person shall bar a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Charles E. Bleyer. On specifications of objection to the bankrupt's discharge. Sustained.

Charles E. Bleyer filed a voluntary petition in bankruptcy on January 9, 1913, and was adjudicated a bankrupt on the same day. In due course his application for discharge came up and was opposed by the First National Bank of Easton, Pennsylvania. The specification of objection to discharge (as amended by stipulation) is as follows:

"(1) That such application should not be granted, because of the following facts, which the undersigned charges to be true, viz.: That such applicant has obtained money and property on credit upon a materially false statement in writing, made by him to the First National Bank aforesaid, for the purpose of obtaining credit from the said bank, in that, on or about May 8, 1912, the said bankrupt, as the president of the Hawley Down Draft Furnace Company, did knowingly and fraudulently furnish a materially false statement in writing to the said First National Bank, of the financial condition of the said the Hawley Down Draft Furnace Company, showing assets of \$188,733.89 and liabilities of \$54,836.31, whereas, in fact and in truth the said assets were much less than the sum of \$188,733.89, and the liabilities much greater than \$54,836.31, and the said company was in fact at that time insolvent, which said materially false statement was so made by said bankrupt for the purpose of obtaining money and property on credit for his own use and benefit from the said First National Bank, and which materially false statement was relied upon by the said First National Bank, and money and property thereupon was obtained on credit by the said bankrupt, as president of the said the Hawley Down Draft Furnace Company, from the said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

First National Bank upon three several notes, dated, respectively, May 8, 1912, June 13, 1912, and July 23, 1912, each for the amount of \$5,000 each payable four months after date at the said First National Bank, and each indorsed by the said bankrupt; he, the said bankrupt, thereby becoming individually liable for the payment thereof to the said First National Bank. Whereupon, the said First National Bank became the holder for a valuable consideration of the said three several notes, and the said bankrupt, as president of the said the Hawley Down Draft Furnace Company, obtained from the said First National Bank money and property on credit, to wit, the proceeds of the said notes to the aggregate amount of \$15,000, and that he, the said bankrupt, as such president of the said the Hawley Down Draft Furnace Company, knowingly and fraudulently made and caused to be made false entries upon the books of accounts of the said the Hawley Down Draft Furnace Company, and did fraudulently take, convert, and apply to his own use the said \$15,000, or a large part thereof, thus as aforesaid obtained on credit, to the prejudice of the First National Bank aforesaid, and that a large part of the said moneys was obtained by said bankrupt for his own and individual use within four months prior to the adjudication of the said bankrupt as a bankrupt, and that the said notes, at the maturity thereof respectively, were each duly presented for payment, and payment therefor duly demanded of the proper persons, according to the tenor and effect thereof, but payment of the same in each instance was refused, and the said notes were respectively protested and still remain due and unpaid."

To the specification the bankrupt has filed exceptions.

Leo Oppenheimer, of New York City, for bankrupt.

Parker & Aaron, of New York City (Charles Adkins Baker, of New York City, of counsel), opposed.

MAYER, District Judge (after stating the facts as above). The objection to the discharge of the bankrupt is based on clause No. 3 of paragraph "b" of section 14 of the Bankruptcy Act, which provides that the bankrupt may be discharged unless he has—

"3. Obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person."

It is contended on behalf of the bankrupt that the objecting creditor alleges corporate acts to bar the bankrupt's individual discharge; in other words, that the money obtained by the bankrupt as president of the corporation on notes of the corporation indorsed by him, did not constitute money obtained by him within the meaning of the act, and that a materially false statement in writing as to the financial condition of a corporation in which the bankrupt is interested, and by means of which statement the bankrupt obtains money or property on credit, is not a statement made "*by him*" within the meaning of the act. For the purposes of this decision, it is admitted that the bankrupt was to benefit financially by his representations as to the condition of a corporation in which he was interested. The question then comes down to this: In order to bar the discharge must the materially false statement in writing, made for his own benefit, be so made by the bankrupt only in respect of his own property, and must it be made by him in his capacity as an individual as distinguished from his capacity as an officer of a corporation?

The precise question here to be determined has not been passed upon by the courts, although *In re Dresser & Co.* (D. C.) 144 Fed. 318, is of some service in reaching a conclusion. It seems to me that the

act is broad enough to comprehend a case in which the facts are as in the case at bar. Concededly the statement was in writing and materially false, and money on credit was obtained as the direct result of the statement, and that money was obtained by the bankrupt for his own benefit. The materially false statement in writing was "made by him" for all substantial purposes, and the fact that it was made because he was president of the corporation, and that he signed with that designation or in that capacity, does not relieve him from the responsibility which he undertook when he signed this statement in order to procure money on credit for his own benefit. The distinction between the bankrupt individual and the bankrupt as president of this corporation is, on the particular facts here conceded, too illusory to justify the close construction urged by the learned counsel for the bankrupt. Such a construction might well open the way to fraudulent transactions; and where it may be argued that the phraseology itself, if literally taken, may be susceptible of one of two meanings, that construction should be adopted which the more likely meets the intent of the act as an instrument in the conduct of business by honest methods.

For the reasons outlined, the exceptions are overruled.

**RUBBER & CELLULOID HARNESS TRIMMING CO. v. JOHN L.
WHITING-J. J. ADAMS CO.**

(District Court, D. Massachusetts. December 31, 1913.)

No. 480.

1. COURTS (§ 270*) — UNITED STATES DISTRICT COURT — JURISDICTION — RESIDENCE OF PARTIES.

Under Judicial Code, § 51 (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]), providing that except as otherwise provided no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but that, where the jurisdiction is founded only on the fact of diverse citizenship, suits shall be brought only in the district of the residence of either the plaintiff or the defendant, a suit by an owner and user of registered trade-marks against a violator of its rights thereunder for an injunction and an accounting was one arising under the trade-mark laws of the United States, and jurisdiction thereof was not founded only on the fact of diverse citizenship, and hence the suit was subject to the provision forbidding suits in any district other than that of the defendant's residence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 810; Dec. Dig. § 270.*]

2. REMOVAL OF CAUSES (§ 12*)—COURT TO WHICH CASE MAY BE REMOVED.

Under Judicial Code, § 51 (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]), providing that except as otherwise provided no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, and sections 28 and 29, authorizing the defendant in certain cases to remove the cause from a state court to the District Court of the United States for the proper district, a suit arising under the trade-mark laws of the United States against a New Jersey corporation could be maintained in the District Court for the District of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Massachusetts unless defendant objected, and hence, where such suit was brought in the Massachusetts state court, defendant could remove it to the District Court for that district.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 32, 33; Dec. Dig. § 12.*]

3. REMOVAL OF CAUSES (§ 106*)—REMAND—WAIVER OF RIGHT TO REMAND.

Where, after the removal of a cause from a state court to the United States District Court, plaintiff in stipulating that defendant might file an answer on or before a certain day and in taking other steps did so with the distinct statement that such steps were taken without waiving its objection to the jurisdiction, plaintiff did not thereby lose its right to move for a remand of the case to the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 216; Dec. Dig. § 106.*]

In Equity. Bill by the Rubber & Celluloid Harness Trimming Company against the John L. Whiting-J. J. Adams Company. On motion to remand to the Massachusetts Supreme Judicial Court. Denied.

Gaston, Snow & Saltonstall, of Boston, Mass., for complainant.
William Quinby, of Boston, Mass., for defendant.

DODGE, District Judge. The plaintiff, a New Jersey corporation having its principal place of business within that state, brought this bill in equity against the defendant, a Maine corporation alleged to have its principal place of business in Boston, in the Massachusetts Supreme Judicial Court. The defendant's attorney admitted due service of the writ summoning it to appear and answer.

The defendant seasonably filed its petition in the state court for the removal of the case here. The record was filed here September 13, 1913. On October 15th, the plaintiff filed this motion to remand. The ground alleged in the motion is that, in view of the citizenship and residence of the parties, the case is not within the original jurisdiction of this court.

[1] 1. The motion treats the case as if the diverse citizenship of the parties were the only ground upon which jurisdiction in a federal court could be maintained. The bill alleges that the plaintiff had owned and continuously used certain registered trade-marks. It proceeds to charge the defendant with violating its rights acquired in connection therewith. It asks an injunction and an accounting. I do not think the case thus presented is to be regarded as a suit in which the jurisdiction of this court can be "founded only on the fact that the action is between citizens of different states." Section 51, Judicial Code. I think it is also a suit arising under the trade-mark laws of the United States, and that the subject-matter, as set forth in the bill, is enough to confer federal jurisdiction; so that the applicable provision of section 51 is that forbidding a defendant to be sued in any district than that whereof he is an inhabitant.

[2] 2. The plaintiff, then, might have brought the suit in this court originally, if it could get service on the defendant within this district, as it has. This court would have retained jurisdiction unless the de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fendant had objected that it was not being sued in the district of its residence. That it might have raised this objection is of no consequence for the present purpose, since it is the defendant who has invoked the jurisdiction of this court by its petition for removal. This court, being the District Court to be held in the district where the suit was pending before removal, is the District Court "for the proper district," into which sections 28 and 29 of the Code gave the defendant the right to remove it. The defendant having exercised that right, I am unable to see that section 51 affords the plaintiff any valid ground of objection. *Mattison v. Boston & M. R. R.* (D. C.) 205 Fed. 821, like the other cases upon which the plaintiff relies, was a case wherein the jurisdiction depended solely upon diverse citizenship.

[3] 3. The defendant contends that, if the plaintiff ever had any right to object to the jurisdiction, that right has been waived by the steps taken in this court on the plaintiff's behalf since the removal here; but no one of these steps appears to have been taken without the distinct statement by the plaintiff that it was taken without waiving its objection to the jurisdiction and insisting thereupon. In a stipulation between the parties, filed October 14th, it is distinctly agreed that the defendant may file an answer on or before a certain day, without waiving the plaintiff's right to object to the jurisdiction and to move to remand. I am unable to hold that the plaintiff has lost the right to object, but I must overrule its objection.

The motion to remand is denied.

In re ARNAO.

(District Court, W. D. New York. January 30, 1914.)

BANKRUPTCY (§ 426*)—CLAIMS—DISCHARGE—RELEASE—JUDGMENTS FOR CONVERSION.

Where a judgment was recovered in a state court against the bankrupt before intervention of bankruptcy proceedings on a claim for conversion arising out of acts of the bankrupt which were practically larcenous, the claim consisted of a willful and malicious injury to the property of the claimant from which a discharge in bankruptcy would not constitute a release under Bankr. Act July 1, 1898, c. 541, § 17 (2), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1911, p. 1497), and hence the bankrupt was not entitled to an injunction restraining the claimant from issuing a body execution and arresting the bankrupt or levying on his property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787, 791-807; Dec. Dig. § 426.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Vincenzo Arnao. On motion to restrain the issuance of a body execution against the bankrupt and from interfering with his property on a judgment for conversion recovered against him in the state court prior to the filing of bankruptcy proceedings. Motion denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Palmieri & Wechsler, of New York City, for plaintiff.
Lanza & Miceli, of Buffalo, N. Y., for petitioner.

HAZEL, District Judge. This is a motion to restrain the plaintiff and the sheriff from issuing a body execution against the bankrupt, and from arresting him and interfering with his property on a judgment for conversion of money recovered against him in the Supreme Court of this state before the petition in bankruptcy was filed. The claim of the bankrupt is that the debt upon which the judgment was recovered is dischargeable in bankruptcy, and that therefore the benefits and privileges of the Bankruptcy Act should not be withheld from him, and that as his arrest is threatened this court should restrain such action until his right to a discharge is determined.

In *Crawford v. Burke*, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, the Supreme Court decided that a broker carrying stocks on margins who sells the same and does not pay over the proceeds to his principal is not indebted to the latter in a fiduciary capacity under section 17 (4) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), and that such a liability arises under section 63, relating to the provableness of a claim founded upon an open account or upon a contract express or implied. Subsequent to this decision, section 17 (2) of the Bankruptcy Act was amended (Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1911, p. 1497]), to provide that a discharge in bankruptcy releases a bankrupt from his provable debts, except such as "are liabilities for obtaining property by false pretenses or false representations or for willful and malicious injuries to the person or property of another."

In the case at bar the inquiry must be as to whether the judgment recovered by the plaintiff was for willful or malicious injury to the person or property of another. Upon this point the doctrine of *Kavanaugh v. McIntyre*, 128 App. Div. 722, 112 N. Y. Supp. 987, is thought to be apposite. After defining the words "malice" and "willful," the Appellate Division, Justice Cochrane writing the opinion, says:

"There are doubtless many torts against which a discharge in bankruptcy is effective. The act is liberally construed in favor of an honest and well-meaning debtor. A conversion of property may exist entirely consistent with the utmost good faith on the part of the converting debtor. In respect to such torts there is no injustice or inequity in extending the provisions of the Bankruptcy Act applicable thereto in accordance with the beneficent and humane policy of such act. But a conversion which shows a design or willingness to inflict a wrong upon another or the reckless disregard of the rights of another rests on a different basis."

And it was held that, where the bankrupt was liable to pay a debt which arose from his dishonest acts, his discharge was barred.

My view as to the interpretation of section 17 (2) accords with the views expressed in the *Kavanaugh Case*, and I believe that the facts here indisputably show that the wrongful acts of the bankrupt were practically larcenous. The decision of *In re Adler*, 144 Fed. 659, 75 C. C. A. 461, cited by bankrupt, does not cover the point under consideration. There it was held by the Circuit Court of Appeals for the Second Circuit that the acts of the bankrupt were constructively fraudu-

lent, although they were not executed by the bankrupt while acting in a fiduciary capacity within the meaning of section 17 (4). Section 17 (2) was not under discussion.

In *Re Cole* (D. C.) 106 Fed. 837, decided by this court in the year 1901, also cited by counsel for the bankrupt in support of the contention that judgment for conversion is dischargeable, it was substantially held that an action in the state court brought to establish the liability of the bankrupt under section 17 (2) would not be enjoined, and such decision as I read it is not at all in conflict with the *Kavanaugh Case*.

It will not be necessary to advert to any of the other cases cited by the bankrupt, for their bases of facts are essentially different, and they were apparently decided either under section 17 (4), or before the amendment of section 17 (2) and its interpretation in the *Kavanaugh Case*. In the latter case at the end of the opinion it is true the court said that the question was "novel and not free from doubt," and I am informed that the case has been taken to the Court of Appeals of this state, where it will be decided in the near future; still, as the question was carefully examined by the Appellate Division for the Third Department, and as there are no controlling federal decisions or none that so well cover the ground, I am persuaded to follow it.

The motion is denied.

In re SAYER.

(District Court, N. D. New York. January 20, 1914.)

BANKRUPTCY (§ 372*)—CLOSING ESTATE—OPENING FOR AMENDMENT OF SCHEDULES—JURISDICTION.

Under Bankr. Act July 1, 1898, c. 541, § 2, subd. 8, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421), providing that the courts of bankruptcy shall have jurisdiction to close estates when fully administered, by approving the final accounts and discharging the trustees, and to reopen them when it appears that they were closed without being fully administered, the court has no jurisdiction to open a closed estate in order that the bankrupt may amend his schedules by adding the names of certain omitted creditors, in the absence of any showing that the estate was not fully administered when it was closed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 574; Dec. Dig. § 372.*]

In Bankruptcy. In the matter of bankruptcy proceedings of J. Stacy Sayer. On petition of the bankrupt for an order reopening the estate and permitting the amendment of schedules. Denied.

Myron E. Gray, of Ogdensburg, N. Y., for petitioner.

RAY, District Judge. The petition sets out in substance that the petitioner, J. Stacy Sayer, a merchant of the city of Ogdensburg, was adjudicated a bankrupt May 26, 1913; that Arthur L. Jameson was duly appointed trustee; and that he duly qualified; and that "at the present time the said bankruptcy estate has been closed." The petition also alleges that by inadvertence the names and the statutory facts concerning claims of certain creditors were omitted from the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

schedules, and that such omission was without the fault of the bankrupt and without willfully intending to do so, and that he is now desirous of having the claims of said creditors presented to this court for its attention.

The petition then sets out the names of two creditors so omitted; one having a claim of \$20 for merchandise and labor, and the other a claim of \$137.60 for merchandise sold and delivered and which includes interest and \$17.43 costs of reducing the said claim to judgment. The petition also says that these creditors have not been regularly notified of the said bankruptcy proceedings, and also "that your petitioner is informed and believes that the estate of the above-mentioned bankrupt was closed on or about the 20th day of October, 1913," and that the record book and all other papers in said matter were forwarded to and filed and deposited with the clerk of the court.

There is no allegation statement of claim in this petition that this estate was closed before being fully administered. The presumption is that the estate of the bankrupt was fully administered and divided amongst the creditors named in the schedules or who appeared without being named and filed and proved their claims. This court therefore is without power or jurisdiction to open this estate for the purpose of allowing the bankrupt to amend his schedules, include the names, etc., of the omitted creditors so as to bar or conclude them by the bankruptcy proceedings. By subdivision 8 of section 2 of the Bankruptcy Act, it is provided that the courts of bankruptcy have jurisdiction to:

"(8) Close estates whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered."

In Collier on Bankruptcy (9th Ed.) p. 61, it is said that subdivision 8 of section 2 invests courts of bankruptcy with the power to "close estates whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered." And, also, "under this subdivision an estate can only be closed when it appears that it has been fully administered." On page 62, the author says:

"This subdivision recognizes the power of the court to reopen estates whenever it appears they were closed before being administered. Upon the proper showing of jurisdictional facts it is the duty of the court to reopen the estate. The exercise of the power to reopen rests in the sound discretion of the court upon a consideration of all the circumstances. Lack of administration sole ground. The subdivision provides for the reopening of an estate only when closed before being administered. This is the only ground for the reopening of an estate. It becomes essential therefore to ascertain whether there has been a lack of administration before granting the application to reopen. The common cause is therefore the discovery of unadministered assets, and it has been held that the allegations of the petition to reopen must be such as to satisfy the court that such assets exist."

In *Matter of Paine* (D. C.) 11 Am. Bankr. Rep. 351, 127 Fed. 246, it was held:

"The power to reopen the case is given in one contingency only, namely, when it appears that the case was closed before being fully administered."

In *Re Spicer* (D. C.) 16 Am. Bankr. Rep. 802, 145 Fed. 431, it was held that the bankrupt's application to reopen, made several months after his discharge so as to permit him to amend his schedules by inserting the name of a creditor omitted therefrom, so that the bankrupt may also be discharged from such creditor's claim, should be denied.

On these authorities, as well as on the terms of the statute, I am of the opinion that this court is without power to grant the application, as it appears that the estate has been administered and closed. The referee could not have closed the estate without first administering it.

On the petition as presented and the facts shown, the application must be denied.

STONE & McCARRICK, Inc., v. DUGAN PIANO CO., Limited, et al.

(District Court, E. D. Louisiana. January 21, 1914.)

No. 14,673.

COPYRIGHTS (§ 58*)—TRADE MANUAL—INFRINGEMENT—REPUBLICATION AS ADVERTISEMENT.

Where plaintiff copyrighted a manual of instruction consisting of a system of salesmanship designed to teach piano dealers how to attractively advertise, and containing forms, models, or diagrams of advertisements, the copyright did not prevent a dealer from making a use of the work, which resulted in the publication of a part of the book in the form of an advertisement, nor did such publication constitute an infringement.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 54; Dec. Dig. § 58.*]

In Equity. Suit by Stone & McCarrick, Incorporated, against the Dugan Piano Company, Limited, and others, to restrain the alleged infringement of a copyright. On motion to dismiss. Granted.

Ernest Wilkinson, of Washington, D. C., and A. J. Peters, of New Orleans, La., for complainant.

Frank E. Rainold, Louis G. Teissier, and Robert H. Marr, all of New Orleans, La., for defendants.

FOSTER, District Judge. In this case the complainant alleges that it has published and copyrighted a book entitled "Manual of Instruction in the Use of Stone & McCarrick (Incorporated) System of salesmanship"; that the book was specially intended to be used by its subscribers and licensees for reprinting parts thereof in a series of articles intended for advertising purposes and was printed in such form as to be specially adapted for use as "copy" for advertisements in newspapers, magazines, periodicals, and other literature; that the Dugan Piano Company and its officers named in the bill have infringed the copyright of the said book by publishing in the New Orleans Item substantial parts of the copyrighted work as advertisements of the wares offered for sale by the Dugan Piano Company.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The defendants move to dismiss the bill on the grounds that advertisements are not copyrightable, and hence advertising copy is not copyrightable, and that the copyright of a text-book or manual of instruction of a useful art, science, or system does not confer upon the proprietor of the copyright the exclusive right to make use of the art, science, or system explained in it.

As to whether advertisements may be copyrighted, there are cases both ways; but conceding, for the sake of argument, that advertisements in the forms copyrighted by the complainant would possess sufficient artistic and literary merit to be the subject of copyright, it seems to me that the second ground of objection is destructive of complainant's case. Complainant has copyrighted a book and not an advertisement. Defendants have published an advertisement and not a book. The book is in the nature of a manual of instruction and is designed to teach piano dealers how to attractively advertise their wares and contains forms, or models, or diagrams of advertisements, just as we may choose to term them. If complainant had published and copyrighted a manual of instruction designed to teach piano makers how to build the instruments, any person would be entitled to follow the instructions and diagrams to construct a piano. I can see no distinction between a system of instruction as to how to make a piano and a system of instruction as to how to draw an advertisement. The copyright of the book did not prevent the general public from making use of the book for the purpose for which it was designed, notwithstanding such use results in the publication of a part of the book in the form of an advertisement. In my opinion the case is on all fours with the decision in *Baker v. Selden*, 101 U. S. 99, 25 L. Ed. 841.

The motion to dismiss will be sustained.

GUNDERSON v. BREY.

(Circuit Court of Appeals, Third Circuit. January 5, 1914.)

No. 1764.

1. CONTRACTS (§ 270*)—RESCISSION—TIME FOR RESCISSION.

What is or is not a reasonably prompt exercise of the right to rescind a contract depends on the circumstances of each case.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1189, 1200; Dec. Dig. § 270.*]

2. SALES (§ 121*)—RESCISSION FOR BREACH—ELECTION.

Defendant contracted to purchase from plaintiff 20 car loads of flour of a specified quality and price, to be manufactured and shipped to defendant's customers as ordered. Two cars were ordered and paid for by defendant through drafts with invoices attached. Shortly afterward complaints were made by the consignees that the flour was not of the quality purchased, and on investigation defendant found it to be the fact and notified plaintiff, who admitted that the wheat was smutty and promised to make good any loss to defendant in settling with his customers, but on receipt of a bill five weeks later refused to pay anything. Defendant thereupon refused to accept further shipments. *Held*, that the request by defendant for reimbursement for the amount he was obliged to pay out was not an election to affirm the contract, and that whether he exercised his right to rescind for the breach within a reasonable time was a question for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 296-301; Dec. Dig. § 121.*]

B. SALES (§ 153*)—PERFORMANCE—SUFFICIENCY OF TENDER.

Where a contract for the sale and purchase of flour specified the grade, the shipment by the seller to apply on the contract of a car load not of such grade, although stated to be of a superior grade, was not a good tender under the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 358-366; Dec. Dig. § 153.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action at law by M. T. Gunderson against William F. Brey. Judgment for defendant, and plaintiff brings error. Affirmed.

Francis G. Gallager, of Philadelphia, Pa., for plaintiff in error.

John Weaver and C. Woods Coulston, both of Philadelphia, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. An action of assumpsit was brought in the court below by M. T. Gunderson, the plaintiff in error, against William F. Brey, the defendant in error, to recover damages for a breach of contract. The material facts, as gathered from the record and the statements of counsel on both sides, are as follows:

Plaintiff was engaged in the manufacture of flour at the village of Kenyon, Minn. Defendant was a flour dealer and broker, doing busi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—26

ness at Philadelphia, buying flour from manufacturers for future delivery and reselling the same at a profit to himself or on commission to bakers and other users of flour.

September 1, 1910, defendant contracted with plaintiff for the purchase of 10 cars of a certain quality of flour manufactured and sold by plaintiff under his private brand of "Gunderson's Best." This flour was known as "Minnesota Standard Patent," a quality well known to the trade. It appears from the evidence that, by a "car" of flour was meant a quantity equivalent to 205 barrels of the net weight of 196 pounds each. This contract, therefore, was for the purchase of 2,050 barrels. The contract resulted from a telegraphic order by the defendant and a telegraphic acceptance by the plaintiff. The contract called for shipments during the months of September and October, 1910, on instructions or directions from defendant, delivered at Philadelphia rate points at \$5.25 per barrel.

On September 20, 1910, defendant sent plaintiff another order by telegraph, for 5 cars of the same flour at the same price, to be delivered in the same manner and to be shipped on instruction from defendant in October and November. No instructions for shipment were given by defendant during the periods mentioned, on either the order of the 1st of September or that of the 20th of that month. Whatever obligation there was for shipments during the months mentioned, seems to have been waived by mutual consent. The plaintiff, however, appears to have been anxious to make early shipments on one or both of these orders, and asked defendant, who had informed him that he could not at once arrange for the shipments under either of the contracts, to get him orders for other qualities of flour to be shipped immediately. This defendant did at various times during the late fall and winter of 1910-11, to such an extent that plaintiff could not ship rapidly enough to suit the defendant's customers.

It was understood that the defendant might have the flour contracted for September 1st and September 20th, packed in sacks, branded either "Gunderson's Best" (plaintiff's private brand), or "Kron Prinz" (defendant's private brand), it being understood that, no matter how the flour was ordered branded, the same quality was always to be shipped.

Two orders—one for a car branded "Kron Prinz" and the other for a car branded "Gunderson's Best"—were sent by defendant to plaintiff, stating specifically that they were under the contract of September 1st. These shipments were made by plaintiff on December 6 and December 27, 1910, respectively, and were received, presumably, on or about December 20, 1910, and January 16, 1911, respectively, as upon those dates they were delivered to defendant's customers. They were paid for by defendant, however, before delivery, through draft with bills of lading or invoices attached. Up to March 10th, no orders were sent for any flour under the contract of September 20th, and the evidence supports the view taken by the learned judge of the court below, that these two contracts of September 1st and September 20th were separate and distinct contracts, the one in no wise relating to or being dependent upon the other. Correspondence between the parties designates the contracts by their dates, and the orders to which we have

referred were given and received specifically as under the contract of September 1st.

On January 28, 1911, the defendant wrote to plaintiff in regard to these shipments, as follows:

"Dear Sir: We have struck a snag in the last two or three cars of your flour received. We enclose herewith a postal card received Wednesday morning, and we immediately took the matter up and went to see this man on Thursday morning. We found the flour very 'dark,' and no comparison with what you have been shipping us. We took a sample out of four or five sacks and brought it home with us. We are sending you by mail a sample out of this car, which you will readily notice is away off. We tested it out with a sample, here in the office, that we had of a previous shipment. We are also mailing you sample of this lot for comparison. * * *"

One of the three cars, as appears from what is said in another part of the letter, was a car shipped under one of the orders above referred to, and not under the contract of September 1st. On February 1, 1911, defendant again wrote to the plaintiff:

"Since writing you about complaint in flour, we have another sample of the 'Kron Prinz,' and upon examination of the samples and comparison with your 'Gunderson's Best' brand, it looks as though you were trying to knock us on the quality of our stencil."

To the first letter, the plaintiff, under date of January 31, 1911, replied, admitting that some of the wheat out of which the flour in question was manufactured was "smutty," and promised to make good any loss to defendant in settling with his customers. On February 4th, 1911, defendant wrote plaintiff, as follows:

"Mr. M. T. Gunderson, Kenyon, Minn.

"Philadelphia, 2—4—1911.

"Dear Sir: I have to acknowledge receipt of your favor of the 31st, and note your admission that some of the wheat you have made flour from has been 'smutty.' How is it that none of this smutty wheat got into the Gunderson's Best brand, but did get in our Kron Prinz brand? It looks very much this morning as though we were going to have a heavy claim to pay on the last two cars, because of the quality, and if such is the case, we certainly shall look to you to take care of us; as we cannot afford to travel with heavy expenses to sell flour on ten cents per barrel brokerage and then have damages come back on us. The expense of maintenance is too great.

"Yours very respt.,

[Signed] William F. Brey."

About this time, samples of both good and bad flour were submitted to Zook, an expert, of the Commercial Exchange, Philadelphia. February 11th, samples of the flour were submitted by the defendant to the "Howard Wheat & Flour Testing Laboratory," at Minneapolis, and on February 16th and February 20th, reports from this laboratory, stating that the flour was "just within the limits of soundness" but decidedly poor in color, were received. On the last-named date, these reports were sent by defendant to the plaintiff.

After some other correspondence, immaterial to the issue now before us, the following letter was received from plaintiff under date of March 3, 1911:

"Mr. William F. Brey, Philadelphia, Pa.

"Kenyon, Minn., March 3, 1911.

"Dear Sir: Yours of the 1st inst. at hand enclosing claim for \$400.00, on car No. 71442 Wab.—shipped 12—6—10 and car No. 18190 C. G. W. shipped 12—27—10. Now Mr. Brey, I will say to you in plain language that I will not allow your claim because it is unreasonable, in fact I will not allow you

anything seeing you are so decidedly unreasonable. You got the grade of flour I sold you, *My Standard Pat.* We know just what you got as we have a baking test of this flour and it is up to standard. You must not think, Mr. Brey, that you can reimburse yourself on your purchases of high flour, in this manner, as I am too old in the business to be bulldozed like this. * * * We will ship you tomorrow a car of 'Kron Prinz' to apply on your purchases of last fall and shall expect to forward some of this flour right along until the contract is filled."

The defendant, as appears by the correspondence, had made two attempts to adjust with the dissatisfied customers this matter of the flour complained of by them. One dollar a barrel was the first demand. Defendant testifies that he subsequently succeeded in getting an agreement that 50 cents a barrel would be received in settlement of the claim for the poor quality of the flour, and so informed the plaintiff in a letter dated March 7, 1911, inclosing with his letter a receipt from the dissatisfied customer of \$200.35, in full release of all claims. In the meantime, to wit, on March 4, 1911, plaintiff wrote to the defendant as follows:

"Dear Sir: Enclosed find invoice for car of 'Kron Prinz' shipped you today, to apply on sale of September 1st, 1910. This is my choice Patent, not the standard patent sold you. This flour is a much higher grade and more expensive to produce. I ship you this grade to avoid any possible chance for you to repudiate your contract on account of quality."

In the letter to plaintiff of March 7, 1911, above referred to, defendant wrote as follows:

"In reply to your letters of the 3d and 4th inst., I wish to advise you that I shall not accept any further shipments on the sale. The sale was made of your best spring wheat patent flour. From the first shipment that I received complaints (sic) about the quality of the flour, I immediately advised you, and mailed sample of the flour. In your letters to me of Jany. 31st, and Feby. 4th, you acknowledged that the flour complained of was 'smutty.' I also took a large sample of the flour from two cars and had a comparative baking test made, by the Howard Testing Laboratory, of Minneapolis. Their report shows that the flour just come within the limit of soundness, was decidedly poor in color, and showed the grade as a very fancy clear or straight flour. It did not come up to the standard spring wheat patent flour."

The car of which acceptance was refused in this letter, was that referred to in plaintiff's letter of March 4th, shipped under the brand of "Kron Prinz," "but is my choice patent, not the standard patent sold you," a flour of "much higher grade and more expensive to produce." It is with reference to this shipment of a higher grade of flour than that sold under the contract of September 1st, that defendant says in the last paragraph of the letter just quoted from of March 7th:

"When I make a sale of first spring wheat patent flour, I expect my customers to receive that grade of flour. I am 'too old in the business to be bulldozed' [quoting from the plaintiff's letter of March 3d] by accepting a straight or fancy clear flour in fulfillment of a sale of standard first patent flour."

Afterwards, on the same day, March 7th, defendant writes to plaintiff, as follows:

"Dear Sir: Enclosed I beg to return invoice for car 'Kron Prinz' shipped without instructions.

"Yours very respt.,

William F. Brey."

On March 10, 1911, we have the following telegram from plaintiff to defendant:

"Kenyon, Minn., Meh. 10, 1911.

"William F. Brey, Penna. Bldg., Philadelphia, Pa. Your two letters of the 7th received. I now understand you have repudiated your contract and I shall commence action for damages at once. M. T. Gunderson."

At the trial in the court below, the case was submitted to the jury upon the evidence, the material parts of which are above summarized.

As already stated, defendant was a flour dealer and broker in the city of Philadelphia. As such, he obtained orders for flour from customers and transmitted the orders to manufacturers, among whom was the plaintiff; the orders here in question were duly forwarded by defendant to the plaintiff on September 1, 1910, and September 20, 1910. These were entirely separate orders, as found by the judge of the court below, and were never treated as one order by either plaintiff or defendant. Defendant sent shipping orders as rapidly as he could obtain them from his customers, but it appears, as we have said, that the stipulations as to the months in which the orders should be sent were disregarded on both sides, and while the defendant neglected to send orders in September and October, the plaintiff was unable, it appears, to fill orders during the greater part of December. No issue was therefore made in these respects at the trial. It also appears from the evidence that the order of September 1st was made upon a sample received by the defendant from the plaintiff, of standard wheat flour, known as "Gunderson's Best," and it was with this sample that the defendant compared the flour shipped in the two cars to Plainfield, N. J.

The assignments of error by plaintiff are founded upon exceptions to portions of the charge and instructions given by the court to the jury. These assignments are six in number. The questions involved in the first, fifth and sixth specifications of error relate to the charge, and are stated in the brief of the plaintiff in error, as follows:

"Did the court err in charging the jury to the effect that if any substantial portion of flour shipped by plaintiff on the contract of September 1, was materially defective, then the plaintiff as to that contract could not recover and the verdict must be for the defendant. Specifications of error Nos. 1, 2, 3."

We do not think that the court erred, either in its statement of the abstract propositions of law or in their application to the facts of the case as they might be found by the jury. The evidence before the jury is all disclosed in the record, and with reference to this evidence the language of the court must be considered. The general contention of the plaintiff now is, and probably before the jury was, that defendant had not exercised his claimed right of rescission within due time. No special request for instruction on this point appears to have been made by the plaintiff, but the facts before the court and jury, and now before us, do not seem to have required any special instruction in that respect.

There is little or no room for dispute as to the facts of the case, as the evidence consists mainly of written correspondence between the parties. The parties themselves discriminated between the contracts

of September 1st and September 20th, and we think, as we have already said, that the court below was right in treating them as separate and distinct sales of flour, and as the plaintiff had refused to make any deliveries on the second contract, the learned judge properly confined the attention of the jury to what occurred with reference to the contract of September 1st. The two orders sent by plaintiff to defendant,—one for a car load branded “Kron Prinz” and the other for a car load branded “Gunderson’s Best,” stated specifically that they were under the contract of September 1st.

As already stated, these cars were presumably received by the consignee at Plainfield, N. J., for whom they were ordered, about December 20, 1910, and January 16, 1911, respectively. We say presumably, because defendant testifies that on those dates he accepted and paid the drafts for the prices of the same, which were attached to the invoices or bills of lading. This feature of the case must be kept in mind, viz., that the cars shipped upon defendant’s orders to defendant’s customers were necessarily by this method required to be paid for, before they were delivered. No opportunity, therefore, was afforded for inspection before delivery, and defendant knew nothing as to the quality of flour received until he was informed by the complaints of his customers, after it had been actually tried out in baking. These were the first and only deliveries under the contract of September 1st, if we except the car load delivered to and accepted by the defendant about February 20th under that contract, as alleged by plaintiff but not admitted by defendant. Of this, more hereafter.

Referring again to the correspondence above recited, on January 28, 1911, defendant wrote to plaintiff, giving him the information that the quality of the flour was complained of by his customers, the consignees, as defective. On February 1, 1911, defendant again wrote that he had made another comparison of the alleged defective flour with the sample that he had from plaintiff of “Gunderson’s Best,” and that the complaints that he had received were justified. In response to the first letter, plaintiff admitted that the flour was “smutty,” and promised to make good any loss incident to selling it to defendant’s customers. Defendant, on January 11th, submitted samples of the flour to a testing laboratory at Minneapolis, and on February 20th received reports from the same, as stated above, and the same were duly submitted to plaintiff in letter of that date. In the meantime, it appears that defendant was endeavoring to settle with his customers for the defective quality of the flour in the first two shipments under the contract of September 1st, and in the letter of the 1st of March sent statement of what he had done in that regard, enclosing receipt in full from his customers. In reply to this letter, we have the letter of March 3d, quoted from above, in which plaintiff refuses to allow anything to defendant on account of this settlement.

It thus appears that defendant promptly notified plaintiff of the complaints of his customers as to the quality of the flour (which defendant had already paid for); that defendant was apparently diligent in seeking to ascertain the truth as to these complaints, by submitting samples of the flour in question to expert examination; and

that he waited for the report of the experts, in the meantime endeavoring to minimize, as far as possible, the loss which he was compelled to make good to his own customers.

The letter of March 4th, presumably received on March 6th, announcing that plaintiff had shipped a car load different entirely from that contracted for, was evidently meant as a tender, upon the refusal of which a breach of contract was to be founded. After the receipt of this letter and the previous letter of March 3d, defendant, on the 7th of March, wrote the letter above quoted from, declining to receive the flour thus shipped and returning the invoice with the notification that he would accept no further shipments on the sale of September 1st. This was clearly intended as a rescission of the contract on the part of the defendant, and was effective as such, unless he was estopped by undue delay or other conduct affecting the rights of the plaintiff, from claiming a release from his obligation to receive and pay for future deliveries of the flour.

[1] What is or is not a reasonably prompt exercise of the right of rescission, must depend upon the circumstances of each case. Delay in fully ascertaining, by expert examination, the true quality of the flour, of which the plaintiff was cognizant, cannot be attributed as a fault to the defendant, or as in any way affecting his right to rescind, nor can a delay attributable to an honest desire to adjust the controversy between the parties, as to the character of the flour, be counted to the disadvantage of the defendant. The 12 or 14 days elapsing between the date when defendant's letter of February 20th, inclosing the expert report as to the character of the flour, was received by plaintiff and the receipt by defendant of plaintiff's letters of March 3d and 4th, do not seem to us to constitute, under all the circumstances of the case, an unreasonable delay, or one prejudicial to the plaintiff's rights. On the contrary, this delay seems to us to have been calculated to impress the jury as evidence of a patient waiting by the defendant on the plaintiff, and of a not unreasonable desire to avoid coming to extremities in the matter. In this view of the case, the court were justified in avoiding any allusion to a possible estoppel on the ground of delay, and in this view plaintiff in error seems to have concurred, as no exception is taken to any supposed omission of the court to charge in that respect. *Lancaster Elec. L. H. & P. Co. v. Platt Iron Wks. Co.*, 172 Fed. 314, 97 C. C. A. 148.

What the plaintiff in error did except to and make the ground of three or four assignments of error, is what was said by the court in a colloquy with counsel, after the conclusion of the charge, stated in the record as follows:

"Mr. Gallager: I would like to ask your honor whether you will charge the jury if the defendant elected to claim damages for the defendant, instead of rescinding the contract, the contract then subsisted, as to future deliveries. Your honor has not mentioned that. I do not know whether you intended to.

"The Court: You mean the claim for damages for the alleged defective flour?

"Mr. Gallager: If the defendant elected to claim damages, that he thereby elected to leave the contract subsisting.

* * * * *

"The Court: Gentlemen, on the question that Mr. Gallagher has suggested, it appears that after the flour was alleged to be defective, Mr. Brey claimed a reduction of one dollar a barrel for the flour, and afterwards settled the claim with his customer for fifty cents on the barrel. If Mr. Gunderson had accepted that settlement, and settled on that basis with Mr. Brey, then Mr. Brey would have waived his right to claim that the contract was broken by Mr. Gunderson. But Mr. Gunderson did not accept the benefit of the settlement, and was not a party to it. The mere fact that Mr. Brey claimed that amount of damages from Mr. Gunderson, which Mr. Gunderson rejected, would not prevent Mr. Brey electing to reject the whole contract because of the delivery of the defective article, if you find that the article was not up to sample.

"Mr. Gallagher: Will your honor allow me to suggest this, that if the evidence shows that the defendant did elect to claim damages, instead of rescinding the contract, that then the defect, while it may have existed, entitled the defendant only to damages, as he had elected not to rescind the contract.

"The Court: You did not present such a point before argument. I think I have covered that in what I have just said to the jury. I will give you the benefit of any error you may consider the court made.

"Mr. Gallagher: My thought is, that the defendant may elect to take one of two courses, he either may accept damages for the defect, or he may rescind the contract, and if the evidence shows he elected to take damages, and claim damages, then the contract subsisted, but if he elected to rescind the contract, then the contract was ended. I merely suggest that to your honor, if you will charge that as law to the jury, leaving them to determine whether the evidence shows it.

"The Court: If I did charge them, I would charge them that that is not the law which applies to this case.

"Mr. Gallagher: Will your honor allow me to specify exceptions to the charge later.

"The Court: You may do it now. The rule of this court is that exceptions to the charge must be made specifically before the jury retires."

[2] We think the court below was correct in its views as above expressed. Undoubtedly, a purchaser had an election, under the circumstances here presented, either to pursue the seller for damages incurred by reason of the seller's defective performance of his contract, or he might, with reasonable promptness after the discovery of this defective performance, rescind the contract and thus relieve himself from liability for subsequent deliveries thereunder. In exercising this right of rescission, the purchaser is bound, as far as possible, to put the seller in status quo, by returning or tendering the goods already received. This requirement, however, is not essential where the goods have already been paid for, as in this case was the fact. This election, however, must be decisively made, and the purchaser cannot resort to or use both methods of relief. Under the circumstances of the present case, the defendant was not bound to make his election until after the plaintiff had refused to reimburse defendant for the outlay he had made by reason of the defect in these first two deliveries of the flour contracted for. Defendant was not making an election of his remedy by merely requesting of the plaintiff a reimbursement of the money he had been obliged to pay to his customers. That request was neither a suit nor a claim for damages. Reimbursement of the money actually paid could be recovered by defendant, notwithstanding his rescission. What would have been the situation if plaintiff had settled with the defendant for these disbursements, is another question. *Roxford Knitting Co. v. Hamilton Mfg. Co.*, 205 Fed. 842, 124 C. C. A. 44.

The contention was ably and urgently made by counsel for the plaintiff, that the sales of September 1st and September 20th constituted in reality one contract, and that defendant had, by his letter of March 7th, repudiated this unitary contract, embracing the sales made upon those two dates. The court, however, took a different view, to which the plaintiff took exception and has founded thereon one or more assignments of error. The view taken by the court, to which we have already referred, was that the two sales made on the two dates of September 1st and September 20th, respectively, constituted separate contracts, and the jury were so instructed. We have already pointed out that this instruction was abundantly supported by the evidence contained in the correspondence between the parties themselves. The court below, therefore, charged the jury that the contract of September 20th was still in force, and that the refusal of the plaintiff after the defendant's letter of March 7th, to fill the orders of the defendant under the contract of September 20th, was a breach on plaintiff's part and entitled defendant to a certificate of recovery for a commission at ten cents a barrel, that he would have received had the whole order been filled. The propriety of this instruction necessarily depended upon the correctness of the preceding instruction given by the court to the jury, that the two contracts were separate and distinct. We find no error, therefore, in the instructions given in the respect here excepted to.

[3] There are other matters that belong to the history of this case, as disclosed in the record, from which the charge of the court below has, we think, justly taken color, though not covered by any special exception or assignment of error. We have already called attention to plaintiff's letter of March 4th, tendering a car load of a different (though superior) grade of flour from that called for by the contract of September 1st. It is noteworthy in passing that this letter begins:

"Enclosed find invoice for car of 'Kron Prinz' shipped you today, *to apply on sale of September 1st, 1910.*" (Italics ours.)

This invoice was intended, as we have pointed out, to stand for a tender under the contract of that date, which, if rejected, would constitute a breach of that contract and thus furnish ground for a suit for damages. On its face, this letter was ineffective as a tender under the contract. The language of the plaintiff himself in this letter is:

"This is my choice patent, not the standard patent sold you."

Plainly, therefore, it was not a tender under the contract of September 1st. It was not the flour to which the contract referred, and the mere fact that it was a superior grade could not remedy this defect in the tender. Moreover, as counsel for defendant has pointed out, defendant was dealing with his customers on the basis of the particular flour ordered from plaintiff. To have injected into his trade a single car load of a superior grade, even at the same price as the flour ordered, would have tended to demoralize his dealings with his customers, and disadvantage—not advantage—to defendant would have resulted therefrom. The court might well have been impressed with the view, that this tender of an invoice of a car load of a different quality

of flour was not a tender under the contract, and therefore formed no basis for the suit instituted by the plaintiff. Defendant's point was not without merit, that he would have been justified, after that tender, in refusing any further shipments on the sale of September 1st, and so have rescinded the contract on that ground, because the only tender that plaintiff made to defendant of the balance of the flour on the contract of September 1st, was confessedly by his own letter not the flour that he had sold. The jury, however, were not so instructed and the record does not disclose whether any such point was made at the trial.

Much stress was laid by plaintiff's counsel at the argument and in his brief upon a so-called "waiver" of defendant's right to rescind, by his having accepted and paid, February 20th, for a car of flour alleged to have been shipped under the contract of September 1st, without complaint. Defendant testifies that, though he made no complaint to plaintiff as to this car, his customers made such complaint to him, and it was a source of serious trouble between him and them. Defendant's counsel does not admit that this flour was shipped under the contract of September 1st. But however this may be, this question of waiver is not before us. It apparently was not pressed at the trial. Certainly no request was made for instruction by the court on this point, and no exception has been taken to the omission in this respect on the part of the court. Even after the charge, during the colloquy between counsel for plaintiff and the court, attention was not called to this point. So far as the record discloses, it is here made for the first time. That it is not properly raised, is obvious, and we express no opinion as to its merit.

We think the case was properly submitted to the jury, and the judgment of the court below is therefore affirmed.

In re GOLD.

CONSTAD et al. v. BUELL.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)

No. 1,954.

1. **BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—PROPERTY OBTAINED BY FRAUD.**

Under the law of Illinois as settled by decision that an attachment or judgment creditor by levy acquires only the rights of the debtor in the property as against another having the legal title, a trustee in bankruptcy coming into possession of property obtained by the bankrupt by false and fraudulent representations did not, by virtue of Bankr. Act July 1, 1898, c. 541, § 47a(2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), which vests in him "all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings," acquire title to the property as against the sellers who rescinded the contract as soon as they learned of the fraud.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 455*)—APPELLATE PROCEEDINGS—"CONTROVERSY ARISING IN BANKRUPTCY PROCEEDINGS."

A proceeding by an adverse claimant to recover property in possession of a trustee is a "controversy arising in a bankruptcy proceeding," within the meaning of Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431), and the decree therein is appealable at any time within six months.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 916; Dec. Dig. § 455.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

In the matter of Sophia M. Gold, bankrupt. From a decree denying their petition to reclaim property, William W. Constad and Morris Newman, doing business as Wm. W. Constad & Company, appeal. Reversed.

The bankrupt, who was a furrier doing a retail business in the city of Chicago, on or about August 10, 1910, approached appellants, who were wholesale furriers in the city of New York, with a view to securing a line of credit in the purchase of furs. She represented that she was worth between \$5,000 and \$6,000 above all her debts, which, she stated to appellants, did not exceed \$1,000. Relying upon her representations, appellants sold and delivered to her at two different dates furs amounting in value to the sum of \$926.25. After receiving said furs, she proceeded to conceal the same and, with intent to defraud appellants, shipped a large part of the same out of Chicago. Within two months thereafter she was adjudged an involuntary bankrupt. Then, for the first time, appellants learned of the fraud through which she had obtained the goods. In the meantime, the trustee took steps to recover the furs so concealed and shipped out of the city, and did recover a portion of appellants' said furs, of the value of \$425. On learning of said fraudulent conduct and said bankruptcy proceedings, appellants rescinded said sales and at once petitioned the court for the return of said recovered furs or the proceeds thereof to them, the same having been sold by the trustee pending such proceedings, all of which steps they took after the furs had come into the possession of the trustee. The matter was heard before the referee, who found that the trustee's title to said goods, under section 47a (2) of the bankruptcy act as amended June 25, 1910, was superior to that of appellants', and dismissed appellants' petition for want of equity. Thereupon the referee filed with the District Court a certificate for review, wherein he stated that under the undisputed evidence adduced on the hearing of appellants' petition, "said petitioners [the appellants] were entitled to reclaim said goods and were entitled to the proceeds of the sale thereof, if, under the bankruptcy law as amended by the act of June 25, 1910, a vendor of goods who has been induced to sell such goods by false and fraudulent representations, can, under any circumstances appearing in evidence, reclaim such goods from the trustee in bankruptcy of the vendee." Upon the hearing upon said petition for review and the said referee's certificate, the District Court affirmed the action of the referee in dismissing said petition. The cause is before us on appeal from that order. The errors assigned, in substance, resolve themselves into the one proposition, viz., the court erred in holding that the rights of the appellants were inferior, under the facts of the case, to those of the trustee.

Alvin W. Wise, of Chicago, Ill., for appellants.

Francis J. Houlihan and Edward Menkin, both of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] Section 47a(2) of the Bankruptcy Act as the same was amended by the act of June 25, 1910, reads as follows, viz.:

"And such trustee, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

By the order of the court affirming the referee's action upon the petition for review, the court in effect held that under the statute as amended, and under the laws of Illinois as construed by the courts of that state, the rights of a defrauded vendor were inferior to those of "a creditor holding a lien by legal or equitable proceedings," and that the latter has the rights of a bona fide purchaser for value without notice of the fraud. The question is one of Illinois law. In support of this proposition, the trustee cites a number of cases from Illinois, the doctrine of which is fully summed up in *Van Duzor v. Allen*, 90 Ill. 499. In that case it appears that one Gaston bought of Van Duzor a threshing machine. Van Duzor claimed that Gaston was to have given his notes with sureties. Gaston insisted his notes were to be secured by chattel mortgage on the thresher. Gaston was given possession without the delivery of security, and proceeded to thresh for those desiring his services, for more than two months, said question of the nature of the security to be given still remaining unsettled, when judgments against him were obtained in favor of persons who had rendered services to him in threshing, upon which judgments executions were sworn out and placed in the hands of a constable, who levied upon the thresher. Van Duzor replevied the latter. On the trial of the replevin suit, Van Duzor was defeated. On appeal the Supreme Court affirmed the judgment. In its opinion the court said:

"A bona fide creditor, who, under a judgment and execution, acquires a lien on property thus situated, occupies the same position in all respects as does a bona fide purchaser. Where the apparent owner of property thus acquired has the indicia of ownership and may sell and pass a good title to a purchaser, without notice, a bona fide creditor may seize the property on execution and sell it thereunder and pass the title, not only against the apparent, but also the real owner."

This decision must be construed with reference to the facts of the case. The question of the rights of a defrauded vendor were not under consideration. Whatever lien, if any, Van Duzor possessed as against Allen, was a secret lien and was not made a condition of the passing of the title. Allen actually had title. This case states the law of Illinois as it stands to-day. Further cases cited by the trustee in support of this doctrine are *Union Stockyards & Transit Co. et al. v. Mallory*, 157 Ill. 565-566, 41 N. E. 888, 48 Am. St. Rep. 341; *Brundage v. Camp*, 21 Ill. 330; *Fawcett v. Osborn*, 32 Ill. 411, 83 Am. Dec. 278; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Doane v. Lockwood*, 115 Ill. 490, 4 N. E. 500; *Butters v. Haughwout*, 42 Ill. 18, 89 Am. Dec. 401; *Farwell v. Hanchett*, 120 Ill. 577, 11 N. E. 875.

None of these, however, apply to the facts of the case at bar. This

clearly appears from the decisions of the Illinois courts. The leading case is that of *Schweizer v. Tracy*, 76 Ill. 345, the facts of which are very similar to those of the case at bar. There the purchaser had obtained the goods through fraudulent representations as to his financial circumstances. After possession taken, the goods were levied upon under a writ of attachment issued against the fraudulent vendee. The defrauded vendors instituted a suit in replevin in which they were defeated and the return of the property to the sheriff awarded. Having failed to return the goods, suit was instituted upon the replevin bond, in which suit *Schweizer* was impleaded with the defrauded vendors. In the lower court judgment went for the plaintiff in that suit. On appeal the judgment was reversed. In the course of its opinion the court said:

"Coming, then, to the conclusion which we do, that had *Mack, Stadler & Co.* discovered the fraud practiced upon them whilst the goods remained in the hands of the fraudulent vendee, and replevied them, they could have successfully maintained their action, the question is presented, whether the attaching creditors here, or the sheriff, by virtue of his writ of attachment, acquired any other or greater title than the fraudulent vendee possessed. Had the vendee, before the reclaiming of the goods by *Mack, Stadler & Co.*, sold them to an innocent purchaser for value, no doubt, under the decisions of this court, the purchaser would have acquired a valid title to the goods"—citing *Jennings v. Gage et al.*, 13 Ill. 610, 56 Am. Dec. 476; *M. C. R. R. Co. v. Phillips et al.*, 60 Ill. 190; *Young et al. v. Bradley et al.*, 68 Ill. 553.

The court thereupon proceeded to explain the language in *Burnell v. Robertson*, 5 Gilman (Ill.) 282, and said:

"That case was a case where a debtor had title to the property, and the controversy was between a prior purchaser from the debtor, who had not obtained possession of the property, and a subsequent attaching creditor; and in reference to such a state of facts, the court says: 'In case of two sales of personal property, both equally valid, his is the better right who first gets possession of the property, and the attaching creditor stands in the light of a purchaser and is to be protected as such.' That is, the attaching creditor stands in the light of a purchaser, not necessarily as against the world, but as against another purchaser, the creditor having, by virtue of his attachment, first obtained possession of the property; thus acknowledging the common doctrine respecting the sale of personal property, that a sale without the delivery of possession, is void as against subsequent purchasers and creditors. This is the full import of that decision. But in the case at bar, the only title of the debtor is one acquired by fraud and false representations, and voidable at the option of his vendors. The general expression used in the case cited is to be understood with reference to the facts of that case, and is not authority in support of the view, that an attaching creditor, under the circumstances of such a case as the present, as against the vendor, stands in the same position as an innocent purchaser for value."

The court further in said opinion said there was no difference as to priority of lien between an attachment lienor and an execution lien, citing *Tousley v. Tousley*, 5 Ohio St. 78; that the attachment creditor took no better title than the fraudulent vendee possessed, and proceeded to hold that the right of possession was in the defrauded vendor and that there was no liability upon the replevin bond. This case was decided prior to *Van Duzor v. Allen*, *supra*, but has been approved in a number of subsequent cases. In *Walsh v. First National Bank*, 228 Ill. 446, 81 N. E. 1067, the court held that the transferee of a bill of lading prevailed over an attaching creditor, and says:

"In such a case an attachment creditor only obtains the rights which the debtor has in the property at the time of the levy of the writ. One claiming to be a creditor of another and levying a writ of attachment is not a bona fide purchaser for a valuable consideration"—citing, among other authorities, *Schweizer v. Tracy*, *supra*.

The latter case is cited approvingly in *Hacker v. Munroe & Son*, 176 Ill. 394, 52 N. E. 12; *King & Co. v. Brown*, 24 Ill. App. 579-582; *Gould v. Howell*, 32 Ill. App. 349-350; *O'Neil v. Patterson & Co.*, 52 Ill. App. 27-33; *Nonotuck Silk Co. v. Levy*, 75 Ill. App. 55-58; *La Salle Pressed Brick Co. v. Coe*, 65 Ill. App. 619-622; *Link v. Gibson*, 93 Ill. App. 433-435; *Magerstadt v. Schaefer*, 110 Ill. App. 171, and other cases. The same rule of law is laid down in *Doane v. Lockwood*, *supra*; *Staver & Abbott Mfg. Co. v. Coe*, 49 Ill. App. 426-431.

From the foregoing it appears that the rule laid down in *Schweizer v. Tracy*, *supra*, is here controlling. The vendors having at the earliest opportunity rescinded the sale, the title to the furs in question never passed to the bankrupt, by reason of her fraudulent representations to the vendors, therefore the trustee took no title thereto inasmuch as, under the laws of Illinois, as construed by the courts of the state, the rights of the defrauded vendor prevailed over the claims "of a creditor holding a lien by legal or equitable proceedings thereon."

[2] At the early part of this session appellee presented to the court and argued orally a motion to dismiss the appeal herein for want of jurisdiction, assigning as ground therefor (1) that appellants' claim amounted to less than \$500, and (2) that this appeal had not been perfected within ten days from the entry of the order appealed from, which motion the court took under advisement until the final hearing. This motion was based upon section 25a of the bankruptcy act, which is applicable only to proceedings in bankruptcy. The matter here involved is, however, not cognizable under section 25a, but is clearly a controversy arising in a bankruptcy proceeding, and as such is governed by the provisions of section 24a of the act, and the terms of the judiciary act of March 3, 1891. Consequently the amount involved is not limited and the appeal, having been taken within six months from the entry of the order, was properly perfected. The motion must therefore be denied.

The judgment of the District Court is reversed, with direction to vacate its decree herein and grant the prayer of the petition to the amount of \$425.

SMITH v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Fourth Circuit. December 17, 1913.)

No. 1154.

1. TRIAL (§ 142*)—GROUNDS FOR DIRECTING VERDICT FOR DEFENDANT—INSUFFICIENCY OF EVIDENCE.

An issue of fact is made for the jury whenever reasonable men might fairly differ as to the inference to be drawn from the evidence bearing on a vital point.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 337; *Dec. Dig.* § 142.*]

2. RAILROADS (§ 375*)—INJURIES TO PERSONS ON TRACK—DUTY AS TO TRESPASSERS.

The engineer of a train is under no duty to keep a lookout for trespassers unless he has reason to expect them on the track, but he is under the duty to use due care to avoid injury to a trespasser whom he sees on the track in a condition or situation indicating his inability to take care of himself.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1275-1284; Dec. Dig. § 375.*]

Care required of railroads as to trespassers on or near tracks, see note to Louisville & N. R. Co. v. Womack, 97 C. C. A. 566.]

3. RAILROADS (§ 375*)—INJURY TO PERSONS ON TRACK—NEGLIGENCE OF ENGINEER.

A finding that the engineer of a train saw a child five years old on the track running ahead of the train in time to stop authorized a finding of negligence if he failed to at once use every effort to stop the train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1275-1284; Dec. Dig. § 375.*]

4. RAILROADS (§ 400*)—INJURY TO PERSON ON TRACK—QUESTIONS FOR JURY.

Evidence considered, and held sufficient to require the submission to the jury of the question whether the engineer of a train saw a child on the track and was negligent in failing to apply the brakes at once.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.*]

Knapp, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of West Virginia, at Huntington; Benjamin F. Keller, Judge.

Action at law by Frances E. Smith, an infant, by her next friend, Isaac V. Smith, against the Baltimore & Ohio Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

L. C. Somerville, of Point Pleasant, W. Va. (Somerville & Somerville, of Point Pleasant, W. Va., on the brief), for plaintiff in error.

Rankin Wiley, of Point Pleasant, W. Va., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. [1] This action for personal injuries resulted in a verdict for the defendant by direction of the District Judge; and the main question presented to this court is whether the evidence on behalf of the plaintiff made an issue of negligence on the part of the defendant which should have been submitted to the jury. In deciding this question the settled rule of guidance is that an issue of fact is made for the jury whenever reasonable men might fairly differ as to the inference to be drawn from the evidence bearing on a vital point. Richmond, etc., R. R. v. Powers, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; Texas & Pacific Ry. Co. v. Harvey, 228 U. S. 319, 33 Sup. Ct. 518, 57 L. Ed. 852.

[2] The plaintiff, a girl five years old, and her brother, three years old, were left by their mother for a short time near the track of the defendant railroad company. They went on the railroad, and the plaintiff was run over by a passenger train and lost a leg and an arm. It was not alleged in the declaration that the engineer in charge of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

locomotive was negligent in not keeping a lookout for the plaintiff or other persons on the track, nor was there any allegation or proof that the servants of the defendant company had reason to expect persons to be on the track at the place of the accident. On the contrary, the specific act of negligence charged, and that which the plaintiff undertook to prove, was that the locomotive engineer saw the plaintiff on the track in time to stop the train, but negligently failed to make the proper effort to do so until it was too late. The testimony adduced to support this allegation must therefore be considered in the light of the rule that the engineer of a train is under no duty to keep a lookout for trespassers unless he has reason to expect them on the track, but that he is under the duty to use due care to avoid injury to a trespasser whom he sees on the track in a condition or situation indicating his inability to take care of himself. *Woodruff v. Northern Pac. R. Co.* (C. C.) 47 Fed. 689; *Sheehan v. St. Paul & D. Ry. Co.*, 76 Fed. 201, 22 C. C. A. 121; *Baltimore & O. R. Co. v. Hellenthal*, 88 Fed. 116, 31 C. C. A. 414; *Cleveland, C., C. & St. L. R. Co. v. Tartt*, 99 Fed. 369, 39 C. C. A. 568, 14 L. R. A. 98; *Grand Trunk Ry. Co. of Canada v. Flagg*, 156 Fed. 359, 84 C. C. A. 263. Many other cases on the subject are collated in a note to 8 L. R. A. (N. S.) 1069 et seq. This rule with its limitations extends to children. *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377, 30 Am. Rep. 686; *Woodruff v. Northern Pac. R. Co.* (C. C.) 47 Fed. 689; *Ashworth v. Southern Ry. Co.*, 116 Ga. 635, 43 S. E. 36, 59 L. R. A. 592; *Garner v. Trumbull*, 94 Fed. 321, 36 C. C. A. 361; note to 8 L. R. A. (N. S.) 1079.

[3] Since the plaintiff was a trespasser at a place where the engineer had no reason to expect her, the District Judge was right in charging the jury that the defendant would not be liable for the failure of the engineer to keep such a lookout as would have enabled him to see her in time to stop the train. In applying the rule above stated, it seems clear to the majority of the court, that if the engineer actually saw the plaintiff on the track and failed to use all reasonable means at his command to stop the train, there would be ground for the jury to draw the inference of actionable negligence. Surely the sight of a little girl of five years, not standing still nor moving off, but running down the track in front of the moving engine, might reasonably be regarded instant notice to the engineer of the child's being aware of the approach of the train, and in such a state of consternation as to be unable to take care of herself. If the jury should find that the engineer did see the plaintiff in this situation in time to stop, they might well say that as a man of ordinary discretion he should have known that he had not a moment to spare, and should have used every effort to stop the train. We cite only a few of the many cases supporting this conclusion. *Gunn v. Ohio River R. Co.*, 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575; *Indianapolis, etc., R. Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387; *Burg v. C., R. I. & P. Ry. Co.*, 90 Iowa, 106, 57 N. W. 680, 48 Am. St. Rep. 419; *Southern Ry. Co. v. Chatman*, 124 Ga. 1026, 53 S. E. 692, 6 L. R. A. (N. S.) 283, 4 Ann. Cas. 675; *Spooner v. D. L. & W. R. R. Co.*, 115 N. Y. 22, 21 N. E. 696; *Southern R. R. v. Smith*, 163 Ala. 174, 50 South. 390;

Ross v. Texas & Pac. Ry. Co. (C. C.) 44 Fed. 44; B. & O. Ry. Co. v. Hellenthal, 88 Fed. 116, 31 C. C. A. 414.

[4] The remaining question is whether there was evidence from which reasonable men might draw contrary conclusions as to the averment that the engineer did see the plaintiff in time to stop the train and failed to do so. The rate of speed was variously estimated by the witnesses at from 8 to 15 miles an hour. The engineers who testified on the subject agreed that a train running at a speed of 8 to 15 miles an hour would stop within a distance of 60 to 80 feet upon application of the emergency brakes, and that it would take from one to three seconds to make the application. The engineer in charge of the locomotive testified that he was looking ahead, but, owing to the curve of the road, the boiler and other portions of the locomotive prevented him from seeing the children till he was within 30 feet of them; that he instantly applied the air brakes, blew the alarm whistle, and made the stop in about 70 feet. This evidence as to the whistle and the quick stop was corroborated by a passenger on the train; and the statement that on a curve the view ahead would be obstructed by portions of the locomotive was confirmed by several witnesses. If the other evidence made no issue as to this course of conduct, the conclusion would be inevitable that the engineer was blameless. But even giving full force to the strong presumption that his anxiety to save the child from peril instantly became uppermost, and bearing in mind that he was in a better position to judge what his opportunity was and to know the time and manner of his action, yet we think there was evidence from which it would have been possible for the jury as reasonable men to infer that the engineer at first relied on the alarm whistle and did not put on the emergency brakes as soon as he saw the child. The testimony of the civil engineers who measured the ground was to the effect that the road is straight for 130 feet approaching the point where the accident occurred, and that there is a curve of only $21\frac{1}{2}$ feet for 100 feet more; and there was testimony from two mail clerks on the train that there were first three or four blasts of the whistle, then a little interval followed by the application of the brakes and seven or eight short blasts. These witnesses "guessed" the distance traveled after the first signal to be 200 feet. Ayelshire, a witness standing a short distance from the road, testified that he saw the train and heard it blow, and looked down the track, and saw the children, that the whistle was sounding short, quick blasts at a point which turned out to be about 300 feet from the place of the accident.

Having in view the evidence that the engineer was looking ahead, that he had a straight track of 130 feet, and that the train could be stopped in that distance, and the evidence of several quick blasts of the whistle at an appreciable time and distance before another series of blasts and the application of the air brakes, we are unable to resist the conclusion that reasonable men might draw these different inferences on vital issues, namely: First, that the engineer's statement that he used every means at hand to stop the train as soon as he saw the children was correct, or that in the emergency which was upon him he at first relied on the alarm whistle and failed to apply the brakes

until it was too late; second, that the engineer in the emergency which was upon him did all that could be expected of a reasonably prudent man, or that, even allowing for the emergency, a reasonably prudent man could and would have stopped the train in time.

For these reasons this court is of the opinion that the District Court erred in directing a verdict for the defendant, and the judgment of the District Court is reversed, and the cause remanded for a new trial.

Reversed.

KNAPP, Circuit Judge (dissenting). The conclusions of the majority involve the affirmance of two propositions: First, that there was evidence from which the jury might find that the engineer did in fact see these children when far enough away to stop the train before reaching them, although he testified positively to the contrary; and, second, if the jury so found, that there was evidence from which they might further find that he did not thereupon do what a reasonably prudent engineer should have done to avoid the accident.

Assuming that the first of these propositions is justified by the proofs submitted, I am of opinion, after careful examination of the record, that nothing was shown which would sustain a verdict for plaintiff on the theory of the second proposition. It appears from the testimony that the engineer could not see the children on the track ahead of him until the locomotive rounded a curve which terminated about 130 or 140 feet from the point where plaintiff was injured. Undoubtedly, if he had reversed the engine and used the emergency brakes upon the instant, the train would have been stopped in time, since by those means it could have been brought to a standstill, at the speed it was moving, before going more than 60 to 70 feet, as was in fact done in this instance. What the engineer saw, or could have seen, when the stretch of straight track came within his line of vision, was "these two little children running down the track," to use the language of the only witness who testified as to where they were and what they were doing at that moment.

What the engineer at once did, as the jury might find from the plaintiff's proofs, was to sound several sharp, warning blasts with the whistle, and then a few seconds later, for it was all a matter of seconds, to reverse the engine and apply the emergency brakes, but unfortunately not soon enough to avert the disaster. Because he did not *immediately* use every effort to stop the train, but for a brief interval resorted to the warning whistle, it is held to be a question of fact for the jury whether "a reasonably prudent man could and would have stopped the train in time."

To this I cannot agree. In my judgment, there is no aspect of the testimony or allowable inference therefrom which would support a finding of imprudent or unreasonable conduct on the part of the engineer. Indeed it seems to me that he did just what a careful engineer would be likely to do in such an unexpected emergency. Under the circumstances disclosed, it would be the natural, almost instinctive, act of an engineer to give signals of warning, which would presumably have the effect of clearing the track. And until he had some reason to apprehend that such signals might fail of their purpose, the

engineer would not be chargeable, in my opinion, with want of due care for neglecting to take the most effective measures for stopping his train. This is not the case of little children playing on the track, heedless of the coming of a train and unconscious of danger, nor of persons discovered on the track whose postures and actions indicate that they are in a more or less helpless condition. The children in question, when they could first be observed by the engineer, were "running down the track" in front of him, evidently aware that the train was approaching, and apparently intending to get out of the way. There was nothing to prevent them from stepping off the track on either side, and the little boy, two years younger than plaintiff, did leave the rails, and was seen "climbing the bank" before the locomotive passed by him. In view of these undisputed facts I think the engineer had a right to suppose, when the children first came in sight, that they would get off the track in response to his warning, and that he was justified in acting upon that supposition. To say that the jury might find him at fault under such circumstances, because he did not instantly, or as quickly as possible, do everything in his power to stop the train, and because, had he done so, the train could have been stopped in time, is to say in effect, or permit the jury to say, that it was not reasonably prudent on his part to assume, even for a few moments, that the plaintiff would heed his warning and get off the track, although the assumption is based upon everyday experience and observation. It is also to say, or permit the jury to say, that the duty of the engineer was measured, not by what reasonable judgment would dictate in such a situation, but by *what he might have done* as the event proved. In short, the conclusions of the majority involve a rule of obligation which seems to me at once unjust to defendant and against the weight of authority. In my opinion the verdict was properly directed, and the judgment should therefore be affirmed.

LUEDERS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1914.)

No. 2260.

1. CRIMINAL LAW (§ 1156*)—WRIT OF ERROR—REVIEW—ORDERS REVIEWABLE—DENIAL OF NEW TRIAL.

Denial of a motion to set aside a conviction and grant a new trial cannot be reviewed on writ of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.*]

2. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES—BANKRUPTCY.

In a prosecution of a bankrupt for concealing an interest in real property standing in the name of E. from his trustee, it appeared that the bankrupt owned certain property in the name of R., and that he procured her to transfer the same to E., and later procured E. to exchange such property for that in controversy under terms requiring a payment of \$1,000 cash. *Held*, that evidence that in February, 1911, he procured a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

certificate of deposit for \$1,200, which he indorsed to E., was admissible, notwithstanding the exchange was not made until the following May, and was not objectionable as tending to show the commission of another offense, to wit, the concealment of the certificate from the trustee; the court having instructed that the only charge in the indictment was the concealment of defendant's interest in the real estate, and, unless the certificate had reference to the defendant's ownership of such property, they should disregard it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

3. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

Evidence, relevant to the offense charged in the indictment, is not admissible because it also tends to prove the commission of another offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

4. WITNESSES (§ 393*)—ACCUSED—IMPEACHMENT—CONTRADICTION.

Where, in a prosecution of a bankrupt for concealing certain property from his trustee, he testified that he had at one time owned certain real property in W., which the government claimed had been exchanged for the property in question, the government was entitled to impeach him by showing that in a former proceeding he had testified that he never owned any real estate at W. or any interest therein.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1252-1257; Dec. Dig. § 393.*]

5. WITNESSES (§ 393*)—TESTIMONY AT PRIOR TRIAL—TRANSCRIPT.

Where a court reporter, who had taken defendant's testimony in a prior proceeding on being shown the transcript of his notes, identified the same and testified that he made it and that it was a correct transcript of his notes, it was admissible to show defendant's testimony on such occasion, though the witness further testified that he had no memory or independent recollection of the testimony, and that a reference to the transcript would not refresh his recollection.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1252-1257; Dec. Dig. § 393.*]

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

A. W. Lueders was convicted of willfully concealing certain property from his trustee in bankruptcy, and he brings error. Affirmed.

Elmer M. Hayden and Maurice A. Langhorne, both of Tacoma, Wash., George F. Vanderveer, of Seattle, Wash., and F. D. Metzger, of Tacoma, Wash., for plaintiff in error.

C. F. Riddell, U. S. Atty., of Seattle, Wash., and E. B. Brockway, Asst. U. S. Atty., of Tacoma, Wash.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The indictment filed by the United States attorney charged that on or about the 23d day of February, 1912, the defendant, within the Southern Division of the Western District of Washington, while he was a bankrupt under the Bankruptcy Act, did willfully, knowingly, fraudulently, and unlawfully conceal and cause to be concealed from one J. M. Phillips, who was then and there the duly appointed, qualified, and acting trustee in bankruptcy of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendant, a bankrupt, certain property, to wit, certain lands situate in the county of Morrow, state of Oregon (which property was particularly described and set forth in the indictment), of the value of \$25,000, to which the estate of said bankrupt then and there had a certain right, claim, and interest.

It appeared from a bill of particulars furnished to the defendant by the government that the manner of concealment of the real estate referred to in the indictment was as follows: The defendant, having bought certain property in the town of Winlock, in the state of Washington, commonly known as the "St. James Hotel property," from one Carl Buege, took title to it in the name of Anna Reinhardt without any consideration moving to the latter therefor; that thereafter the defendant procured Anna Reinhardt, without any consideration therefor, to transfer the property by deed to one E. Maud Everitt; and that said E. Maud Everitt did thereafter trade said property for the real estate set forth and described in the indictment, situate in the county of Morrow, state of Oregon, with the intent and purpose on the part of said defendant to conceal all of the last-mentioned real estate from the trustee in bankruptcy mentioned and named in the indictment.

The jury found the defendant guilty as charged in the indictment, and he was sentenced by the court to imprisonment for the term of nine months.

The first four assignments of error relate to the admission of certain testimony introduced by the government over the objections of the defendant. The objection was that the testimony was incompetent, irrelevant, and immaterial and prejudicial to the rights of the defendant.

[1] 1. The fifth assignment is directed to the refusal of the court to set aside the verdict and grant a new trial. With respect to the latter assignment, it is well settled that the ruling of the trial court denying a new trial cannot be assigned as error. *Moore v. United States*, 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996; *Holder v. United States*, 150 U. S. 91, 14 Sup. Ct. 10, 37 L. Ed. 1010; *Blitz v. United States*, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; *Wheeler v. United States*, 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244; *Clune v. United States*, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269.

[2] 2. The first two assignments of error relate to the admission by the court of certain testimony over the objection of the defendant, which it is claimed was irrelevant, incompetent, and immaterial.

The first objection was to the testimony of one A. S. Hoonan, assistant cashier of the National Bank at Aberdeen, Wash. The second objection was to the testimony of one Clyde L. Philliber, clerk in the Bank of Ladd & Tilton, at Portland, Or. As the testimony of these two witnesses relate to the same transaction, the objections will be considered together.

The testimony of A. S. Hoonan was to the effect that, while he was acting as teller in the National Bank at Aberdeen, Wash., he sold to the defendant a certain draft. The draft, which was introduced in evidence by the government, was dated February 11, 1911, and was on the First National Bank of Portland, Or., in favor of E. M. Everitt,

for the sum of \$1,200. It was signed by A. S. Hoonan, as teller, and was indorsed on the back, "E. M. Everitt."

The testimony of Clyde L. Philliber, a clerk employed in the Bank of Ladd & Tilton, at Portland, Or., was to the effect that on February 13, 1911, the assistant cashier of his bank came to his window with a draft drawn from the United States National Bank at Aberdeen on the First National Bank of Portland, Or., and requested that he give a certificate of deposit to E. M. Everitt; that the assistant cashier wrote out the certificate and the witness countersigned it. The draft theretofore introduced in evidence and identified by the witness Hoonan was then shown to this witness, and he identified his stamp upon it and testified that it seemed to have passed through his department. A certificate of deposit of the Ladd & Tilton Bank, of Portland, Or., dated February 13, 1911, in favor of E. M. Everitt, for \$1,200, signed by E. C. Philliber, teller, and Walter W. Cook, assistant cashier, and indorsed on the back, "E. M. Everitt," was thereupon introduced in evidence, and the witness testified that the signatures thereon were those of himself and the assistant cashier, Walter W. Cook.

The charge in the indictment is that the defendant, being a bankrupt, had concealed from his trustee in bankruptcy certain real estate belonging to his estate in bankruptcy, and that this real estate was situated in Morrow county, Or. The bill of particulars furnished to the defendant by the government charged that the defendant, having bought certain property in the town of Winlock, state of Washington, took title to the property in the name of one Anna Reinhardt; that thereafter the defendant procured the said Anna Reinhardt to transfer said property to one E. Maud Everitt; that said E. Maud Everitt, as agent for the defendant, thereafter traded the Winlock property, in the state of Washington, for certain real property situated in Morrow county, Or., and the defendant was charged with concealing this real estate in Morrow county, Or., from his trustee in bankruptcy.

It appeared from the testimony of one P. E. Alvord, who resided in Portland, Or., that he knew the defendant in a business way, and that in April or May, 1911, he met the defendant and Miss Everitt; that he knew that they wanted to dispose of the Winlock property in Washington, and, knowing that certain parties in Eastern Oregon wanted to exchange some wheat land in that locality for property in or near Portland, Or., he brought the parties together and an exchange was made of the property in Winlock, Wash., for the real estate in Morrow county, Or.; that there was a difference between the values of the two properties in this transaction; that the St. James Hotel property was valued at \$11,000, and the Oregon property at \$25,600, leaving a balance of \$14,600, of which latter amount \$13,000 was to remain on mortgage, \$1,000 was to be paid in cash, and \$600 was to be paid in two months from the date of the agreement. It is contended by the government that the circumstances tended to show that the transaction narrated by the witnesses Hoonan and Philliber, concerning the draft of \$1,200 on the First National Bank of Portland, Or., and the certificate of deposit in the Bank of Ladd & Tilton, at Portland, Or., was connected with the cash payment of \$1,000 involved in the exchange

of the properties related by the witness Alvord and contained in the agreement of the parties. The fact that the draft was purchased on February 11, 1911, and the exchange of the properties was not made until May, 1911, does not necessarily disconnect the two transactions, if the circumstances tended to show that they were connected. The evidence was circumstantial, and it was for the jury to give it only such weight as it was entitled to receive in determining the ultimate question whether the defendant became and was the real owner of the Oregon property. But the objection is that this testimony tended to prove that the defendant was guilty of an offense other than the one charged in the indictment (that is to say, the evidence tended to show that the money represented by the draft and by the certificate of deposit for \$1,200 was the property of the defendant); that, if the jury believed this testimony, they might draw the conclusion that his concealment of this property from his trustee in bankruptcy was an offense other than that charged in the indictment; and that such a conclusion would prejudice the jury against the defendant and his defense. With respect to this objection, the trial court advised the jury that the only charge in the indictment was the secreting of the particular real estate described, and, unless the jury believed the transaction, about which this inquiry was being made, concerned the matter charged in the indictment, they were to disregard the testimony of these witnesses. We think this instruction disposed of the defendant's objection to this testimony.

[3] Assuming that the testimony did tend to prove the commission of another offense, its admission was not rendered improper if it was relative to the offense charged in the indictment.

In the case of *Williamson v. United States*, 207 U. S. 425, 451, 28 Sup. Ct. 163, 172 (52 L. Ed. 278), the Supreme Court of the United States disposed of a similar objection in these words:

"The contention that the proof on the subjects just stated should not have been admitted, because it tended to show the commission of crimes other than those charged in the indictment, and consequently must have operated to prejudice the accused, is, we think, without merit, particularly as the trial judge, in his charge to the jury, carefully limited the application of the testimony so as to prevent any improper use thereof."

See, also, *Moore v. United States*, 150 U. S. 57, 60, 14 Sup. Ct. 26, 37 L. Ed. 996.

As to the relevancy and weight of this testimony, what the Supreme Court said in *Holmes v. Goldsmith*, 147 U. S. 150, 164, 13 Sup. Ct. 288, 292 (37 L. Ed. 118), is applicable here:

"As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be. 'The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth. *Stevenson v. Stewart*, 11 Pa. 307.' The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because

unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

[4] 3. It is contended further that the court erred in permitting counsel for the government to cross-examine the defendant, who was a witness on his own behalf, as to certain testimony alleged to have been given by the latter in a former proceeding, wherein one John Forsgrim was plaintiff and the defendant herein was defendant. On direct examination the defendant had admitted that, prior to the making of the deed from Anna Reinhardt to E. Maud Everitt, he had owned the property described in that deed, known as the St. James Hotel property, at Winlock, Wash., and on cross-examination, after admitting that he had been summoned and had testified in the former proceeding, he was asked the following questions and gave the following answers:

"Q. * * * Doctor, weren't you asked this question and wasn't this your answer, 'Did you ever own real estate there [Winlock]?' and didn't you say, 'No, sir'? A. I do not recollect. If you have got the evidence there it is probably so. Q. And then were you not asked, 'Did you ever have any interest in any real estate there?' and didn't you say, 'No, sir'? A. I do not know."

Counsel for the defendant admit that had the defendant ever testified in any former proceeding that he had owned, or did own, an interest in the real estate in Winlock, and had on the trial of the action now before the court testified to the contrary, then it would have been permissible to impeach him by showing that at a different time and place he had admitted owning an interest in the real estate in Winlock; but they contend that that rule has no application to the present case for the reason that the defendant had testified in this case that he had at one time owned real estate at Winlock, and the impeaching testimony tended to show that during the former proceeding he had testified that he had never owned any real estate, or any interest therein, at that place. The cases admit of no such distinction. The basis of impeaching testimony is inconsistency or contradiction. Evidence impeaches a witness when it assails his general credibility or otherwise weakens the force of his testimony and distracts from the weight to be given it (40 Cyc. 2564); and in connection with this rule there must always be considered the further rule that, in order to impeach a witness by proof of contradictory statements made by him, it is essential that such statements have reference to some matter which is relevant and material to the issue on trial (10 Encyc. Pleading & Practice, p. 294). The questions asked the defendant related to the ownership of the hotel property in Winlock which it was contended had been owned by the defendant and had been exchanged by him for the property set forth and described in the indictment, for the concealment of which he was being tried. The statements brought out on cross-examination were clearly material, and the fact that they were variant from previous statements rendered them admissible for the purpose of impeachment. Nor can it be claimed that there was no reason for the introduction of the former statements and that they were of no weight in determining the question at issue as to the ownership of the property charged to have been concealed from his trus-

tee in bankruptcy. They were inconsistent with and a contradiction of the testimony given by the defendant during the trial of this case upon that very question, and tended to impeach that testimony.

[5] 4. In connection with the impeaching questions asked the defendant by counsel for the government during his cross-examination, and for the purpose of further impeaching his testimony, the government called as a witness one J. A. Cross, the stenographic reporter who had reported the testimony of the defendant during the proceeding referred to. He was shown a paper which he identified as a transcript of the defendant's testimony in that proceeding; and although the witness stated that he could not testify from memory as to what the defendant had said at that time, and had no independent recollection of what the defendant had testified to during that proceeding, and further that a reference to the testimony would not refresh his recollection, still he testified that it was a transcript of the notes taken at that time, that he himself had made the transcript, and that he could swear that it was a correct transcript. From the transcript it appeared that the defendant had testified during the former proceeding that he had never owned any real estate at Winlock nor any interest in any real estate at that place. The specific objection to the admission of this testimony is that the reporter had no independent recollection of what the defendant had testified to, and further that a reference to the transcript did not in any manner refresh his recollection of the defendant's former testimony. But we think that these objections to the introduction of the testimony of the witness were fully overcome by the testimony of the witness that the paper was a transcript of his notes taken during that proceeding, and that he had made the transcript and could swear that it was a correct transcript. The rule is that if the witness, at or about the time the memorandum was made, knew its contents, and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum. The two are the equivalent of a present, positive statement of the witness, affirming the truth of the contents of the memorandum. *Acklen's Ex'r v. Hickman*, 63 Ala. 498, 35 Am. Rep. 54; *Wright v. Wright*, 58 Kan. 525, 50 Pac. 444; 1 *Wigmore on Evidence*, par. 735.

The judgment of the court below will be affirmed.

BRITISH & AMERICAN MORTGAGE CO., Limited, v. STUART.

In re VANDIVER.

(Circuit Court of Appeals, Fifth Circuit. January 6, 1914. On Petition for Rehearing, January 28, 1914.)

No. 2,538.

1. MORTGAGES (§ 125*)—PROVISION FOR ATTORNEY'S FEE—VALIDITY AND CONSTRUCTION.

A provision in a mortgage for the payment of attorney's fees and making the mortgage a lien therefor, where recognized as valid by the law of the state, is enforceable to the extent of a reasonable fee for services

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

actually rendered; but, until the debt becomes due and the services of the attorney are rendered, no debt exists on account of such stipulation to be added to the amount of the note or mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 211½, 244, 245; Dec. Dig. § 125.*]

2. **BANKRUPTCY (§ 318*)—PROVABLE DEBTS—ATTORNEY'S FEES UNDER STIPULATION IN MORTGAGE.**

Under Bankr. Act July 1, 1898, c. 541, § 63a(1), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), which limits provable debts to such as are "a fixed liability absolutely owing at the time of the filing of the petition," a claim for attorney's fees under a stipulation in a mortgage for the payment of such fees for the collection of the debt secured by foreclosure or otherwise cannot be allowed against or paid from the bankrupt's estate, where the mortgage debt was not due at the time of the filing of the petition in bankruptcy, and where no services were rendered by the attorney before the filing of the petition in bankruptcy; and the fact that it is sought to prove the claim only against the proceeds of the mortgaged property, sold by the trustee free from the lien, does not exempt it from the operation of such provision.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.*]

Petition to Superintend and Revise Proceeding of the District Court of the United States for the Middle District of Alabama; Thomas G. Jones, Judge.

In the matter of Henry F. Vandiver, bankrupt. Petition by British & American Mortgage Company, Limited, to revise an order disallowing a claim for attorney's fees claimed under a mortgage. Affirmed. Petition for rehearing denied.

Wm. S. Thorington, of Montgomery, Ala. (Jack Thorington, of Montgomery, Ala., on the brief), for petitioner.

Robert E. Steiner and Leon Weil, both of Montgomery, Ala., for respondent.

Before PARDEE and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The petitioner had a mortgage on the bankrupt's real estate, which contains the following stipulations as to attorney's fees:

"That the parties of the first part hereby agree to pay the attorney's fees, and all other expenses which may be incurred by the said mortgagee, its successors or assigns, in the collection of, or in attempting to collect the several sums, herein secured, by a foreclosure of the mortgage, or otherwise, or for enforcing or attempting to enforce any of the terms or provisions hereof, with or without suit, for the payment of which this conveyance is a lien, including solicitor's fees for a foreclosure by suit in equity, and this mortgage shall stand as security for the same, and it shall be no defense as to such solicitor's fees, or other costs, fees, or expenses for a foreclosure in equity, that a foreclosure might have been made under any power herein, the course of procedure being optional with the holder, and it being the purpose and intent hereof to secure such holder in the collecting of principal and interest—hereby secured—net of everything."

The controversy here is as to a claim for attorney's fees based on the foregoing agreement.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

After the adjudication in bankruptcy, George Stuart, the trustee of the bankrupt, filed a petition in the District Court to sell the land described in the mortgage, free of liens, and the mortgagee, petitioner here, was made a party to the proceeding. It filed an answer, and also filed proof of the mortgage debt and proof of the attorney's fees for services rendered in and connected with said proceedings "according to stipulations in the mortgage"; but the services were all rendered after the filing of the petition in bankruptcy. No question is made as to the rendition of the services, nor of the fact that they were fairly worth \$250, the amount claimed. The referee allowed the mortgage debt as proved, but disallowed the claim for attorney's fees, and the District Court confirmed the referee's order. The petitioner seeks to revise and reverse the order disallowing the attorney's fees.

[1] For a clear understanding of the question to be considered later, it is first necessary to ascertain the effect and proper construction of stipulations in notes and mortgages to pay attorney's fees for their enforcement and collection. Such stipulations are generally held to be valid, and they are sustained in Alabama, where the mortgaged land is situated. *Munter & Faber v. Linn*, 61 Ala. 492. The agreement here is for no fixed sum; but such an agreement, if made for a definite sum, would not be conclusive as to the amount on the parties. It could only be enforced for such an amount as was reasonable. Unless the services, or some of the services, covered by the stipulation, are performed, there can be no collection or enforcement of such contract. It follows that the obligation to reimburse the mortgagee or payee for costs of enforcement or collection is contingent, creating no liability unless the services provided for are performed or partly performed. If the debt is paid promptly at maturity, no services of an attorney being required or rendered, no attorney's fees can be added to the amount of the note or mortgage. The creditor would not be permitted to make a profit by collecting fees he did not have to pay. Until the claim becomes due and the services of the attorney are rendered, no debt exists, on account of such stipulation, to be added to the amount of the note or mortgage. *Springstead et al. v. Crawfordsville State Bank*, 34 Sup. Ct. 195, 231 U. S. 541, 58 L. Ed. — (decided December 22, 1913); *Williams v. Flowers*, 90 Ala. 136, 137, 7 South. 439, 24 Am. St. Rep. 772; *McCabe v. Patton*, 174 Fed. 217, 98 C. C. A. 225.

The stipulation which we have copied from the mortgage names no sum which was to be paid as attorney's fees. It fixes no time of payment. The payment is to be made for attorney's fees "incurred by the said mortgagee * * * in the collection of, or in attempting to collect, the several sums," etc. It is obvious that it was not in the contemplation of the parties that an attorney would be employed to collect or attempt to collect the mortgage debt before it was due. When the mortgage became due, without the aid of attorneys and without expense, so far as it appears, the debt was extended for four years—a period not yet expired. So it cannot be that any debt on such account was due and "absolutely owing" at the date of bankruptcy, according to the terms of the contract.

The petition in bankruptcy was filed against Vandiver by his creditors on September 19, 1912, and he was adjudicated a bankrupt on October 10, 1912. Up to that time nothing had occurred which would authorize the addition of any sum to the amount of the mortgage on account of attorney's fees; the mortgagee had not been required, nor had anything happened to authorize him, to employ and compensate an attorney and add the fees to the amount of the mortgage.

So we have the important if not the controlling facts shown by the record that, at the date of the filing of the petition in bankruptcy, no debt for attorney's fees existed; and, the mortgage not being due, the time had not arrived when such debt could have been created.

[2] The bankruptcy act designates the debts which may be proved against a bankrupt's estate. The claim presented here is one "evidenced * * * by an instrument in writing," and, if provable, it must be under section 63a, the relevant part of which is as follows:

"Debts Which May Be Proved.—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest. * * *" Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]) § 63a.

The limitation is to claims "absolutely owing at the time of the filing of the petition against him." For accuracy and uniformity of administration, some time had to be fixed. The language used excludes the idea that debts may be proved which did not exist and which the bankrupt did not owe at the time fixed—the date of the filing of the petition. Subdivision 5 of the same section forbids the proving of interest which accrues on judgments "after the filing of the petition." When a discharge is granted, it only discharges provable debts, and "none post-dating the petition in bankruptcy are affected by the discharge." Collier on Bankruptcy (8th Ed.) 312; section 17, Bankruptcy Act. The property owned by the bankrupt at the date of bankruptcy vests in the trustee, but property acquired after the adjudication does not pass to the trustee. Section 70, Bankruptcy Act; *In re Parish* (D. C.) 122 Fed. 553. The date of the filing of the petition is all-important in setting the time at which the bankrupt's condition becomes fixed in relation to debts provable against his estate. This is shown pointedly by a class of cases relating to court costs. Where part of such costs are incurred before the filing of the petition and part afterwards, the part incurred before the filing is provable against the estate and dischargeable, and the part incurred afterwards is not provable or dischargeable. 1 Remington on Bankruptcy, § 692.

In *McCabe v. Patton*, 174 Fed. 217, 98 C. C. A. 225, the question was on the allowance of attorney's fee provided for in the notes. The court held that, to be allowed, it must meet the requirements of being "a fixed liability as evidenced by * * * an instrument in writing absolutely owing at the time of the filing of the petition against him." The claim was rejected for want of proof of the rendition of collection

services before the date of bankruptcy. In *Re Gebhard* (D. C.) 140 Fed. 571, the attorney's fee was rejected because no attorney was, in fact, employed by the creditor "until after the bankruptcy." In *Re Garlington* (D. C.) 115 Fed. 999, the attorney's fees were rejected because the note had not matured at the time of the bankruptcy. And in *Re Keeton, Stell & Co.* (D. C.) 126 Fed. 426, the note had become due, but had not been placed in the hands of an attorney prior to the filing of the petition in bankruptcy, and the fees were disallowed. In *Re Jenkins* (D. C.) 192 Fed. 1000, a provision was placed in chattel mortgages for attorney's fees, and the mortgages were placed in the hands of an attorney, but no services were performed by him; and, subsequently, on the bankruptcy of the mortgagor, his trustee sold the property, and the question arose as to the proof of the attorney's fees as a debt against the bankrupt's estate. The claim was disallowed. See, also, *In re Roche*, 101 Fed. 956, 42 C. C. A. 115. The rule that the fees, to be provable, must have accrued before the filing of the petition, seems to be generally recognized. *Collier on Bankruptcy* (8th Ed.) 708; 1 *Remington on Bankruptcy*, §§ 670, 671; 1 *Loveland on Bankruptcy*, 619, § 300.

In *Merchants' Bank v. Thomas*, 121 Fed. 306, 57 C. C. A. 374, decided by this court, and cited by the petitioner, in which attorney's fees provided for by notes were allowed to be proved, the notes had been placed in the hands of an attorney and he had performed services before the bankruptcy. The case in that regard was wholly unlike the instant case.

Although not due, the mortgage was a provable debt, with the rebate of interest prescribed by section 63a.

But the petitioner was not obliged to prove his mortgage as a debt against the bankrupt's estate. 1 *Jones on Mortgages* (6th Ed.) § 729. The discharge of the bankrupt would not have affected his right to enforce his mortgage when it became due (*In re Blumberg* [D. C.] 94 Fed. 476; *Bank of Commerce v. Elliott*, 6 Am. Bankr. Rep. 409, 109 Wis. 648, 85 N. W. 417; *Paxton v. Scott*, 10 Am. Bankr. Rep. 80, 66 Neb. 385, 92 N. W. 611; 2 *Jones on Mortgages* [6th Ed.] § 1236); and if, on its becoming due, he was required to resort to suit, it may be that the amount of his attorney's fees would be a proper claim to add to the amount of the mortgage. But that is far from allowing the mortgage debt to be proved, with abatement of interest, before it is due, with the addition of attorney's fees which, under the circumstances, could not have been within the contemplation of the parties when the contract was made and which were not absolutely owing at the date of bankruptcy.

In *Riggin v. Magwire*, 15 Wall. 549, 21 L. Ed. 232, it was held that, although the fifth section of the Bankruptcy Act of 1841 gave the right to prove "uncertain and contingent demands," so long as it remains wholly uncertain whether a contract or engagement will ever give rise to an actual duty or liability and there is no means of removing the uncertainty by calculation, such contract or engagement is not provable under the act. The same construction is placed on the present act.

Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084. So it seems clear that the agreement as to attorney's fees, on its face and at the date of bankruptcy, was not provable as a claim against the bankrupt estate.

After the date of the filing of the petition, the bankrupt cannot add to the liabilities of his estate. He may create personal liabilities which are not affected by the bankruptcy proceedings and against which his discharge, when obtained, will not protect him. It may be conceded (but we do not so decide) that, although the mortgage was not due, the proceedings to sell, free of liens, in the District Court were equivalent to foreclosure, and that the mortgagee, being called into the litigation, was necessarily required to employ an attorney, and that such employment would be embraced within the clause of the mortgage relating to attorney's fees, and all this would only show an indebtedness or liability accruing after the filing of the petition in bankruptcy; and, whether considered as a secured or an unsecured claim, it was one not provable nor dischargeable under the provisions of the bankruptcy act. *In re Burka* (D. C.) 104 Fed. 326.

The petition to revise is denied, and the decree is Affirmed.

On Petition for Rehearing.

The application for a rehearing is based chiefly on the proposition that the petitioner is not attempting to prove his claim for attorney's fees against the bankrupt's estate, but is only undertaking to prove it against a special fund pledged for the purpose of paying it. The petition, however, recites that the petitioner "filed proof of its mortgage debt as a secured claim against said bankrupt and his estate, including principal and interest, and attorney's fees according to stipulations in said mortgage. * * *" The trustee contested the proof of the claim as to attorney's fees. The proof of the claim so offered and the objections to it made the issue which was tried in the lower court.

The case is one controlled by the bankruptcy act. Sections 57e and 57h provide that secured claims may be proved, "but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities." This provision should not be construed to conflict with section 63a, which prevents the proof of a claim which accrued after bankruptcy. We find no provision permitting the proof of a secured or an unsecured claim which accrued after bankruptcy.

When a secured claim is proved, the part of it that is not satisfied by the security stands like any other unsecured claim and is entitled to dividends. *Collier on Bankruptcy* (8th Ed.) 595. This fact, it seems to us, shows that a secured claim, which accrued subsequent to the filing of the petition in bankruptcy, cannot be proved as a claim against the bankrupt's estate without conflicting with section 63a, quoted in our opinion. If the claim were entitled to be proved as proposed, if the security was insufficient to pay the debt (as might often be the case), the part left unpaid, although accruing subsequent to bankruptcy, would be placed on a level with claims which accrued before the filing

of the petition and be entitled to dividends. This result, in our opinion, would be in conflict with the provisions of the act.

The rehearing is
Denied.

PAGE v. TOWN OF WARRENTON.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1913.)

No. 1,158.

1. MUNICIPAL CORPORATIONS (§ 628*)—FIRES—DESTRUCTION OF PROPERTY—STATUTES—APPLICATION.

Code Va. 1904, §§ 1049-1067b, provides for the formation of volunteer fire companies in cities and towns, and declares the conditions under which such companies may be formed and their duties and organization. Section 1053, in such chapter, provides that in every city or town "in which there is any such company" there shall be appointed, at such time and in such manner as the council of such city or town may prescribe, a principal engineer and as many fire wardens as the council may direct. Section 1060 declares that the principal engineer or the warden commanding in his absence may direct the pulling down or destruction of any house or other thing that he may judge necessary to be pulled down or destroyed to prevent the further spreading of fire, and section 1061 gives the owner of such property the right to recover from such city or town the amount of the actual damage which he may have sustained by reason of the same having been pulled down or destroyed under such direction. *Held*, that it was a prerequisite to the authority of the town council under such act to appoint a principal engineer or fire warden that there was an organized fire company in the town within such act; and hence, where a declaration by a property owner to recover damages for the tearing down of his building alleged that the town, its officers and agents, wrongfully blew up and tore down his building in order to stop a fire, but did not allege the existence of an organized fire company under the act in the town or show the appointment by the council of any one with authority to act under section 1060, it was fatally defective.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1381-1383; Dec. Dig. § 628.*]

2. MUNICIPAL CORPORATIONS (§ 628*)—FIRES—DESTRUCTION OF PROPERTY—PREVENTION—COMMON-LAW LIABILITY.

A municipal corporation is under no common-law liability to a citizen for damages for property destroyed to prevent the spread of fire.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1381-1383; Dec. Dig. § 628.*]

In Error to the District Court of the United States for the Eastern District of Virginia, at Alexandria; Edmund Waddill, Jr., Judge.

Action by W. W. Page against the Town of Warrenton. A demurrer to the declaration was sustained, the action dismissed, and plaintiff brings error. Affirmed.

J. K. M. Norton, of Alexandria, Va., for plaintiff in error.

J. A. C. Keith, of Warrenton, Va., and Samuel G. Brent, of Alexandria, Va., for defendant in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before PRITCHARD, Circuit Judge, and CONNOR and KELLER, District Judges.

KELLER, District Judge. W. W. Page, a citizen and resident of the state of New York, was the owner of a house in the town of Warrenton, Va. On October 29, 1910, a fire occurred in the town of Warrenton, and the house of Mr. Page was destroyed by the officers of the town for the purpose of stopping the spread of fire.

Thereafter, said Page brought his action of trespass in the lower court, laying his damage at \$5,000. A demurrer was interposed to the original declaration; an amended declaration was filed, which was also demurred to; the demurrer was sustained and the action dismissed; to which action of the court the plaintiff sued out his writ of error, assigning as error the sustaining of the defendant's demurrer and the entering of judgment for the defendant town.

We do not deem it necessary to reproduce in full the plaintiff's declaration, but the following paragraphs, extracted from it, will be helpful in making clear the point in controversy:

[1] After the opening paragraph the plaintiff states his cause of action thus:

"That heretofore, to wit, on the 29th day of October, 1910, the said plaintiff was the owner in fee simple of a two-story frame, metal roof building and addition attached thereto, No. 38 on the East Side of Culpepper street, block No. 12, in the said town of Warrenton, and the said plaintiff avers that on the day aforesaid, a church which was a considerable distance from the said plaintiff's building was on fire, and that the said defendant, its officers and agents, wrongfully and unlawfully blew up, tore down and destroyed his said dwelling house and addition attached thereto, and said plaintiff further avers that there is a statute law of the state of Virginia, in such cases made and provided, being sections 1060, 1061, and 1062 of the Code of Virginia of 1904, as follows:

"Sec. 1060. The principal engineer, or the warden commanding in his absence, may direct the pulling down or destroying of any fence, house, or other thing which he may judge necessary to be pulled down or destroyed, to prevent the further spreading of the fire, and for this purpose may require such assistance from all present as he shall judge necessary.

"Sec. 1061. The owner of such property shall be entitled to recover from the city or town the amount of the actual damage which he may have sustained by reason of the same having been pulled down or destroyed under such direction.

"Sec. 1062. The preceding section shall not enable any one to recover compensation for property which would have been destroyed by the fire, if the same had not been pulled down or destroyed under such direction, but only for what could have been saved with ordinary care and diligence, had no such direction been given."

The declaration then goes on to aver that the town had no chief engineer or warden as contemplated by the statute cited, but that it had a mayor and a recorder, and cites passages from the charter of the town in regard to the general powers and duties of the mayor and quotes a provision in the charter that in the absence of the mayor his duties devolve upon the recorder. He then proceeds:

"And the said plaintiff further avers that at the time of the destruction of his house, as aforesaid, that the mayor, the said defendant (sic) was absent, but the said plaintiff avers that the said recorder was present at the

said fire and approved and directed the destruction of said plaintiff's house as aforesaid.

"And the said plaintiff avers that his said building and addition thereto would not have been destroyed by the said fire, if the same had not been blown up, pulled down, and destroyed by the said defendant, its officers and agents, as aforesaid, and the said plaintiff avers that by reason of the premises aforesaid he has sustained loss and damage in the sum of \$5,000; and therefore he brings his suit."

Chapter 45 of the Code of Virginia of 1904, embracing sections 1049 to 1067, inclusive, relates to the formation of volunteer fire companies in cities and towns, and provides for the conditions under which such companies may be formed and their duties and organization.

Section 1053 provides:

"In every city or town *in which there is any such company* (italics ours), there shall be appointed, at such time and in such manner as the council of such city or town may prescribe, a principal engineer, and as many fire wardens as the council may direct."

Subsequent sections of this chapter designate the principal engineer and fire wardens so appointed, and the commanders of fire companies, as the fire department of such city or town; prescribe their duties as to attending fires, their authority, etc.

We then come to the sections quoted in the plaintiff's declaration.

This chapter must be read as a whole, and, when so read, it evidently provides for a permissive system under which the towns and smaller cities of Virginia were authorized by the Legislature to provide more or less effectually against fires.

Manifestly, as a prerequisite to the authority of the town council of Warrenton to appoint a "principal engineer or fire warden," there must have been organized a fire company under the act, because the language of section 1053 heretofore quoted limits the authority to appoint to such a case. The declaration is utterly silent as to the existence of such a company, and we may take it, for the purposes of this case, that there was no such fire company in Warrenton.

[2] If so, there was no authority in the town council to organize a fire department under the act, and the law in force there was and is the old common law, under which, as is well known, no recovery can be had for property of the citizen destroyed to prevent the spread of fire. *Beach v. Trudgain*, 2 Grat. (Va.) 220; *Amick v. Tharp*, 13 Grat. (Va.) 570, 67 Am. Dec. 787.

While the foregoing is sufficient to vindicate the course of the learned trial judge in sustaining the defendant's demurrer to the plaintiff's declaration, we desire to say that, even had the declaration averred the existence of a company or companies organized under the provisions of chapter 45 of the Code, still, in our judgment, the demurrer would have to be sustained because of its failure to show the appointment by the council of any one with authority to act under the provisions of section 1060. As was well said by the learned trial judge in his memorandum opinion filed October 3, 1912:

"The lawmaking body may well have left to the chief of the fire department or his representative next in authority, the discretion of when and when not to destroy a building to prevent the spread of fire, at the town's

expense, when it would never for a moment have thought of leaving to the mayor or town clerk, the exercise of such discretion."

The statute being plain and the averment being made in the declaration that there was no principal engineer or warden, it follows that there was no officer in the town of Warrenton lawfully authorized to bind the town in respect of the destruction of buildings to prevent the spread of fires.

Affirmed.

POTLATCH LUMBER CO. v. O'CONNELL.†

(Circuit Court of Appeals, Ninth Circuit. January 5, 1914.)

No. 2,281.

1. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—MINORS—ASSUMED RISK.

Plaintiff, a boy of 17 years, was injured at 10:30 p. m. on a certain day when engaged in unloading logs from a flat car for defendant. He had worked for about two hours for each of two preceding nights. The night in question was dark, cold, and misty, and the only light was from an arc light 150 to 250 feet away. Plaintiff and another were directed by the foreman to get on a car and unload four logs still remaining thereon, and, after plaintiff had gotten the first log started, he attempted to move back, when he was struck across the back by another log and knocked from the car. The log which was being removed struck the unsupported end of one which projected beyond the body of the car, with the result that the opposite end of the log swung around and struck plaintiff. He testified that there was not sufficient light to enable him to see how the logs lay, and that he thought the log they were removing would roll straight off. *Held*, that he did not assume the risk as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

2. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—EVIDENCE.

Where, in an action for injuries to a servant by his being thrown from a car at night while unloading logs, the negligence alleged was the failure of the master to furnish sufficient light, and the complaint also charged that plaintiff was inexperienced in the work, and entered the master's employment with the understanding that he was to be engaged in a less hazardous occupation, the master was not prejudiced by evidence that plaintiff was put to work without warning or caution as to the danger; having pleaded as an affirmative defense that plaintiff when engaged understood and fully appreciated any and all dangers connected with such employment, including the fact that the logs might roll and injure him if he got in their path, etc.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

In Error to the District Court of the United States for the Northern Division, of the Eastern District of Washington; Frank H. Rudkin, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied March 10, 1914.

Action by J. J. O'Connell, by Catherine M. O'Connell, his guardian ad litem, against the Potlatch Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Edward J. Cannon, George M. Ferris, and Charles E. Swan, all of Spokane, Wash., for plaintiff in error.

Robertson & Miller, of Spokane, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error was a boy 17 years of age. He was injured at 10:30 o'clock at night, while engaged in unloading logs from a flat car for the plaintiff in error. He had been similarly engaged in work for about two hours on each of the two preceding nights, and that was the extent of his prior experience with the work. The night was dark, cold, and misty. The only light came from an arc light from 150 to 250 feet away. After removing the most of the logs by means of a crane, there remained three or four logs on the car. They were 16 feet in length; two of them being about 12 inches, and one about 18 inches, in thickness. They were lying in a disorderly way, some across the others. The end of one of the logs extended out beyond the body of the car. There was ice and snow on the car, and the floor was slippery. The foreman of the plaintiff in error told the defendant in error and one Rud to get upon the car and unload the remaining logs. They, each using a cant hook, obeyed the direction of the foreman. He pointed at a particular log to be unloaded first. The defendant in error testified: "It was awful slippery. It took some time to get the first log started, and when it started we started to move back, and when I started to move back the other log hit me across the back, knocking me on my head in the pond." In brief, the log which was being removed, struck the unsupported end of the log which projected beyond the body of the car, with the result that the opposite end of that log swung around and struck the defendant in error. He testified that there was not sufficient light to enable him to see how the logs lay, one with relation to the other, and that he thought the log they were removing would roll straight off.

[1] It is assigned as error that the court below refused to grant the motion of plaintiff in error for a directed verdict in its favor upon the ground that the risks incident to doing the work were open and obvious, and that the defendant in error therefore assumed the same. It would serve no useful purpose to review the numerous decisions cited, in which liability for injury has been sustained or denied under circumstances more or less similar to those in the case at bar. The decision of each case must depend upon its own peculiar circumstances. The ultimate inquiry must be whether or not, under the facts as shown, it should be held, as a matter of law, that the danger must have been obvious to one of the age and experience of the workman who was engaged in it when injured. We may concede it to be true, as argued by the plaintiff in error, that a boy of the age of 17, without experience in unloading logs, would know that to impose a sufficient weight or force upon the end of a projecting and unsupported log resting upon a flat car would cause that end to go down, and the opposite end to

go up. But in the present case, the situation was not so simple as that. In the first place, there was evidence tending to show that the light was not sufficient to enable the defendant in error to see whether or not the weight of one or more of the other logs on the car was imposed upon the projecting log, so as to prevent it from tipping. In the second place, in the case of a boy of that age, it should not be held that he must have known that, when another log struck the unsupported end of the projecting log, the opposite end would not only rise, but would swing laterally in his direction. Again, it is to be said that a boy of that age naturally looks to the guidance and direction of the older men, who are working with him. Here there were two experienced men standing by, who saw what he was engaged in doing, and had the same opportunity that he had to discover the danger he was in, and yet they gave him no word of caution or warning. The plain inference from their silence is that the danger was not obvious to them. In view of all the facts, it is clear, we think, that the court below did not err in refusing to rule, as a matter of law, that the defendant in error assumed the risk.

[2] Evidence was admitted, over the objection of the plaintiff in error, that the defendant in error had entered upon his work without receiving any caution from his employer as to the danger involved therein. It is contended that it was error to admit such testimony for the reason that in the complaint there was no allegation whatever of negligence on the part of the plaintiff in error in that respect. The complaint alleged the facts and circumstances under which the plaintiff in error was injured, including the failure of the plaintiff in error to furnish sufficient light, and, in addition thereto, alleged that at the time of the happening of the accident the defendant in error was of the age of 17 years, "and inexperienced in the character of work, and entered the employ of the defendant with the understanding that he was to be engaged in a less hazardous occupation." It is true that, in an action by a servant against his master to recover for injuries received through the latter's negligence, it is necessary to set forth the particular ground of negligence which is relied upon, and, in the present case, it may be conceded that, if the defendant in error had relied upon the negligence of his employer in failing to give him warning of the danger of the work in which he was engaged, it would have been necessary to allege such negligence. But in the present case the act of negligence relied on was the failure of the plaintiff in error to furnish sufficient light. No other act of negligence is alleged in the complaint, and, so far as the bill of exceptions informs us, it was upon that ground that the jury returned a verdict for the defendant in error, for the instructions to the jury are not contained in the record. For aught we know to the contrary, the issues were so presented by the court to the jury as to confine their attention solely to the act of negligence alleged in the complaint. It is true that, in an opinion rendered by the court below on the motion of the plaintiff in error for a new trial and for a judgment non obstante veredicto, the court expressed doubt as to the correctness of the ruling, whereby the testimony that no notice of danger was given to the defendant in error was admitted

in evidence; but the most that can be deduced from the language of the opinion is that the court did not in the charge instruct the jury to disregard the evidence so admitted. In the opinion the court said:

"However, the foreman in charge of the work was a witness at the trial, and at no stage of the case was there any intimation that a warning had been in fact given. Indeed, the third affirmative defense, 'that the plaintiff, at the time he entered upon the work in which he was engaged, understood and fully appreciated any and all dangers connected therewith and fully appreciated the fact that the logs would roll and might injure him if he got in their path, and that in entering upon the work he assumed and took upon himself all dangers and risks incident to his employment, among which were the dangers and risks which he alleges caused the accident,' would seem inconsistent with the theory that a warning was given. Under all the circumstances, therefore, I am not prepared to say that the defendant was prejudiced by the ruling complained of."

We agree with the court below that the record does not justify the conclusion that the plaintiff in error was prejudiced by the ruling complained of.

The judgment is affirmed.

STEEL & MASONRY CONTRACTING CO. v. REILLY.

(Circuit Court of Appeals, Second Circuit. December 9, 1913.)

No. 14.

1. MASTER AND SERVANT (§ 116*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—UNSAFE PLACE TO WORK.

A plank laid loosely across steel roof trusses having a slope of about 1½ inches to the foot, which plank had a spike driven through and bent up under it at the place where it rested on one of the trusses, so as to prevent the wood from contacting fully with the truss, was not safe as a standing place for workmen while handling and placing the purlins.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 207; Dec. Dig. § 116.*]

2. MASTER AND SERVANT (§ 116*)—UNSAFE PLACE TO WORK—CONSTRUCTION OF STATUTE—"SCAFFOLD."

A plank laid across steel roof trusses for workmen to walk and stand upon while performing their work is a "scaffolding," within the meaning of Labor Law N. Y. (Consol. Laws, c. 31), § 18, which provides that an employer shall not furnish or erect a scaffolding which is unsafe, unsuitable, or improper, and which is not so constructed, placed, and operated as to give proper protection to the life and limb of employes using the same; and under the decisions of the Court of Appeals of the state, if an employer fails to comply with such requirement, he is liable for a resulting injury to an employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 207; Dec. Dig. § 116.*]

For other definitions, see Words and Phrases, vol. 8, p. 7795.]

In Error to the District Court of the United States for the Southern District of New York.

Action at law by Anna M. Reilly, administratrix of Edward J. Reilly, deceased, against the Steel & Masonry Contracting Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On writ of error to review a judgment entered upon the verdict of a jury for \$10,500 in favor of the plaintiff for damages occasioned by the death of her husband Edward J. Reilly, due to the negligence of the defendant, in providing an insecure scaffold for the use of its employes. The judgment with interest and costs amounted to \$11,105.58. The parties will be spoken of hereafter as plaintiff and defendant as they appeared in the court below.

Amos H. Stephens, of New York City (Frank Verner Johnson and William B. Davis, both of New York City, of counsel), for plaintiff in error.

Ralph Gillette and Bertrand L. Pettigrew, both of New York City, for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The plaintiff's intestate was killed by a fall from the iron framework while engaged in constructing the grand stand at the Polo Grounds in the City of New York. He was in charge of a gang of men engaged in putting into position the purlins, which are iron beams extending from truss to truss. Planking had been laid on this ironwork for the purpose of receiving the purlins, which were being brought up in slings. The roof of the grand stand slopes downward from the front to the rear, the grade being $1\frac{1}{2}$ inches to a foot. A plank between 14 and 18 feet in length, 12 inches wide and 3 inches thick had been laid diagonally upon the trusses to enable the workmen to cross the space between the purlins and also to stand upon it while landing the draughts of purlins as they came up from below. As Reilly stepped upon this plank it slid downward upon the slanting truss for a distance of about 2 feet, causing him to fall from 60 to 75 feet to his death. This fatal sliding was accelerated, if not actually caused, by a spike that had been driven through the plank and bent over against the end so that at the point where the plank rested on the truss there was not a contact of wood with iron but of iron with iron. It cannot be seriously contended that such a structure was a safe one to provide for the use of the workmen at such an altitude. Indeed, the defendant's general foreman testified that with the bent spike resting on the slanting truss, the plank would have a tendency to slip. In answer to the direct question he said, "No, I don't think it was safe." We have, then, a plank laid diagonally across the slanting trusses for supporting the workmen engaged in hoisting the purlins. This plank had an iron spike bent down on its under side at the point where the plank rested upon the truss.

The action is brought under section 18 of the New York Labor Law (Consol. Laws, c. 31) which, so far as it is necessary to consider it, is as follows:

"Scaffolding for use of Employees.—A person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure shall not furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged."

This law, in language too plain to be misunderstood, commanded the defendant, during the erection of the grand stand in question, not to furnish or cause to be furnished for the performance of such labor, scaffolding which was unsafe, unsuitable or improper and which was not so constructed, placed and operated as to give proper protection to the life and limb of Reilly while lawfully using the same.

Two questions are thus presented: First, was the plank unsafe? Second, was it, when placed across the trusses for the use of the workmen, a scaffold?

[1] There is no disputed question of fact regarding the plank. It is not, and cannot be, controverted that a plank with an iron spike bent on its lower side and so laid that the spike contacts with the iron of a slanting truss, causing the plank to slide down two feet when stepped on from above, is an unsafe structure. A finding by the jury to the contrary would have been set aside as having no testimony to support it.

[2] Was the structure a scaffold or scaffolding within the meaning of the act? We think it was. To hold that planks laid across trusses for the use of workmen are not scaffolding is practically to nullify the statute. All an employer will then need to do in order to escape liability will be so to build the platform on which the workmen stand that the word "scaffolding," if narrowly construed, does not describe the structure. If a scaffold ceases to be such because some part of the building is utilized for its support, the law becomes a dead letter. Any one with ingenuity enough to rest the plank of his scaffolding on the brick walls or steel floor beams can evade it.

We think the law should not be so emasculated. In construing a state statute we should be guided by the decisions of the courts of that state. Without quoting at length from these decisions, we understand them to hold that the statute positively imposes upon the employer the affirmative and imperative duty to furnish for the use of his servants safe, suitable and proper scaffolding, and if he fails to do this he is liable for an injury caused by his neglect. It is not necessary to hold that he becomes an insurer. It is enough that his failure to furnish a safe scaffolding, as required by law, makes him liable. *Caddy v. Interborough Rapid T. Co.*, 195 N. Y. 415, 88 N. E. 747, 30 L. R. A. (N. S.) 30; *Madden v. Hughes*, 185 N. Y. 466, 78 N. E. 167; *Gombart v. McKay*, 201 N. Y. 27, 94 N. E. 186, 42 L. R. A. (N. S.) 1234; *Swenson v. Wilson & B. Mfg. Co.*, 102 App. Div. 477, 92 N. Y. Supp. 849, affirmed 186 N. Y. 555, 79 N. E. 1116.

In *McDonald Co. v. Manns*, 177 Fed. 203, 101 C. C. A. 373, this court held that loose stringers laid on angle irons over an open bin with plank placed across them, upon which the workmen were expected to stand, constituted a scaffold within the law now in question and that if such structure were unsafe the master was absolutely liable. Judge Ward says:

"We think this structure was a scaffold, within section 18 of the New York Labor Law, which the defendant 'caused to be furnished' to the plaintiff. That law makes the defendant answerable absolutely for the safety of such a scaffold. *Stewart v. Ferguson*, 164 N. Y. 553 [58 N. E. 662]. The accident itself indicates that the stringer which broke was insufficient, and there was

testimony to the effect that it was improperly constructed from unsuitable material."

We think that Reilly was killed by falling from an unsafe scaffolding and that the defendant is liable for the damages so occasioned.

Judgment affirmed with costs.

THE MERIDA.

(Circuit Court of Appeals, Second Circuit. December 9, 1913.)

No. 49.

COLLISION (§ 95*)—STEAMER AND TUG WITH TOW—MUTUAL FAULTS.

A decree affirmed which held a steamer and tug both in fault for a collision between the steamer and a scow without steering apparatus in tow of the tug meeting in the narrow channel between a harbor breakwater and another submerged breakwater in course of construction; the steamer being in fault for not giving the tug and tow more room, and the tug for suddenly crossing the bows of the steamer in an effort to prevent the scow from striking the submerged breakwater.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*

With or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

Appeal from the District Court of the United States for the Western District of New York.

Suit in admiralty for collision by the Buffalo Dredging Company, as owner of the Scow No. 12, against the steamer Merida; the Gilchrist Transportation Company, claimant. Decree against respondent for half damages, and claimant appeals. Affirmed.

Clinton & Clinton, of Buffalo, N. Y. (George Clinton, Jr., of Buffalo, N. Y., of counsel), for appellant.

Brown, Ely & Richards, of Buffalo, N. Y. (J. B. Richards, of Buffalo, N. Y., of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is an appeal from a decree holding the Merida and the tug McNaughton both at fault for a collision between the steamer and scow No. 12 in tow of the McNaughton which resulted in the sinking of the scow.

The southern entrance to Buffalo Harbor is a passage 600 feet wide between Bottle Light, at the southerly end of a breakwater running about northwest by north and southeast by south and Stony Point Light, at the northerly end of a breakwater running about northwest and southeast. At the time of the collision to be presently considered, a breakwater was in course of construction, but still covered with water from three to eight feet deep running about a thousand feet west northwest from Stony Point Light to within fifty feet of a red gas buoy. These structures made a channel of deep water 1,000 feet long and some 900 feet wide between the gas buoy and the northerly break-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

water, gradually diminishing to 600 feet at the gap between Bottle Light and Stony Point Light, which is the entrance to the harbor.

July 8, 1907, the tug McNaughton, towing a loaded dump scow drawing $10\frac{1}{2}$ feet of water, 120 feet long and 32 feet beam, with square ends, by a line 200 feet long fixed on the starboard corner of the bow, rounded Bottle Light to go out through this channel into the lake. The scow was without any steering apparatus. Just ahead of this tow was the tug Tam O'Shanter, towing a similar scow on a hawser fixed on the port corner. The Tam O'Shanter blew a signal of two whistles to the steamer Merida which was coming down outside of the northerly breakwater, bound for the south entrance and about a half a mile away from it. The Merida answered with two. The McNaughton followed with a blast of two whistles as she rounded Stony Point Light, to the Merida, which were also answered with two. The Merida proceeded slowly but without starboarding and met the first dump scow just as she was rounding the red buoy into the lake. Thereupon the McNaughton blew a signal of three whistles which was, by the local understanding, a signal to the Merida to check her speed which was answered and conformed to. At about this time the proofs show that the scow was sheering toward the submerged breakwater. Several of the witnesses say that this was caused by an eddy current around the end of it. The testimony as to this current, its cause, force and direction, is extremely vague and unsatisfactory. The master of the Tam O'Shanter says the current was very slight. However, it does appear that because of a sheer to port, the tug blew an alarm and went suddenly off to starboard right across the steamer's bow, with the intention of pulling the scow away from the submerged breakwater, but in so doing brought her into collision with the steamer. The district judge has found the place of collision to have been less than 225 feet outside of the breakwater.

The rule which requires a vessel navigating a narrow channel to keep on the side of midchannel which lies on her own starboard side is statutory. It is not contained in the act of February 8, 1895, which regulates navigation on the Great Lakes. When the signal of two whistles was exchanged the Merida and the McNaughton were on crossing courses, but each knew that this was but temporary, and the effect of the exchange was an agreement that they should meet and pass each other starboard to starboard. The Merida was not bound to enter on the range for midchannel nor to keep north of it. All she was bound to do was to give the tug and tow enough room to pass safely between her and the submerged breakwater. Her master, however, was entirely unacquainted with the channel and did not know of the existence of the submerged obstruction. If he had, it is quite evident he would have given the tug and tow more room. Certainly he would and should have been active in doing so when he saw that the scow was sheering to port toward a dangerous submerged obstruction.

The practice of towing a rudderless scow with square ends by a line fixed to one corner of the bow is new to us. It is said to be followed for the purpose of keeping the scow clear of the tug's wash, the scow under such circumstances towing steadily on one side or the other of

the tug, according as the line is fixed to the port or starboard corner. Several of the witnesses say that the effect of towing the scow from her port corner would be to keep her on the starboard side of the tug. We think this cannot be so. The resistance of the water against the square bow would tend to make the scow rotate to starboard around the point where the line was fast until that tendency was counteracted by the resistance of the water against the starboard side. Then the scow would arrive at a condition of equilibrium and tow steadily, heading to port, but tailing to starboard. The sudden sheer of the tug across the steamer's bow when so close aboard was negligent navigation as the master of the tug himself admits. If the eddy current to which he attributes the sheer was a thing to be expected under the circumstances, as he seems to say, he should not have postponed his porting and his alarm whistle until danger was so imminent.

The decree is affirmed, with interest; costs of this court to be divided.

YOUNG v. CORRIGAN.

(Circuit Court of Appeals, Sixth Circuit. February 3, 1914.)

No. 2398.

1. TRIAL (§ 193*)—INSTRUCTIONS—COMMENTING ON EVIDENCE.

It was not error for the trial court in the charge to express an opinion relative to plaintiff's failure to produce a certain witness, where the jury was given to understand that it was not bound by such opinion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.*]

2. TRIAL (§ 255*)—INSTRUCTIONS—NECESSITY OF REQUESTS.

Plaintiff could not complain of the court's failure to charge that certain evidence could be considered only in mitigation of damages, where she requested no such instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

In Error to the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

Action by Georgian Young against James W. Corrigan. Judgment for defendant, and plaintiff brings error. Affirmed.

J. J. Sullivan, of Cleveland, Ohio, for plaintiff in error.

Holding, Masten, Duncan & Leckie, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Plaintiff sued defendant for breach of an alleged promise to marry. Defendant denied the promise. The case was submitted to the jury, which rendered verdict for defendant, thereby neg-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ating the alleged promise. The principal errors assigned are: (a) That the court in commenting in the charge upon plaintiff's failure to produce a certain witness exceeded the limits of proper comment or expression of opinion, and entered the field of argument, and (b) that the court should have instructed the jury to consider certain evidence only in mitigation of damages.

[1] Neither of these criticisms is well made. The court had the right to express his opinion and advise the jury upon the subject in question, if the jury was given to understand that it was not bound by such opinion. *Simmons v. United States*, 142 U. S. 148, 155, 12 Sup. Ct. 171, 35 L. Ed. 968; *Doyle v. Union Pacific R. R. Co.*, 147 U. S. 413, 430, 13 Sup. Ct. 333, 37 L. Ed. 223; *Allis v. United States*, 155 U. S. 117, 123, 15 Sup. Ct. 36, 39 L. Ed. 91. The jury was sufficiently advised in this regard. The comments criticised did not trench upon the province of the jury, or go beyond the limits of reasonable expression of opinion.

[2] The testimony in question was admissible at least in mitigation of damages, as stated by the court in admitting it. Defendant did not ask an instruction that the testimony could be considered only for the purpose stated. Even had exception been taken (as it was not) to the failure to so instruct, plaintiff could not complain, for it is no ground of reversal that the court failed to give instructions not requested. *Express Co. v. Kountze Bros.*, 8 Wall. 342, 353, 19 L. Ed. 457; *Texas & Pacific Ry. Co. v. Volk*, 151 U. S. 73, 78, 14 Sup. Ct. 239, 38 L. Ed. 78; *Hickory v. United States*, 151 U. S. 303, 317, 14 Sup. Ct. 334, 38 L. Ed. 170; *Isaacs v. United States*, 159 U. S. 487, 491, 16 Sup. Ct. 51, 40 L. Ed. 229; *Humes v. United States*, 170 U. S. 210, 211, 18 Sup. Ct. 602, 42 L. Ed. 1011; *Coney Island Co. v. Dennon* (C. C. A. 6) 149 Fed. 687, 693, 79 C. C. A. 375.

We have examined all the other errors presented, and find them without merit.

The judgment of the district court is affirmed, with costs.

CINCINNATI TRACTION CO. v. POPE.

(Circuit Court of Appeals, Sixth Circuit. October 17, 1913.)

No. 2,306.

1. PATENTS (§ 13*)—SUBJECTS OF PATENTS—"MANUFACTURE"—STREET RAILROAD TRANSFER TICKET.

A street railroad transfer ticket, devised to keep a check on passengers and conductors with respect to the time when used, in part by means of a coupon, the body portion when the coupon is detached being receivable only during the forenoon hours, may properly be classed as an article to be used in a method of doing business, and as such is a "manufacture" within the meaning of Rev. St. § 4886 (U. S. Comp. St. 1901, p. 3382), and a proper subject of a patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 11, 12; Dec. Dig. § 13.*]

2. PATENTS (§ 13*)—SUBJECTS OF PATENTS—"MANUFACTURE."

The term "manufacture," as used in the patent law, has a very comprehensive sense, embracing whatever is made by the art or industry of man, not being a machine, a composition of matter, or a design.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 11, 12; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 5, pp. 4344-4346; vol. 8, p. 7716.]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—TRANSFER TICKET.

The Pope patent, No. 805,153, for a time limit transfer ticket for use by street railroads, etc., was not anticipated and discloses patentable invention; also *held* infringed.

Appeal from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity by William C. Pope against the Cincinnati Traction Company. Decree for complainant, and defendant appeals. Affirmed.

Wood, Wood & Nathan, of Cincinnati, Ohio (William R. Wood, of Cincinnati, Ohio, and Charles C. Linthicum, of Chicago, Ill., of counsel), for appellant.

Hosea & Knight, of Cincinnati (Marcellus Bailey and James L. Norris, both of Washington, D. C., of counsel), for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

KNAPPEN, Circuit Judge. This is a suit for the infringement of claims 1, 3, 4, 7, and 8 of United States patent to Pope, No. 805,153, November 21, 1905. The defenses are: (a) Nonpatentable subject-matter; (b) anticipation; (c) lack of invention; and (d) noninfringement. The district court held the patent valid and infringed, and made the usual decree for injunction and accounting, from which this appeal is taken.

1. *Is the subject-matter patentable?* The invention relates particularly to "time limit" transfer tickets for use by street railways, traction companies, etc. The stated objects of the invention are, in substance, to enable the railroad company to make the transfer as quickly as possible, and to keep check on conductors and passengers; and thereby be able to determine whether a given transfer has been correctly issued and whether lawfully presented by the passenger; as well as to provide a transfer ticket which when used can prove with certainty the correctness of the passenger's claim, thereby preventing litigation in case a transfer issued for forenoon use is presented for afternoon fare, and for this reason refused by the conductor.

The specifications disclose a ticket consisting of a strip of suitable material (presumably paper) divided into a body portion and a single afternoon coupon, the latter being separated, on the one side from the body portion and on the other from the stub, by lines or perforations or indentations, enabling the ready separation of the body from the coupon, as well as of the latter from the stub. In the "preferred embodiment" of the invention (Fig. 1) the body portion

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is provided with a column of abbreviations indicating the months of the year and with columns of numerals for the days of the month; also with an inscription containing the name of the issuing railroad and suitable instructions to the passengers, as to the limitations under which the transfer is usable. It bears also inscriptions indicating the transfer points, the conductor's number, and "conventional indications" showing the hour and fractions thereof. The body portions are consecutively numbered, correspondingly with the coupons, and contain the legend, "If no coupon attached hour punched is A. M. hour." The coupon contains the abbreviated name of the railroad and notice "not good if detached." This coupon denotes that the hour punched on body of (number) transfer is p. m. hour. In a modified form suggested the ticket and legends are somewhat different in details of inscription, but the net result of the information given is the same. In this modified form (Fig. 2) the coupon and body each contain a table of hours, the former on a dark ground, the latter on a light field. The drawings of the "preferred" and "modified" forms (Figures 1 and 2, respectively) follow, reference figures and extensions of reference lines being omitted:

D. T. Co. NOTICE Not good if detached. This coupon denotes that the hour punched on body of 101012 transfer is P.M. HOUR		<table border="1"> <tr> <td>1</td><td>2</td><td>3</td><td>4</td><td>5</td><td>6</td><td>7</td><td>8</td><td>9</td><td>10</td><td>11</td><td>12</td><td>13</td><td>14</td><td>15</td><td>16</td> </tr> <tr> <td>17</td><td>18</td><td>19</td><td>20</td><td>21</td><td>22</td><td>23</td><td>24</td><td>25</td><td>26</td><td>27</td><td>28</td><td>29</td><td>30</td><td>31</td><td></td> </tr> </table>																1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	
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DOE TRACTION COMPANY NOT TRANSFERABLE. Good only for a coupon trip on street car service, on main line, on Conductor No. 539 If no coupon attached, hour punched is A.M. HOUR																																																	

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1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	

1	2
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<p style="text-align: center; font-weight: bold;">P. M. TRANSFER</p> <p>Not good for pass page if this coupon</p> <p style="font-size: 1.5em; font-weight: bold;">101012</p> <p>Is detached from body of ticket.</p> <p style="text-align: center; font-weight: bold;">HOURS</p> <div style="border: 2px solid black; padding: 5px; text-align: center; font-weight: bold; font-size: 1.2em;"> 10 24 55 MINUTES </div> <p>Minutes 10 20 30 40 50</p>	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	
	Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec																
	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31		
	DAY OF MONTH																

DOE FRED TRANSIT CO. Conductors

No. 53

101012

Not Transferred—Good only for a one-way
 trip on next entering day of when pass is
 marked as to time and place. Passengers are
 not to be carried on this pass.

FROM	TO	B. S. ret.	Ret. Post	Col. Ass.	Arc. A	Depot	Bell Son	Brooklyn	Post Office	Hudson	White Line	Troy Div.	East Ho

A. M. HOURS	1	2	3	4	5	6	7	8	9	10	11	12
ONLY												
Minutes	10	20	30	40	50							

Claim 1 reads:

"1. A transfer ticket comprising a body portion and a coupon, said body portion and coupon bearing conventional indications to constitute an antemeridian transfer ticket when said body portion is used separately and a postmeridian transfer ticket when used together."

Claims 3, 4, and 7 do not differ from claim 1 in respects material here.

Claim 8 reads:

"8. A transfer ticket comprising a body portion and a coupon and further provided with conventional indications to constitute a complete transfer ticket for one part of the day when said body portion is used separately and a complete transfer ticket for another part of the day when said body portion and coupon are used together."

[1] The patent is assailed as relating merely to "a method of transacting business, a form of contract, a mode of procedure, a rule of conduct, a principle or idea, or a permissive function, predicated upon a thing involving no structural law"; and counsel say that the ticket in question "has no physical characteristics which enable it to be distinguished from any other transfer ticket or from any other printed slip of paper." If this criticism is well taken, the subject-matter is not within the patent statute.¹

[2] But while the case is perhaps near the border line, we think the device should be classed as an article to be used in a method of doing business, and thus a "manufacture" within the statute (Rev. St. § 4886 [U. S. Comp. St. 1901, p. 3382]). Broadly stated:

"The term 'manufacture,' as used in the patent law, has a very comprehensive sense, embracing whatever is made by the art or industry of man, not being a machine, a composition of matter, or a design."²

The device of the patent clearly involves physical structure. The claims themselves are, in a proper sense, limited to such structure.

The specifications describe a distinctive physical structure, viz., a given combination and general arrangement of body and coupon (with the suggestion that the two parts may be printed in different colors), accompanied by "conventional indications" and instructions for the use and interpretation of the ticket. But the alleged patentable novelty does not reside in the arrangement of the printed text, nor does such text constitute merely a printed agreement. The argument to that effect overlooks the important consideration that the body alone is good at one time, and that the body and coupon are required for the other portion of the day; and that the ticket bears on its face, whether the body is used alone or with the coupon, the distinguishing indications. Nor is there merely an attempt to patent a form of a contract. The specifications do not confine the construction to

¹ In re Moeser (Ct. of App. D. C.) 123 O. G. 655; Hotel, etc., Co. v. Lorraine (C. C. A. 2) 160 Fed. 467, 87 C. C. A. 451; United States Credit System Co. v. American Credit Indemnity Co. (D. C.) 53 Fed. 818; s. c., 59 Fed. (C. C. A. 2) 139, 8 C. C. A. 49.

² Language of Judge Acheson in Johnson v. Johnston (C. C.) 60 Fed. 618, 620. See, also, Riter-Conley Mfg. Co. v. Aiken (C. C. A. 3) 203 Fed. 699, 703, 121 C. C. A. 655, and cases there cited.

either the style, or printed arrangement or language of the legends. The essential thing is that the required information be conveyed on the face of the ticket. The authorities cited in the margin sustain, to a greater or less degree, the patentability of this device.³

Rand, McNally & Co. v. Exchange Scrip-Book Co. involved the patentability of an exchange scrip-book containing the essential feature that the units are expressed in money instead of miles as in ordinary mileage tickets, and avoided the necessity for calculation "by adopting a standard, expressed on the face of the ticket, that indicates to both carrier and traveller, without calculation, just what each one is entitled to." The language of Judge Grosscup seems peculiarly applicable here:

"Nor do we think that this patented concept is nothing more than a business method. Its use is a part of a business method. The ticket patented is not a method at all, but a physical tangible facility, without which the method would have been impracticable, and with which it is practicable."

The Benjamin Menu Card Case involved a combination of menu card with meal check. To the objection that it was "only for a piece of cardboard paper, with printed matter or composition on both sides thereof, and divided on one side by perforated lines employed in the system of doing business," Judge Seaman said:

"The fact that the structure may be of cardboard with printed matter upon it does not exclude the device from patentability, according to the patent office. * * *"

The presence of conventional indications and legends does not rob the structure of patentability. In more than one of the cases cited, the structures sustained as patentable bore conventional indications and information.

The cases relied upon by defendant are, we think, readily distinguishable from the instant case. In *Re Moeser* the device of the patent was characterized as "a form of proposed contract." The device involved in *Hotel Co. v. Lorraine*, was declared to be "simply a system of bookkeeping." In *United States Credit Co. v. American Credit Co.*, the subject-matter was considered by the District Court as a method of transacting business. In the latter case (as considered by the Court of Appeals), as in most, if not all, of the other authorities relied upon, the patentability under the statute of the subject-matter involved does not seem to have been passed upon.

[3] 2. *Anticipation.* The strongest references presented to prove anticipation are the "Ham ticket" (covered by patent), "Exhibit 709," and the "Valley Junction" ticket. The Ham and No. 709 consist each of a ticket bearing two separate and independent tables of time figures, the one printed light on a dark ground and the other dark on a light ground, and apparently intended for forenoon and afternoon use respectively. The claims of the Pope patent read upon neither

³ *Johnson v. Johnston*, supra; *Rand, McNally & Co. v. Exchange Scrip-Book Co.* (C. C. A. 7) 187 Fed. 984, 986, 110 C. C. A. 322; *Thomson v. Citizens' National Bank* (C. C. A. 8) 53 Fed. 250, 255, 3 C. C. A. 518; *Benjamin Menu Card Co. v. Rand, McNally & Co.*, 210 Fed. 285 (opinion by Judge Seaman); *Ex parte Wm. E. Watkins*, decision of Duell, Commissioner of Patents.

of these devices, in letter or in spirit. Assuming that the different method of printing the two tables of time figures is, without other designation, a sufficient indication of intended forenoon and afternoon use respectively, neither of these references has the fundamental structure of Pope's device, which is a ticket comprising a body portion (always one and the same) plus a single coupon; the ticket being so constructed as that independently of any rule of conduct, as to punching or otherwise, the ticket when bearing the coupon is by that fact alone, and necessarily, good only for a given part of the day, and when without the coupon good only for another part of the day; for, if the tables of time figures found in "Exhibit 709" and the "Valley Junction" ticket are to be considered as coupons (as was apparently the intention of the Ham ticket, at least), we have a body portion plus two coupons, neither one nor both performing the office of Pope's coupon. If these tables are not to be treated as coupons, the departure from the Pope device is equally clear. It follows that in case of neither of these references can there be a complete transfer ticket for one part of the day when a "body portion" is used separately and a complete transfer ticket for another part of the day when the "body portion" and coupon are used together. This conclusion can be avoided only by treating one of the coupons, when used in connection with the body portion, as a part of that body portion. Such construction is strained and unnatural. Nor is the result affected by the argument that the Ham ticket and No. 709 could be issued without detaching either the a. m. or p. m. end, the appropriate time-table being punched; nor by the suggestion that Pope's ticket Fig. 2 could be so used, and still respond to the patent claims. These arguments ignore the actual physical structure of Pope's device as before set out. Conceding that there "could be no patentable novelty in a coupon ticket per se, nor in the mode of use involved in issuing a whole or a part only of a ticket," it is not the mode of use which is the subject of the patent, and the structural differences between the Pope device and the prior art are, in our opinion, matters of substance and not merely form.

The Valley Junction ticket is even more plainly nonanticipatory. It was never intended for use as a transfer, but merely as a receipt or check for fare paid. It has in no sense a body portion and a coupon. It has, it is true, two narrow lines of figures (1 to 12 inclusive) running transversely across the end of the ticket, the one indicated as a. m., the other as p. m., and evidently intended to be appropriately punched. The only way in which the ticket could be considered as in any sense comprising a body portion and a coupon is by treating the line of p. m. figures as a coupon and the remainder (including the a. m. figures) as a body portion. This would be a forced and unreasonable construction.

In our opinion, the broad structural conception of the Pope transfer has not been anticipated.

3. *Invention.* Does the Pope device involve invention, or merely the expected skill of the printer or street car man? It need not be said that this is a question of fact. The question is less difficult when considered in connection with the utility of Pope's device and the

public favor it has met. In 1896 defendant began using the "709" transfers. So far as shown, no other company used that precise form. Until 1903 it used various unpatented forms, printed by the Webb Printing Company. In the latter year the Ham patent issued, the Pope patent issuing more than two years later. The Globe Printing Company had the sole right of manufacture under both patents. The defendant used the Ham ticket apparently until about the time the Pope patent issued, when it applied to the Globe Company for figures on a form covered by the claims of that patent; the Globe Company having manufactured according to those claims for some months before the patent issued. It did not, however, buy of the Globe Company but of the Webb Company, against whom and another of its customers infringement suits are pending; the testimony herein being, by stipulation, applicable thereto. It has ever since used this form of transfer, which is clearly an infringement of the Pope patent. The "tribute of its imitation"⁴ is cogent evidence of the utility of the Pope transfer. Indeed, this utility is readily apparent as respects both facility and rapidity of use and effectiveness in preventing misunderstandings and misuse. It is novel and distinctive in form. It has been favorably received. Although its average price was slightly higher than that of the Ham, it has largely superseded that device, which was never used by more than 12 railway companies. The Pope transfer is used by 44 railway companies, included within 19 states, ranging from coast to coast and from Maine to Louisiana. Its annual sales are more than three times the sales of the Ham transfers during the entire period of 2½ years between the issues of the Ham and Pope patents, and bear the same ratio to the period of 2½ years following. From March 23, 1909, to February 1, 1910, the sales of the Pope transfers were 21 times greater than those of the Ham, which were then used by but three roads. Although the fact that an improvement has superior utility, and immediately supersedes other devices, is not material where the question of invention is not in doubt;⁵ yet in case of doubt these considerations may determine the question of invention.⁶ It may well be that, given the idea of the Pope patent, the expected skill of the printer or street car man would have been sufficient to determine the arrangement of printed text, and even

⁴ Mr. Justice McKenna's expression in *Diamond Rubber Co. v. Consolidated Tire Co.*, 220 U. S. 441, 31 Sup. Ct. 444, 55 L. Ed. 527.

⁵ *Olin v. Timken*, 155 U. S. 141, 155, 15 Sup. Ct. 49, 39 L. Ed. 100; *Adams v. Bellaire Stamping Co.*, 141 U. S. 539, 542, 12 Sup. Ct. 66, 35 L. Ed. 849; *Hollister v. Benedict, etc., Co.*, 113 U. S. 59, 72, 5 Sup. Ct. 717, 28 L. Ed. 901; *Gould & Eberhardt Co. v. Cincinnati Shaper Co.*, 194 Fed. 680, 685, 115 C. C. A. 74, and cases cited; *McClain v. Ortmyer*, 141 U. S. 419, 429, 12 Sup. Ct. 76, 35 L. Ed. 800.

⁶ *Hollister v. Benedict, etc., Co.*, *supra*; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 143, 14 Sup. Ct. 295, 38 L. Ed. 103; *Potts v. Creager*, 155 U. S. 597, 608, 15 Sup. Ct. 194, 39 L. Ed. 275; *Hobbs v. Beach*, 180 U. S. 383, 392, 21 Sup. Ct. 409, 45 L. Ed. 586; *Star Brass Works v. General Elec. Co.*, 111 Fed. (C. C. A. 6) 398, 49 C. C. A. 409; *Kalamazoo Ry. Supply Co. v. Duff Mfg. Co.* (C. C. A. 6) 113 Fed. 264, 51 C. C. A. 221; *Dowagiac Mfg. Co. v. Superior Drill Co.* (C. C. A. 6), 115 Fed. 886, 895, 53 C. C. A. 36; *Electric Controller Co. v. Westinghouse Co.* (C. C. A. 6) 171 Fed. 83, 87, 96 C. C. A. 187.

the form of legends; yet, in view of the history of the art, taking into account the apparent desire for a more effective transfer (as evidenced by the frequent changes in the use of unpatented devices), the superior utility of the device in suit, its novel and distinctive character, and the extent to which it has been accepted by the public, we think the device of the structure of the Pope transfer must be held to involve invention.

4. *Infringement.* As appears from what we have already said, we have no difficulty in holding that the transfer in use by the defendant at the time of and since the commencement of suit is an infringement of the Pope patent.

The decree of the District Court is affirmed, with costs.

SMITH INCANDESCENT LIGHT CO. v. WELSBACH GAS LAMP CO.

(Circuit Court of Appeals, Second Circuit. December 9, 1913.)

No. 77.

PATENTS (§ 328*)—INFRINGEMENT—GAS LAMP.

The Smith reissue, patent No. 13,033 (original No. 759,037), for improvements in gas lamps, construed, and held not infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Smith Incandescent Light Company against the Welsbach Gas Lamp Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 197 Fed. 951.

Miller & Merwin, of New York City (T. D. Merwin and W. B. Morton, both of New York City, of counsel), for appellant.

Alfred Wilkinson, of New York City, and Bakewell & Byrnes, of Pittsburgh, Pa. (C. P. Byrnes, of Pittsburgh, Pa., of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. The complainant sues for infringement of reissued letters patent No. 13,033 for improvements in lamps. The features of the invention which need to be considered in this case are especially adapted to out-door mantle gas lamps and are found in a structure inserted in the bottom of the glass globe surrounding the burners which is intended to furnish a sufficient supply of air, prevent injurious drafts, and keep the glass globe cool and so less liable to break.

The glass globe surrounds the burners and has an opening in the bottom. Just above the opening is a circular cup with a slightly convex bottom, having a diameter larger than the opening, and connected with this cup by a threaded stem is, just below the opening, a flat horizontal circular disk having vertical radial blades between it and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

globe. The wind striking the outside deflector horizontally is turned by the blades up vertically to the bottom of the cup within the globe and is by it deflected so as not to enter the globe vertically.

The defendant's structure is a lamp bottom contained in a neck or cylindrical extension of the glass. It has two deflectors, both below and outside of the opening of the globe. The wind entering the lower deflector horizontally is turned by the blades up into a sort of hat-shaped circular box having a foraminous bottom and having perforations in its circumference, through which perforations the air issues against the perpendicular side of the glass extension or neck and is turned vertically upward into the globe. There is also an annular opening into the globe from the bottom of the neck between the deflectors and the neck, through which air enters vertically.

The claims of the patent alleged to be infringed are 1 to 5 and 22 to 30. We discover no infringement. All the claims are for a combination of elements admittedly old. Claims 1, 2, and 3 call for a cup, an element which the defendant's structure has not. Claims 1, 4, and 5 call for a deflector within the globe, an element which the defendant's structure has not. Claims 4 and 5 call for a deflector having a diameter greater than that of the opening of the globe, an element which the defendant's structure has not.

Claims 22 to 30 are for a combination calling for means for laterally deflecting the air entering the globe so as to prevent it from ascending into the zone of the burners and to cause it to ascend into the zone between the mantles of the burners and the sides of the globe, whereby the sides of the globe are kept cool, the mantles protected from all currents, and fresh air for burner consumption is supplied.

Actual experiment by the smoke test which shows the route the air is traveling within the globe demonstrates that the defendant's structure does not function in this way at all. On the contrary, the stream of air enters the globe vertically through the annular aperture between the lamp bottom below the globe and the side of the cylindrical neck inclosing it, into which stream the air entering the lower deflector laterally is turned by the upper deflector. Some of the air from this combined vertical stream is sucked into the lower ports of the Bunsen burners to support consumption of the flames as the stream passes them and then midway of the mantles it turns to the sides of the globe.

On the other hand, the smoke test shows that in the complainant's structure the air, as it enters the globe, is turned horizontally by the deflector within the globe and streams along the sides until at a point about midway of the mantles it turns inward toward them and then downward to the ports of the Bunsen burners.

As we find no infringement, the case is disposed of without considering other subjects discussed at length by counsel. The decree is affirmed, with costs.

PALMER et al. v. SUPERIOR MFG. CO.

(Circuit Court of Appeals, Second Circuit. December 9, 1913.)

No. 61.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—APPARATUS FOR INVERTING TUBULAR FABRICS.

An order denying a preliminary injunction against infringement of the Palmer patent, No. 878,995, for apparatus for inverting tubular fabrics, reversed.

Appeal from the District Court of the United States for the Northern District of New York.

Suit in equity by William B. Palmer and Jesse V. Palmer against the Superior Manufacturing Company. From an order denying a preliminary injunction, complainants appeal. Reversed.

For opinion below, see 203 Fed. 1003.

The District Court denied a motion for a preliminary injunction restraining the infringement of claim 1 of letters patent No. 878,995 granted to William B. Palmer February 11, 1908, for improvements in apparatus for inverting tubular fabrics. The decision of the District Court is reported in 203 Fed. 1003. The patent was also considered by the District Court in an action against the Jordan Machine Company, the decision being reported in 186 Fed. 496. The decision of this court on appeal is reported in 192 Fed. 42, 112 C. C. A. 454.

Walter D. Edmonds, of New York City (Edmonds & Peck, of New York City, of counsel), for appellants.

Walter E. Ward, of Albany, N. Y., for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The validity of claim 1 of the Palmer patent has been expressly decided by this court and is not now in controversy. The only defense now seriously urged is non-infringement. The defendant is using one of the machines made by the Jordan Company, but since the decision of this court it has made certain changes which it insists avoids infringement. Claim 1 is as follows:

"1. In an apparatus of the class described, the combination with the fabric supporting tube; of a pair of feed rolls adapted to engage the opposite sides of said tube; and yielding means for forcing said feed-rolls against said tube."

It is insisted that the defendant does not have the last element of the claim, viz.: "Yielding means for forcing said feed rolls against said tube." In our former decision we held expressly that the patentee was entitled to a fair range of equivalents and could hold as an infringer one who advanced the fabric by rolls which pressed against it by yielding pressure, whether produced inside or outside of the feed rolls, by a spring or its equivalent. We thought that Palmer had made an important advance in the art and was entitled to hold it against one who accomplished the identical result by simply changing the character and location of the yielding pressure. We cannot resist the conclusion that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the defendant is endeavoring to appropriate the Palmer improvement by taking the yielding pressure from the frame and locating it in the tube by placing there spring actuated idler rollers to do the same work. In one case the frame presses the feed rollers against the fabric and in the other the springs press the idler rollers against the fabric and the fabric against the feed rollers. In this way it is advanced precisely as in the patent. It is a mere mechanical change involving no departure from the spirit of the invention.

The order denying motion for an injunction is reversed and the District Court is instructed to proceed in accordance with this opinion.

SPIRELLA CO. v. NUBONE CORSET CO. et al.

(District Court, W. D. Pennsylvania. January 7, 1914.)

No. 175.

PATENTS (§ 328*)—ANTICIPATION—METHOD OF MAKING GARMENT STAYS.

The Beeman patent No. 1,002,488, for a method of making garment stays, *held* void for anticipation.

In Equity. Suit by the Spirella Company against the Nubone Corset Company and others. On final hearing. Decree for defendants.

Fred. W. Winter, of Pittsburgh, Pa., for complainant.

J. C. Sturgeon, of Erie, Pa., for defendants.

ORR, District Judge. This is a patent suit involving United States patent No. 1,002,488, issued under date of September 5, 1911, to M. M. Beeman, for a "Method of Making Garment-Stays." The plaintiff charges that the defendants are infringing. The defendants reply that there is nothing new or novel in the method of the patent, and that therefore the patent is invalid. While the case is not free from complexity, yet it is free from doubt after an examination of the patent in suit and prior patents and a careful consideration of the evidence produced at the trial.

In the specification Beeman says:

"The object of the invention is to provide a method of forming said stays whereby a sufficiently rigid stay can be formed from comparatively light wire, and particularly a stay which has greater resistance to bending in one direction than in the opposite, and one which will not take a permanent set."

The complete apparatus for producing the stay is not shown in the patent. It is not intended to be shown, for the specification says:

"The bending may be performed in any suitable way, and is shown as carried out by mechanical means."

The drawings illustrate the bending fingers and the wire, which is taken by one of the bending fingers and bent around a pin to form a loop or eye, and then carried by said finger across the stay, where it is caught by a pin, after which it is carried by the other bending finger

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the side of the stay from which it first came, thus forming a loop or eye on each side of the stay. The loops on each side of the stay are depressed and carried underneath previously formed loops. The unformed portion of the wire is held by a guide inclined downwardly from the plane of the formed portion of the stay. The specification says that:

"The consequence is that the wire is twisted at the loops * * * and is thereby put under an initial torsional strain."

The specification further says:

"The loops of the fabricated portion of the wire are inclined or tilted from the plane of the stay, as shown in Fig. 2, while the unformed portion of the wire stands at the opposite angle or inclination from the plane of the stay. Consequently, when the wire is carried across from side to side and the eye is tilted to bring it to the inclined position, a certain amount of twist is necessarily given to the wire. This places the wire under an initial torsional strain. This manner of forming the stays, that is, by holding the unformed portion of the wire at an incline to the formed portion of the stay, and carrying the wire across the stay and simultaneously bending it down, results in depressing the edges of the loops or eyes below the normal plane of the stay, so that the finished stay is somewhat concave on its lower side, as shown at 16, Fig. 5. This formation of the stay gives the same greater stiffness or resistance against bending in a direction away from the hollow or concave side of the stay, this being due in part to the concavity of the stay, in part to the torsional strain in the wire, and in part to the overlapping of the loops so that each loop is supported on one side on an adjacent one."

We notice in the specification, especially in the part last quoted, that the stay intended to be formed in accordance with the method of the patent would have the quality of rigidity by reason of three things: (A) The concavity of the stay; (B) the torsional strain in the wire; and (C) the overlapping of the loops.

The only claim of the patent in issue is the first, which is as follows:

"1. The method of forming garment stays consisting in bending wire at intervals and alternately in opposite directions to form curved edge-forming loops or eyes and transverse connecting portions, and while so bending the edge-forming loops or eyes imparting a twist to the wire and thereby placing the same under initial torsional strain."

Before taking up the consideration of a prior patent upon which the defendants rely, it is deemed proper to consider whether or not the stays alleged by the plaintiff to have been made in accordance with the method of the patent in suit are in any sense different from the stays made prior to the time fixed by Beeman as the date of his invention. The court is not unmindful of the fact that similarity of products or identity of construction of useful articles is not evidence that the methods of producing the results are the same, yet where the advantageous qualities of a product such as corset stays are set forth in the patent, it is helpful sometimes to consider whether or not the product of an earlier date contains the same advantages.

Of the three causes of rigidity mentioned in the specification, one only is apparently new, that is, "the torsional strain in the wire." The concavity of the stays and the overlapping of the loops of the stays manufactured by both plaintiff and defendants in times past are readily observable.

The phrase "torsional strain in the wire" is new, but it is clear that torsional strain in the wire existed in the stays made by both plaintiff and defendants long prior to the period fixed by Beeman as the date of his invention. There seems to be no doubt whatever that by overlapping the loops there is a slight change in the plane of the wire of which those loops are formed. The plane of the wire being changed as the loops are formed, so that one overlaps the other, necessarily causes an initial torsional strain. There is therefore nothing new in the causes of the rigidity of the stays. The most that can be said for the patent in suit is that it provides for a variation in the plane of the wire.

After a careful consideration of all the evidence, we are satisfied that the patent was anticipated by the United States patent to F. W. Mallett, No. 820,510, dated May 15, 1906. That patent is for a machine for forming metallic stays for garments. It represents a complete machine with bending fingers, with a detailed explanation of its several parts and their respective uses. It is not necessary to describe it in detail; *d* and *d*^x therein denote the alternately oscillating wire bending fingers. The free end of each finger is provided with a groove or notch *d'*, "which is slightly below the plane of the top of the adjacent bar when in its raised position." The bar carries upon it the stay, and in that bar are pins which form the loops of the stay. The wire is carried through the groove at the end of each finger. From this reference to the specification of the Mallett patent it is seen that there is provision for inclining the wire from the plane of the stay. Again, in the specification of the Mallett patent, it is stated:

"In the release of the loop from the front pin *b*, the wire is allowed to slip longitudinally and causes the released loop to be caught on the rear pin *b*^x, and thus form the loops contiguously side by side and slightly overlapping. The continuation of the alternate action of the bars and fingers forms a metallic band composed of correspondingly shaped loops, disposed alternately in reversed positions. The notches *d'* of the fingers *d* *dx*, receiving the wire through them and being slightly below the top of the raised bar, causes the fingers to bend the wire down across the inner edges of the bars, and thus produce a transverse convexity on the under side of the metallic band formed from the wire. This convexity partly stiffens the said band on one of its sides and increases the flexibility on the opposite side."

Again it is stated with reference to the guide *e*, through which the unformed wire passes to the bending fingers, that it may be raised or lowered and clamped in its desired position, with this further statement:

"Said adjustability of the guide *e* is desired to direct the delivery of the wire slightly below the plane of the elevated wire-carrying bar, as shown in Fig. 1, and to cause the wire to enter into the notch *d'* of the finger for the purpose of convexing the wire band, as hereinbefore described."

We find, therefore, in the Mallett patent convexity as a cause of rigidity, while in the patent in suit concavity is specified as a desirable feature. The convexity of the one is the concavity of the other.

We find in the Mallett patent the overlapping of the loops just as in the patent in suit, and we find provision for holding the unformed portion of the wire at an incline to the formed portion of the stay. It is true we find nothing in the Mallett patent with respect to torsional

strain in the wire; but, under all the evidence in this case, torsional strain in the wire was created in the product of the Mallett machine.

The court has reached the conclusion, therefore, that the method in issue which forms the first claim of the patent in suit was necessarily and inevitably practiced in the use of the Mallett machine as early as the summer of 1905, and has been practiced uninterruptedly since that time. For this reason, and because the Mallett machine cannot operate without imparting twist to the wire, and because there is no clear line distinguishing the process and product of the complainant in the early use of the Mallett machine and the process and product of a later date when the method of the patent in suit is claimed to have been used, and because it is impossible to distinguish between the product of complainant in early days and the product of the present day, there is nothing novel in the method of the patent in suit. The patent must therefore be adjudged to be invalid, and the bill of complaint must be dismissed.

Let a decree be drawn.

KEYSTONE TRADING CO. v. ZAPOTA MFG. CO. et al.

(District Court, E. D. Pennsylvania. January 6, 1914.)

No. 1,109.

1. PATENTS (§ 127*)—SUIT AGAINST INTERFERING PATENTEE—CONSTRUCTION OF STATUTE.

Rev. St. § 4918 (U. S. Comp. St. 1901, p. 3394), which provides that whenever there are interfering patents any person interested in any of them may maintain a suit in equity in which either of the patents may be adjudged void or other appropriate relief granted, applies to a case where there is a claimed interference between patents granted to the same inventor, although on a finding of interference the later patent becomes ipso facto void.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 179, 180; Dec. Dig. § 127.*]

2. PATENTS (§ 127*)—SUIT AGAINST INTERFERING PATENTEE—PRELIMINARY INJUNCTION.

In view of the further provision of said section "that no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment," the court on the giving of security may properly grant a preliminary injunction restraining defendant from disposing of his patent except on an order of the court.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 179, 180; Dec. Dig. § 127.*]

In Equity. Suit by the Keystone Trading Company against the Zapota Manufacturing Company and James D. Darling. On complainant's application for preliminary injunction and defendants' motion to dissolve temporary restraining order. Preliminary injunction granted.

Henry P. Brown, of Philadelphia, Pa., and Briesen & Knauth, of New York City, for plaintiff.

Henry N. Paul, Jr., and Joseph C. Fraley, both of Philadelphia, Pa., for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

THOMPSON, District Judge. The bill sets out that the plaintiff is the owner, by assignment from the defendant James D. Darling, of the three following patents issued to him: No. 907,748, issued December 29, 1908; No. 947,635, issued January 25, 1910; and No. 1,005,001, issued October 3, 1911—for the invention of certain new and useful improvements in the manufacture of chewing gum, and alleges infringement by the defendants of the above patents. It is further alleged in the bill that the inventions covered by patents Nos. 947,635 and 1,005,001 are capable of conjoint use, and that the product obtained therefrom is covered by patent No. 907,748, and that the inventions covered by the three patents are so conjointly used by the defendants; that the defendants claim to operate and manufacture under the protection of and own letters patent No. 1,040,285 issued to Darling on October 8, 1912, for the manufacture of chewing gum; and that the latter patent interferes with the patents owned by the plaintiff. The plaintiff prays *inter alia* for an injunction against the alleged infringement and that patent No. 1,040,285 be declared void.

In the separate answer of the defendant Darling, he denies infringement either jointly with the other defendant or individually; denies that the inventions covered by patents Nos. 947,635 and 1,005,001 are capable of conjoint use; denies that the product obtained therefrom is covered by letters patent No. 907,748; denies that the inventions covered by the three patents have been used jointly by him; and denies that patent No. 1,040,285 interferes with the other patents in suit.

[1, 2] The Zapota Manufacturing Company in its answer denies that Darling was the inventor of or entitled to the patents for the invention covered by the plaintiff's patents; denies the infringement; denies that the plaintiff's patents are capable of conjoint use, and denies that the patents have been used by it either separately or conjointly; denies the alleged interference; and alleges that the plaintiff's patents are void because of prior use and prior art. An *ex parte* restraining order was issued on motion of the plaintiff November 24, 1913, restraining the defendants from disposing of, selling, transferring, or attempting so to do letters patent No. 1,040,285, or any right, title, interest, or license thereunder, without leave of court first obtained upon notice to the plaintiff's solicitor. The plaintiff in support of the restraining order and of the present application for a preliminary injunction bases its right to the relief prayed for upon section 4918, Revised Statutes (Act of July 8, 1870, c. 230, § 58, 16 Stat. 207 [U. S. Comp. St. 1901, p. 3394]), which provides:

"Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment."

The plaintiff contends that, in view of the final paragraph of section 4918, the object and intention of the statute will be defeated unless the defendants are restrained from disposing of the patent except upon an order of court granted upon evidence that such disposition is made in good faith. It is contended on the part of the defendants that section 4918 does not apply to a case like the present, where the alleged interfering patents have been issued to the same inventor as patentee. It is contended that section 4918 was intended to apply to the ascertainment of the issue of priority between two different inventors, and hence the section gives the court the power to declare either patent void, so that, whether the patent to the original or first inventor be later or earlier in date than that of his opponent, one may be rightly upheld and the other canceled, without regard to their respective dates of issue. It is contended that, in the case of patents granted to the same inventor, this result cannot follow, because, the moment the fact of identity of claims is established, the second patent becomes ipso facto void.

The proposition that, where two patents showing the same invention or device are issued to the same party, the latter one is void, is well sustained by the authorities. *Suffolk Company v. Hayden*, 3 Wall. 315, 18 L. Ed. 76; *James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786; *Mosler Safe Co. v. Mosler*, 127 U. S. 354, 8 Sup. Ct. 1148, 32 L. Ed. 182; *McCreary v. Pennsylvania Canal Co.*, 141 U. S. 459, 12 Sup. Ct. 40, 35 L. Ed. 817; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121.

I find nothing in the language of the act nor in the decisions, however, to sustain the narrow construction urged on behalf of the defendants. The act applies "whenever there are interfering patents."

It is true that in *Palmer Pneumatic Tire Co. v. Lozier* (C. C.) 69 Fed. 346, Judge Ricks, in the Circuit Court for the Northern District of Ohio, said, referring to section 4918:

"The sole purpose is to determine which inventor of the two or more interfering patents was prior in his discovery or invention."

In using that language he was discussing the decision of Judge Treat in *Foster v. Lindsay*, Fed. Cas. No. 4,976, where the interference suit was between two different patentees. Standing alone, the language would be inaccurate because the purpose of the act is to determine first whether the patents in suit are interfering patents and, if they are, the determination as to which inventor was prior in his discovery would follow. As between two different patentees when the interference is established, the only remaining purpose of the act is as stated by Judge Ricks. While, in the case of patents granted to the same inventor, the moment the fact of identity of claims is established, the second patent becomes ipso facto void, yet the question of identity must be established in some proceeding, and the language of section 4918 apparently establishes the proper proceeding. Counsel contends that the declaring of the second patent to the same patentee void would be contradictory to the power under the act to "declare either of the patents void."

In my opinion this is putting too strained a construction upon the language. The broad language "may adjudge and declare either of the patents void" I think includes the power to declare void a second patent interfering with a prior patent to the same patentee. Otherwise, in case of interfering patents issued to the same patentee, there is no remedy for the assignee of the prior patent where an improper or fraudulent use is attempted to be made of the subsequent patent. Under the language of the act providing for "due proceedings had according to the course of equity," and under the decisions, jurisdiction lies under section 4918 to grant an injunction. See *Potter v. Dixon*, 5 Blatchf. 160, Fed. Cas. No. 11,325, opinion by Mr. Justice Nelson; *Palmer Pneumatic Tire Co. v. Lozier* (C. C.) 69 Fed. 346.

A preliminary injunction will therefore issue in accordance with the terms of the temporary restraining order upon plaintiff entering security within one week in an amount to be fixed by the court upon 48 hours' notice.

KAWNEER MFG. CO. v. VENTWELL STORE FRONT CO.

(District Court, N. D. Ohio, E. D. October 22, 1913.)

No. 200.

1. PATENTS (§ 297*)—SUITS FOR INFRINGEMENT—PRELIMINARY INJUNCTION—EFFECT OF PRIOR ADJUDICATIONS.

Where there has been a prior adjudication sustaining a patent in a suit in the same or another circuit in which the validity of the patent was contested on full proofs, a District Court on a motion for a preliminary injunction should sustain the patent and leave the question of its validity to be determined on the final hearing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481-488; Dec. Dig. § 297.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—STORE FRONT CONSTRUCTION.

The Plym patent, No. 852,450, for an improved store front construction, *held* valid and infringing on motion for a preliminary injunction.

In Equity. Suit by the Kawneer Manufacturing Company against the Ventwell Store Front Company. On motion for preliminary injunction. Motion granted.

Fay & Oberlin, of Cleveland, Ohio, and Parkinson & Lane, of Chicago, Ill. (R. M. See, of Cleveland, Ohio, and Wallace R. Lane, of Chicago, Ill., of counsel), for plaintiff.

Thurston & Kwis, of Cleveland, Ohio, for defendant.

DAY, District Judge. A motion for a preliminary injunction is made in this suit for infringement of United States letters patent No. 852,450, dated May 7, 1907 (application filed August 26, 1906), granted to Francis J. Plym, entitled "Improvements in Store Front Construction," embracing a new mechanical device for mounting heavy glass plates, especially adapted for use in show windows or wherever heavy plate glass has to be so mounted as to resist strains and the damage

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

incident to extreme atmospheric changes. The patent in controversy has been the basis of several suits for infringement. In the suit of this plaintiff against the Pittsburgh Plate Glass Company, brought in the Northern District of Illinois, Eastern Division, after a full hearing, a decree was entered in accordance with the bill. Also in the case of the Kawneer Manufacturing Company against the Ritzler Metal Manufacturing Company, of Kansas City, Mo., a consent decree was entered. Also in the case of this plaintiff against the United States Metal Products Company, a consent decree was entered in July, 1913.

[1] It is settled that where there has been a prior adjudication sustaining a patent, and the infringement thereof in the same or another circuit, where the validity of the patent has been contested upon full proofs, the District Court should, upon a motion for a preliminary injunction, sustain the patent, and leave the question of the determination of its validity to be determined upon the final hearing. *Interurban Ry. & T. Co. v. Westinghouse E. & Mfg. Co.*, 186 Fed. 170, 108 C. C. A. 298; *Acme Acetylene Co. v. Commercial Acetylene Co.*, 192 Fed. 321, 112 C. C. A. 573; *Fireball Gas Tank & I. Co. v. Commercial Acetylene Co.*, 198 Fed. 651-653, 117 C. C. A. 354; *Leeds & Catlin Co. v. Victor Talking Machine Co.*, 213 U. S. 301, 312, 29 Sup. Ct. 495, 53 L. Ed. 805.

[2] Regardless of this rule of law, the prior patents relied upon by the defendant do not, in my opinion, raise any question as to the validity of the patent in suit.

The patent in suit includes nine claims. The fifth, sixth, and seventh are relied upon to cover the invention. These claims are as follows:

"5. In a construction of the character described, the combination of a shelf or support, a glass plate resting edgewise thereon, means for pressing said plate yieldingly outward, a retaining strip adjustable toward or from said support or shelf and disposed at the outer side of and engaging said glass plate and provided with holes in its lower edge, and a gutter underlying the shelf or support to conduct water to the holes in the lower edge of the retaining strip.

"6. In a construction of the character described, the combination of a shelf or support, a glass plate resting edgewise thereon, a resilient gutter exerting an outward pressure on the glass plate, and a retaining strip adjustable toward or from said support or shelf and disposed at the outer side of and engaging said glass plate.

"7. In a construction of the character described, the combination of a shelf or support, a glass plate resting edgewise thereon, a resilient gutter exerting an outward pressure on the glass plate and provided with holes, and a retaining strip adjustable toward or from said support or shelf and disposed at the outer side of and engaging said glass plate and provided with holes in its lower edge."

The structure contemplated by these claims of the patent provides for a glass plate mounted on supports in a subgutter, which extends longitudinally beneath its edge. Between what would ordinarily be the window frame or the floor of the window seat is an inner lateral resilient channel support providing another gutter above the first-mentioned gutter, extending lengthwise of the glass, its upper face fitting flatwise against the glass, and serving to retain the glass under an elastic lateral resistance and also tending to divert any moisture from the surface of

the glass into the gutter where it is out of contact with the glass. This gutter is provided with openings in its bottom, discharging in the sub-gutter below, where it passes off through certain openings in the bottom of the adjustable outer retaining strip which is a part of the structure.

The inner support, which is of resilient material, presses elastically against the inner surface of the glass near its edge, being so shaped as to present a flat face parallel to the glass of sufficient dimension to make a tight water joint. The reverse bend, which forms the inner gutter, serving also to afford the spring which enables it to press the glass yieldingly outward, when the outer retaining strip is forced toward the support and against the face of the glass by an adjusting screw. The adjustable outer retaining strip is provided with a flat face, which extends parallel of the glass, with an outwardly bent part below, which provides space for the gutter and for the vertical support or bracket within the gutter. The openings in the gutters serve for a discharge for the moisture, also to conduct the current of cool air which circulates with the lower edge of the glass, and passes through the inner gutter, where it is distributed on the back of the window face, serving to keep the glass near to the temperature of the outer air and to prevent the deposit of moisture.

The defendant's device is practically the same, although made of a different material; it being claimed by the defendant that its device is made of the same sort of steel as is used in making beams and girders. The gutter is of a slightly different form, and it is admitted in argument that the defendant's device infringes claims 5, 6, and 7 of the patent in suit, provided the gutter in defendant's device is resilient.

The sixth and seventh claims of the patent are limited to a resilient gutter, in combination with the other features of the device which lend novelty to these claims. The fifth claim, however, is not thus limited, but specifies in combination with the other elements of the claim that the back member "means for pressing said plate yieldingly outward."

From a consideration of these various definitions of "resilience" it would seem that if this back gutter or the portions forming the back wall had some spring or capacity to rebound, as such a spring would have, that it might be said to be resilient. In my opinion the back gutter of the defendant's device is resilient. It may be made of a material which requires a little more pressure to cause it to recover its position or to yield, yet, nevertheless, it is resilient, and this resiliency is an important function in the structure of the defendant. The claims in issue require that the gutter be resilient to a degree such that the resilience performs some useful function in practical use. Defendant's device includes a gutter which possesses a degree of resilience sufficient to perform a useful purpose under the conditions of practical use.

I am, accordingly, of the opinion that the defendant's device infringes a valid patent, and that a temporary restraining order or an injunction should issue.

DART et al. v. SAYLOR ELECTRIC CO.

(District Court, W. D. Pennsylvania. November 10, 1913.)

No. 73.

PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — CONDUIT FOR ELECTRIC WIRES.

The Speer patent, No. 693,916, for a conduit for electric wires which is waterproof, fireproof, and flexible, in view of the prior art which disclosed conduits having all such qualities, must be narrowly construed, and as so limited is not infringed by the device of the Saylor patent, No. 1,049,771.

In Equity. Suit by Russel Dart and others against the Saylor Electric Company. On final hearing. Decree for defendant.

Christy & Christy, of Pittsburgh, Pa., for complainants.

C. M. Clarke, of Pittsburgh, Pa., for defendant.

ORR, District Judge. This patent suit is before the court upon final hearing. The proofs were compiled before the adoption of the new equity rules by the Supreme Court. The plaintiffs are the owners of letters patent of the United States, No. 693,916, issued to E. D. and H. N. Speer on February 25, 1902, for "conduit for electric wires." They charge the defendant with infringement of said letters patent. The defendant denies the validity of the patent by reason of a want of novelty or invention and denies infringement.

There have been many patents issued for tubes or conduits for electric wires. The earlier forms of apparatus seem to have possessed no flexibility. Therefore the tube in the wall and the tube in the ceiling of a building had to be connected by a joint of some kind. At the joint the electrical conductor would not be so well insulated and protected from flame and moisture as in the tube. Flexibility was subsequently procured by the use of a spiral or helix in the construction of conduits. This, perhaps, is first disclosed in United States patent to Herrick, No. 456,271, dated July 21, 1891. Herrick accomplished what he stated to be his object; that is, he provided a conduit "which shall be flexible to such an extent that it shall be capable of being bent without injury to the desired angle or curve where it becomes necessary that a change should occur in the direction followed by the conductor, whereby the cutting and joining of the conduit required in the case of the conduits generally in use shall be obviated." In the patent in suit the object of the invention is stated to be as follows (*italics by the court*):

"In order to be practicable, safe, and durable, the duct must be so constructed that it shall be *waterproof* to prevent deterioration from moisture; that it shall be *fireproof* to prevent ignition by a possible electric spark; and that it shall be *flexible*, so that it can be readily carried around the corners and bends which are frequently found in buildings without breaking or buckling."

Inasmuch as "waterproof," "fireproof," and "flexible" conduits are disclosed in prior patents, the novelty of the invention must be found, if at all, in the construction of the conduit as described in the patent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The claims in issue are:

"(2) A duct for electric wires having an inner tube composed of a longitudinally arranged sheet of flexible fireproof material, a waterproof coating on said tube, a layer of fireproof cord on said tube, a fireproof cover outside of the cord, and a waterproof coating on said cover, substantially as described."

"(6) In a duct for electric wires, the combination of an inner flexible longitudinally arranged fireproof sheet forming a tube, a layer of cord around outside said tube, and a cover on the cord, substantially as described."

The elements of claim 2 are: (1) An inner tube (composed of a fireproof, flexible, longitudinally arranged sheet of material); (2) a waterproof coating thereon; (3) a spirally wound fireproof cord outside of said tube; (4) a fireproof cover outside of said cord; and (5) a waterproof coating on said cover.

The elements of claim 6 are: (1) An inner flexible longitudinally arranged fireproof sheet forming a tube; (2) a layer of cord around outside of said tube; and (3) a cover on the cord.

A careful reading of the patent in the light of the prior art leads to the conclusion that none of said elements are new except the "cord." The inventor in his specifications gives his definition of that in the following language:

"By 'cord,' we intend either 'cord' properly so called, twine, yarn, marline, wire, or generally any filamentary body which is capable of being wound around or laid along the inner tube and around the same, and we intend that the term 'cord' in the specification and claims shall include all such filamentary bodies, whether of combustible or incombustible material, as wire or asbestos twine."

It cannot be that such definition can be extended to include tape or strips of fabric or duck or other fibrous material. The waterproofing compositions and the coverings are to be of "suitable" materials and quality, thus indicating, as prior patents disclose, that they were lacking in novelty. It has been specially urged that the use of the inner tube, as required by the patent, was novel and of great utility. With respect to it the patent states:

"The inner tube 1 is formed in any suitable manner, as, for example, on a mandrel, and of any suitable material, as paper or muslin or other like material; the meeting edges 2 3 making a lapped joint and being cemented together. Before forming the tube 1 the material is thoroughly saturated with a fireproofing solution, which is preferably composed of two ounces avoirdupois of phosphate of ammonia in a quart of water."

That is disclosed by United States patent to Kinney, No. 557,830, dated April 7, 1896.

There is great utility in having the inner surface of the conduit smooth and unbroken, because the insertion of the electric wire is thus facilitated. This is not disclosed by the patent in suit, and apparently was not recognized by the inventor. It had been disclosed by United States patent to Johns, No. 465,564, of December 22, 1891. Indeed, in the patent in suit the inventor states that under certain conditions it is well to cause the inner tube to be "perforated with holes 14, preferably staggered, as shown, to increase the flexibility of the duct."

There appears to be nothing novel in the combination or in the method of construction of the Speer conduit except the "cord." A

conclusion must be reached that the patent is one of narrow limitation, and that, unless all the elements of the claims in issue are found in the defendant's structure, infringement cannot be found.

The defendant is manufacturing flexible conduits under letters patent, No. 1,049,771, dated January 7, 1913, issued to Frank D. Saylor upon an application filed by him prior to the bringing of this action. Without detailing the characteristics of defendant's product, it is clear that the "cord" of the patent in suit is not the "strip" or "ribbon" of the Saylor patent. The purpose of each is to form the spiral which gives flexibility, but they are not any more like each other than they are like the spiral in the patent to Herrick above mentioned. Because of that patent they cannot be within the doctrine of equivalents. Infringement is not found.

The bill must be dismissed at plaintiffs' costs. Let a decree be drawn.

HICKS v. PENN MUT. LIFE INS. CO.

(District Court, D. Massachusetts. January 26, 1914.)

No. 494.

1. ACCOUNT (§ 12*)—EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW.

Where plaintiff sued for commissions alleged to be due him on premiums paid under certain insurance policies issued by defendant, in accordance with his contract, his claim being to recover money only, he had an adequate remedy at law, and could not maintain a suit for an accounting.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 62-70; Dec. Dig. § 12.*]

2. EQUITY (§ 51*)—JURISDICTION—MULTIPLICITY OF SUITS.

Where an insurance agent sued under his commission contract for commissions due on premiums, and sought to recover, not only those which had accrued, but also asked that defendant be ordered to pay commissions under the contract as they might accrue thereafter, the bill was not sustainable as an exercise of equity jurisdiction, to avoid a multiplicity of suits.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 167-171; Dec. Dig. § 51.*]

In Equity. Suit by J. Everett Hicks against the Penn Mutual Life Insurance Company. On motion to dismiss. Granted.

White & Bradbury, of Boston, Mass., for complainant.

Charles F. Rowley, of Boston, Mass., for defendant.

DODGE, Circuit Judge. [1] The plaintiff's claim to commissions is based wholly on a written contract set forth in his bill. If this be construed as he claims, commissions are now due him on premiums paid under certain policies issued by the defendant, and further commissions may become due on premiums to be paid in the future. His claim is one for money payments only.

His bill asks that the defendant render an account of all premiums already received by it since a specified date under policies of a kind

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

described, and for payment of such amount as may be found due. All this he can obtain equally well in a suit at law. *U. S. v. Bitter Root Co.*, 200 U. S. 451, 478, 479, 26 Sup. Ct. 318, 50 L. Ed. 550.

[2] He does not ask in so many words for specific performance as to the commissions which may become due him, but he does ask that the defendant "be ordered to pay" them to him as they may accrue hereafter. It is urged that at law he could only get commissions due; that, in order to get those accruing hereafter, other suits would be necessary after they had become due; and that jurisdiction may be taken in equity to avoid multiplicity of suits.

His rights under the contract, however, once established by recovery for commission now due, no question except as to amount would remain open for controversy. There would be no damages incapable of ascertainment at law. Under such circumstances, there is no sufficient justification for the exercise of jurisdiction in equity and the interference with the defendant's right to jury trial therein involved. See *Gen. Electric Co. v. Westinghouse, etc., Co.* (C. C.) 144 Fed. 458, 467-471.

The motion to dismiss is granted.

SOUTH & NORTH ALABAMA R. CO. v. RAILROAD COMMISSION OF ALABAMA et al.

(District Court, M. D. Alabama. December, 1913.)

No. 263.

1. CARRIERS (§ 12*) — STATE REGULATION OF RATES — REASONABLENESS OF RATES.

In determining the reasonableness of a rate of passenger fare established by a state commission to be charged by a railroad company on intrastate business, a rate voluntarily established by the company, in common with practically all other companies doing business in that part of the country, and maintained for many years, may properly be accepted as reasonable, and used as a basis for comparison; and, where it appears that its earnings, under the new rate, although such rate is lower, have exceeded those of its most prosperous year under the old rate, a finding is justified that the new rate is reasonable, unless there has been a material increase in the cost of the service.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

2. CARRIERS (§ 12*) — STATE REGULATION OF RATES — REASONABLENESS OF RATES.

If the yield to a railroad company from intrastate passenger earnings under a specific rate is reasonable in amount to remunerate it for the service performed thereunder, confiscation cannot result from such a rate, even though it be also true that the entire earnings derived from intrastate business, both freight and passenger, are unremunerative, the reasonableness of a single rate or a partial schedule being open to separate contestation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 210 F.—30

3. CARRIERS (§ 12*)—STATE REGULATION OF RATES—REASONABLENESS OF RATES.

If a rate of passenger fare established by a state commission on intrastate business will yield a reasonable return to a railroad company for the service, it cannot be held confiscatory by the courts because it fails to yield, in addition, an amount to compensate for prior losses.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

4. CARRIERS (§ 12*)—STATE REGULATION OF RATES—REASONABLENESS OF PASSENGER RATES.

A 2½-cent passenger rate established by the Railroad Commission of Alabama on intrastate business *held* not confiscatory as to complainant railroad company, on a motion for preliminary injunction.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

5. INJUNCTION (§§ 135, 136*) — PRELIMINARY INJUNCTION — DISCRETION OF COURT.

The granting or refusal of a preliminary injunction rests in the sound discretion of the court under the circumstances of the particular case, and it should only issue in cases of extreme urgency, where the right is clear, and where considerations of the relative inconvenience are strongly in complainants' favor.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 304, 305, 306; Dec. Dig. §§ 135, 136.*]

6. CARRIERS (§ 18*)—ORDER OF STATE COMMISSION FIXING RATES—REASONABLENESS OF RATES.

Evidence considered, and *held* insufficient to warrant the granting of a preliminary injunction to restrain the enforcement of an order of the Railroad Commission of Alabama, reducing the rate of passenger fare on complainant's road from 3 cents per mile to 2½ cents, on the ground that the reduced rate is confiscatory, where the value of complainant's property devoted to the intrastate passenger service and other matters bearing on the cost of such service were in serious dispute, and not clearly or satisfactorily established.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.*]

In Equity. Suit by the South & North Alabama Railroad Company of Alabama against the Railroad Commission of Alabama and others. On motions for preliminary injunction. Denied.

See, also, 196 Fed. 800.

Henry L. Stone and W. A. Colston, both of Louisville, Ky., Sydney J. Bowie, of Birmingham, Ala., and J. M. Foster, of Montgomery, Ala., for complainant.

S. D. Weakley, of Birmingham, Ala., and R. C. Brickell, Atty. Gen., of Alabama, for defendants, Charles Henderson, Leon McCord and Frank M. Julian, composing the Railroad Commission of Alabama.

Before SHELBY, Circuit Judge, and NILES and GRUBB, District Judges.

On Application for Temporary Injunction.

NILES, District Judge, made the following statement of facts:

On September 9, 1913, complainant filed a supplemental bill of complaint to its original and supplemental bills herein, reciting that, since the rendering and filing of the decree in this case on April 2,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1912, in the United States Circuit Court for the Middle District of Alabama, sitting in equity at Montgomery, Ala. (the jurisdiction and records of which court have been transferred to this court by sections 289, 290, and 291 of the Judicial Code of the United States), the defendants, Charles Henderson, Leon McCord, and Frank N. Julian, constituting the Railroad Commission of Alabama, regardless of said decree, issued to complainant on June 13, 1912, a citation or order to show cause why the said commission should not fix and establish reasonable passenger rates to be charged between points on complainant's line within the state of Alabama. Said citation recited that the said commission believed the rate of three cents per mile for transportation of passengers on complainant's line in the state of Alabama was unreasonable, and fixed a date to wit, July 1, 1912, to determine the question. Complainant, pursuant to said citation, appeared on July 15, 1912, by counsel before the commission, and filed a protest against the authority of defendants to proceed because of the previous adjudication and decree in said United States Circuit Court, which said decree, or the substantive part, is as follows:

"This cause having been submitted upon the exceptions of the complainant and of the defendants, respectively, to the master's report, and upon the pleadings and evidence for a final decree, and having been argued by counsel and considered and understood by the court, it is considered, ordered and adjudged by the court:

"First. That the exceptions of the defendants to so much of the master's report as finds that the several acts of the Legislature of Alabama, regulating the rates to be charged by common carrier railroads for the transportation of passengers and property, unlawfully interfere with the regulation of interstate commerce by Congress, and are therefore violative of section 8, article 1, of the Constitution of the United States, be, and the same are hereby, sustained.

"Second. That the several exceptions filed by the complainant to the master's report, and all other exceptions filed by the defendants, be, and the same are each hereby, overruled.

"Third. That the provisions of the act of the Legislature approved March 2, 1907, and entitled, 'An act to fix and establish the maximum rates to be charged by railroads now operating, or which may hereafter operate, as common carriers, in whole or in part in the state of Alabama, for the transportation originating and terminating within the state, of certain articles, and for this purpose to classify said articles and said railroads,' in connection with the rates provided for and limited by the other acts of the Legislature of Alabama covered by this decree, operated to deprive complainant of its property without due process of law, and the act was, prior to its repeal, therefore, violative of the Constitution of the United States, and void, as to complainant.

"And the eight several acts of the Legislature approved on November 23, 1907, and entitled, respectively, as follows:

"'An act to fix and establish the maximum rates to be charged by railroads now operating, or which may hereafter operate, as common carriers, in whole or in part in the state of Alabama, for the transportation originating and terminating within the state, of certain articles or commodities to be known as Group 1, and for this purpose to classify said railroads.

"'An act to fix and establish the maximum rates to be charged by railroads now operating, or which may hereafter operate, as common carriers, in whole or in part in the state of Alabama, for the transportation, originating and terminating within the state, of certain articles or commodities, to be known as Group 2, and for this purpose to classify said railroads.

"'An act to fix and establish the maximum rates to be charged by railroads now operating, or which may hereafter operate, as common carriers, in whole

or in part in the state of Alabama, for the transportation, originating and terminating within the state, of certain articles or commodities, to be known as Group 3, and for this purpose to classify said railroads.

"An act to fix and establish the maximum rates to be charged by railroads now operating, or which may hereafter operate, as common carriers, in whole or in part in the state of Alabama, for the transportation, originating and terminating within the state, of certain articles or commodities, to be known as Group 4, and for this purpose to classify said railroads.

"An act to fix and establish the maximum rates to be charged by railroads now operating, or which may hereafter operate, as common carriers, in whole or in part in the state of Alabama, for the transportation, originating and terminating within the state, of certain articles or commodities, to be known as Group 5, and for this purpose to classify said railroads.

"An act to fix and establish the maximum rates to be charged by railroads now operating, or which may hereafter operate, as common carriers, in whole or in part in the state of Alabama, for the transportation, originating and terminating within the state, of certain articles or commodities, to be known as Group 6, and for this purpose to classify said railroads.

"An act to fix and establish the maximum rates to be charged by railroads now operating, or which may hereafter operate, as common carriers, in whole or in part in the state of Alabama, for the transportation, originating and terminating within the state, of certain articles or commodities, to be known as Group 7, and for this purpose to classify said railroads.

"An act to fix and establish the maximum rates to be charged by railroads now operating, or which may hereafter operate, as common carriers, in whole or in part in the state of Alabama, for the transportation, originating and terminating within the state, of certain articles or commodities, to be known as Group 8, and for this purpose to classify said railroads."

"And so much of the Code of 1907, as re-enacts the said several acts, in connection with the maximum rate act and the passenger rate act covered by this decree, operate to deny to the complainant the equal protection of the laws, and deprive it of its property without process of law, in violation of the fourteenth amendment of the Constitution of the United States, and are each null and void, as to complainant.

"Fourth. That the act of the Legislature of Alabama, approved February 9, 1907, and entitled, 'An act to make the railroads' rate of freight in force January 1, 1907, for the transportation, originating and terminating within this state, the maximum rates,' and an act of the Legislature of Alabama approved February 14, 1907, entitled, 'An act to prescribe and regulate passenger rates on all railroads other than street railroads carrying passengers between points within the state of Alabama,' and so much of the Code of Alabama of 1907 as re-enacts the provisions of said several acts, in connection with the other rate acts covered by this decree, operate to likewise deprive complainant of its property without due process of law, in violation of the fourteenth amendment of the Constitution of the United States, and are each null and void, as to complainant, and that said act of the Legislature of Alabama approved February 14, 1907, entitled, 'An act to prescribe and regulate passenger rates on all railroads other than street railroads carrying passengers between points within the state of Alabama,' in connection with the several orders of the Railroad Commission of Alabama allowing railroads other than complainant to charge more than 2½ cents a mile for transportation of passengers, operates to deny to complainant the equal protection of the law, and for this reason also renders said act, in connection with said orders, violative of the fourteenth amendment of the Constitution of the United States.

"Fifth. That so much of the order of the Railroad Commission of Alabama as provides that on and after December 1, 1907, complainant shall charge at the rate of 2¾ cents a mile for transportation of all passengers between points in Alabama who are transported partly over complainant's road and partly over certain other railroads with which complainant's road connects, in connection with the other rate statutes covered by this decree, operates to deprive complainant of its property without due process of law, and is, as to complainant, violative of the fourteenth amendment of the Constitution of the United States.

"Sixth. That the defendants, and each of them and their respective successors in office, and all and every other person, are hereby enjoined from bringing any action, in any court, or from taking any other steps against complainant, or any of its officers, agents, or employes, to compel it or them to observe or to enforce any of the said several acts of the Legislature of Alabama, or of said order of the Railroad Commission, or to forfeit the license or right of complainant to do an interstate freight and passenger business in the state of Alabama on account of its having instituted or prosecuted this cause.

"Seventh. If, and when, circumstances shall have changed so that the rates fixed in said several acts of the Legislature of Alabama will yield to complainant reasonable compensation for the services performed and a reasonable return upon the property devoted to the service, the Railroad Commission of Alabama and the Attorney General of said state, or either of them, may appear to the court by bill or otherwise, as they may be advised, for a further order in that behalf, and that jurisdiction over said cause be retained for that purpose.

"Eighth. That no freight or passenger rate in conflict with the provisions of any of the said several acts shall be charged by complainant prior to the 15th day of April, 1912.

"Ninth. That complainant and defendant each pay the attendance fee of their respective witnesses, and that each pay one-half of all of the other costs of the cause.

Thos. G. Jones, United States District Judge.

"Filed 2d day of April, 1912, at 3:45 o'clock p. m.

"Harvey E. Jones, Clerk,

By Ellen W. Jackson, Deputy."

That the record of the commission shows no proceedings by or before it prior to the issuance of said order to show cause on June 13, 1912.

The commission upon consideration overruled complainant's protest as to jurisdiction and the plea of res adjudicata, and decided to proceed regardless thereof. Complainant again protested because of the failure of commission to observe due process of law in the investigation, in addition to the above-mentioned grounds of protest. Thereupon, on November 1, 1912, a hearing was had upon the issue. It was agreed by counsel that all testimony introduced in the hearing of the cause before the federal court, upon which was based the decree of the said United States Circuit Court of date of April 2, 1912, might be introduced in any proceeding which might be brought before any federal judge looking to an application for an injunction against any order the commission might make in the case. Afterwards, to wit, on August 25, 1913, the commission issued the following order:

"Railroad Commission of Alabama.

"Montgomery, Ala., August 25, 1913.

"Railroad Commission of Alabama v. South & North Alabama Railroad Company.

"Citation to show Cause why This Commission should Not Establish Just and Reasonable Passenger Rates on Your Line of Road between Points within the State of Alabama. Docket No. 709.

"The above cause having been heard at a previous session of the commission, and, after a careful consideration of the testimony in this case, this commission is of the opinion that the present passenger rates charged by the South & North Alabama Railroad Company are unreasonable, therefore, it is ordered, that the South & North Alabama Railroad Company publish and make effective between all points on its line of road in Alabama, a standard passenger rate of two and one-half cents (2½) per passenger mile for adults, and a rate of one and one-fourth (1¼) cents per passenger mile for children not over twelve (12) nor under five (5) years of age, and that it shall also

publish and make effective joint rates between all points in Alabama, between which it now has joint rates, and its proportion of such joint rates, shall not exceed the above standard rates described.

"Railroad Commission of Alabama,

"By Chas. Henderson, President."

The above order was duly served upon complainant, the effect of which, complainant contends, is to deprive it of its property without due process of law, and deny it the equal protection of the laws in violation of the provisions of section 1 of the fourteenth amendment to the Constitution of the United States. Further, that unless said order of the commission is immediately restrained and enjoined as prayed for herein, complainant will, by reason of the enormous penalties provided by the statutes of Alabama for failure to comply with said order of the commission, be compelled to put into effect the rates provided in said order, a compliance with which would deprive it of its property without due process of law and the equal protection thereof, guaranteed by the federal Constitution.

Complainant copies into the bill the said statutes of Alabama relating to the case.

Complainant further says that the commission in issuing said order acted in an arbitrary, capricious, and unreasonable manner, exceeding the authority delegated to it by the law, and erred as to matter of law, and that the said rates fixed thereby are unfair, unreasonable, and invalid in the following respects, as follows:

"(A) Defendants were and are without jurisdiction to establish any passenger rates on complainant's lines between points within the state of Alabama, because the reasonableness of complainant's present passenger rates is res adjudicata, having been actually and directly in issue in this suit, and having been judicially passed upon and determined by the Circuit Court of the United States for the Middle District of Alabama, and being conclusively settled by the decree of that court.

"(B) Said defendants, constituting the Railroad Commission of Alabama, were, and are, without jurisdiction to establish the maximum passenger rates of 2½ cents per mile on complainant's lines between points within the state of Alabama, because the unreasonableness and confiscatory character of the maximum passenger rate of 2½ cents per mile for transportation on complainant's lines within the state of Alabama is res adjudicata, having been actually and directly in issue in this suit, and having been judicially passed upon and determined by the Circuit Court of the United States for the Middle District of Alabama, and being conclusively settled by the decree of that court.

"(C) Defendants are without statutory or other authority to establish any rates on complainant's lines until complainant's existing rates are found to be unreasonable, or unjustly discriminatory, according to due process of law; and complainant's existing rates cannot be and could not, in accordance with the evidence, have been found to be, either unreasonable or unjustly discriminatory, and defendants have not afforded or followed due process of law in their investigation.

"(D) Said order issued by defendants, constituting the Railroad Commission of Alabama, on the 25th day of August, 1913, would, if enforced, necessarily amount to an interference with and a burden upon interstate commerce, and is therefore in violation of section 3548 of the Civil Code of Alabama, and without authority of law, and is furthermore in violation of the Constitution of the United States, and particularly in violation of the third clause of the eighth section of article 1 of said Constitution.

"(E) Even if defendants had jurisdiction to make an order with respect to complainant's intrastate passenger rate in the state of Alabama, the order made is arbitrary, capricious, and unlawful because it is not based upon any

evidence, and the finding and order of the commission are contrary to the uncontradicted evidence introduced before said defendants, constituting the Railroad Commission of Alabama.

"(F) Even if the defendants had jurisdiction to make an order with respect to complainant's intrastate passenger rates in the state of Alabama, the order made is arbitrary, unreasonable, and unlawful because the enforcement of said order would result in confiscation of complainant's property without due process of law and without just compensation, and in denial of the equal protection of the laws of the state of Alabama, and in violation of the provisions of section 1 of the fourteenth amendment."

Complainant, proceeding, says that an estoppel exists against defendants with respect to complainant's intrastate rates in Alabama, and with respect to reasonableness or unreasonableness thereof, because such rates and such reasonableness were identical facts or circumstances included in the former litigation, and defendants are estopped to allege anything concerning such facts or circumstances contrary to said judgment and decree of the Circuit Court of the United States for the Middle District of Alabama in this cause rendered and filed. That because in said suit the reasonableness of complainant's present intrastate passenger rates in Alabama was determined, said issue is *res adjudicata*, and is as a plea, a bar, and as evidence, conclusive.

Complainant further says that there has not been any change in circumstances so that the passenger rates fixed by said order of the commission will yield to complainant reasonable compensation for the services performed, and a reasonable return upon the property devoted to that service, and that neither the commission nor the Attorney General of Alabama has applied to the court, by bill or otherwise, for a further order in that behalf, but that said order of the commission, herein complained of, was issued without such application, and regardless of the jurisdiction retained by the court over this cause for that purpose.

Complainant further says that the determination of the reasonableness or unreasonableness of complainant's intrastate passenger rates in the state of Alabama, upon which determination the power of the commission to fix rates is necessarily predicated, involves necessarily the determination of values and the distribution of accounts, jurisdiction over which values and accounts Congress has directly conferred upon the Interstate Commerce Commission in sections 19a and 20 of the act to regulate commerce; that therefor the enforcement of said order would necessarily amount to an interference with and a burden upon interstate commerce, rendering said order unlawful, unconstitutional, and void.

Complainant further says the present passenger rate of 3 cents per mile is fair, reasonable, and just, and that "far from being prohibitive of the free movement of passengers or other traffic, has encouraged and promoted travel and transportation, and increased the production, commerce, and population of the country tributary to complainant's lines in the state of Alabama," though such rates between points in Alabama "have never yielded as much as a fair, just return on the value of complainant's property within the state of Alabama devoted to the service" of carrying such intrastate passengers.

Complainant says further that it is not only entitled to earn a fair return from its intrastate traffic in the state of Alabama upon the value of the property devoted to intrastate traffic passenger and freight combined, but it is also entitled to earn from its interstate passenger traffic in the state of Alabama, separately considered, a fair return upon the value of the property to its intrastate passenger traffic, to wit, not less than 8 per cent.

Complainant submits a statement constructed according to the unit of service basis or plan of distributing operating expenses and other items, which was approved by the master and court in this case, showing that at full railroad rates, or at the maximum rates of 3 cents per mile charged by the railroad company, complainant's intrastate passenger traffic in the state of Alabama did not yield a fair return upon the value of the property devoted to said traffic.

Complainant refers to its several exhibits, made a part of the bill, in proof of its claim that not only its intrastate passenger business does not yield a fair return, but that it is not earning a fair return from all its business in the state of Alabama, interstate, intrastate, passenger, and freight combined, based upon the value of property devoted to the traffic.

Complainant further says that the operation of its lines for each of 41 fiscal years ending June 30, 1913, have not been profitable, and that from the beginning until the date mentioned it has failed to earn its fixed charges by an average annual amount of \$152,674.78. Finally complainant says that its loss from the reduction of its intrastate passenger rates in Alabama as provided in the order of the commission herein complained of would amount to more than \$92,500 per annum.

The bill concludes with a prayer for relief, and until a final hearing the usual restraining order. A restraining order as prayed was granted, staying the operation of the order of the commission until a motion for an injunction pendente lite could be heard.

Defendants, composing the commission, filed their answer, admitting the issuance of the citation or order to complainant to show cause as to the unreasonableness of its intrastate passenger rate in Alabama, but denying that said citation was issued regardless of the decree of April 2, 1912, of the United States Circuit Court for the Middle District of Alabama. Defendants claim they proceeded in strict accordance with the Alabama statutes in such case made and provided, and in all their proceedings complainant was afforded every opportunity of making its lawful defense—quoting in full the said statutes. Defendants further say that on the final hearing, after full and painstaking consideration of the evidence and complainant's several contentions, the commission reached the conclusion that, under conditions prevailing at the time said order was entered, the passenger rate of 3 cents per mile of complainant in Alabama on intrastate business was unreasonable, and that a rate of 2½ cents per mile should be established as a just and reasonable rate, fair alike to the railroad company and the public.

Defendants refer to the testimony of Sam P. Kennedy, Secretary of the Railroad Commission of Alabama, in support of their position, and the brief and argument of H. C. Secheimer, Esq., introduced herein.

Defendants deny that the order of the Railroad Commission would not afford a fair return upon the value of the property used in transporting passengers affected by said rate, or that the said rates are unfair or unreasonable or unlawful, but, on the contrary, said order was fair and proper, and should be observed.

Defendants allege that in the figures and accounts shown before the master and the court by the complainant on the hearing prior to the final decree in said cause, there were inaccuracies, for the reason that the alleged value of the property devoted to public use is too high, and the operating expenses and taxes assigned to intrastate business are excessive, and derived by a method which is unfair to intrastate business; that the unit of service basis which is employed in said accounts, for the most part, is unfair, unreasonable and unjust to intrastate business, and was devised for the purpose of complainant's litigation with the state of Alabama, and has not been previously used by experts, and that the same is so unreliable and unreasonable that it cannot be accepted with safety by the court as a means of ascertaining intrastate operating expenses.

Defendants deny complainant would lose a revenue of \$92,500 per annum if the order of the commission held.

Defendants further say that the complainant is managed, controlled, and operated by the Louisville & Nashville Railroad as one of its divisions in the state of Alabama, owning about 90 per cent. or more, of its stock, controlling it since 1873, fixing its rates, etc., and in all respects managing and operating it.

Further, that on February 19, 1913, the Alabama Railroad Commission fixed a 2½-cent passenger rate on the other divisions and lines of the Louisville & Nashville Railroad in the state of Alabama, except the South & North Alabama Division (complainant), and that the said 2½-cent passenger rate is now in effect on the Louisville & Nashville Railroad's other divisions in the state of Alabama, and has been since August 12, 1913, after the order of the commission had been approved by a majority of the special tribunal of three federal judges to pass on and determine the application of the Louisville & Nashville Railroad for an injunction restraining said order of the commission.

Finally defendants allege that the conditions and amount of business are such on the South & North Division of the Louisville & Nashville Railroad—that is, on the line of the complainant—that the 2½-cent intrastate passenger rate is sufficiently high, and that the same is fair and reasonable alike both to the carrier and to the public, and that no reason exists why complainant should enjoy on said lines a higher rate than the Louisville & Nashville and other railroads in the state of Alabama that are now charging and receiving 2½ cents per passenger mile on intrastate business in the state of Alabama.

The bill herein recites various items in support of its grievances as contributing to its losses in passenger earnings among them, especially, the custom of the rebuying of tickets at state lines by interstate passengers. These items the court does not consider necessary to embody in this opinion, as being of secondary import as applied to this issue, which is an application for a preliminary injunction.

GRUBB, District Judge. This matter comes on to be heard upon the application of the plaintiff for an injunction pendente lite against the Railroad Commission of Alabama, restraining the enforcement of an order, the effect of which was to reduce the plaintiff's passenger fare of 3 cents a mile for adults to $2\frac{1}{2}$ cents, with like reduction for half fares.

The questions of *res adjudicata*, due process of law, and interference with interstate commerce, with reference to the proceeding before the Commission, are not different from those presented in the case of *Louisville & Nashville Railroad Co. v. Railroad Commission of Alabama et al.* (D. C.) 208 Fed. 35, decided by this court, and may be ruled against the plaintiff as they were in that case, without extended discussion.

The questions as to whether the plaintiff would receive a fair return on its property devoted to intrastate business, after the restoration of its voluntary freight rates, and with the $2\frac{1}{2}$ -cent passenger rate enforced, and if not, whether the enforcement of the $2\frac{1}{2}$ -cent passenger rate would materially contribute to the result, remain for decision. The facts upon which these questions are to be decided differ from those presented to the court in the *Louisville & Nashville Case*, and the plaintiff contends that these differences should result in a different decision, and the plaintiff also contends that some of the legal conclusions which formed the basis of that decision are erroneous, and should be reconsidered by the court, with the result of a different conclusion in this case.

The principal criticism of the decision of the court in the *Louisville & Nashville Case* is directed at that part of the opinion which holds that a showing of increased earnings under the reduced rate over what the plaintiff had received in former prosperous years under the 3-cent fare, though such increase could not be traced to stimulation of traffic due to the reduction, might avail to show that confiscation did not result from the reduction.

One contention of plaintiff is that if the increase in earnings under the reduced rate is due to increased density of traffic, or to increased prosperity, or to any cause other than stimulation, the plaintiff is entitled to the benefit of such increase as against legislative reduction of rates, at least up to the point where the increase under the reduced rate is such as to yield only a fair return on the property devoted to the public use. The soundness of this contention does not admit of doubt. The question in each case remains as to whether the increase under the reduced rate has or has not brought the earnings up to or beyond the point of remuneration.

The plaintiff also contends that the voluntary putting in force and maintaining for a time of a rate by the carrier does not estop the carrier from thereafter asserting that the rate is so unreasonably low as to be confiscatory, upon its subsequent discovery of that fact. This contention is also sound.

Applying these legal principles to the *Louisville & Nashville Case*, the plaintiff argues that the court's conclusion, from the fact that the passenger earnings in 1912 under the reduced rate had exceeded those

for the prosperous year of 1907 under the 3-cent rate, that the reduced rate was not confiscatory is an erroneous one. The argument assumes that the court, in reaching this conclusion in the Louisville & Nashville Case, held that the state had power to deprive the carrier of a part of its increased earnings by rate reductions, though such increase still left the carrier's earnings below the point of remuneration, and that the putting in force and maintenance of a 3-cent passenger rate voluntarily by the carrier prevented it from afterwards asserting the unremunerativeness of the 3-cent rate, though it could in fact be shown to be unremunerative. We think counsel are mistaken in each assumption.

The court found from the record in that case that the increase in passenger earnings under the reduced rate had in fact passed beyond the remunerative point, resting its finding partly, it is true, upon the fact that the earnings had passed the amount yielded during the carrier's most prosperous years under the 3-cent fare, which it had voluntarily put in force and for many years maintained. The court did not hold that the putting in force and maintenance of the 3-cent rate estopped the carrier from thereafter showing its unremunerativeness, if it was able to do so, but did hold the voluntary maintenance of the rate for a long period operated as an admission by the carrier of its reasonableness, to dispel the effect of which clear proof to the contrary would be necessary, and that such clearness of proof was not forthcoming. The court found that the 3-cent fare, while in force, had been a reasonable one to the carrier, and did not hold that the carrier by its action in employing the 3-cent fare had precluded itself from ever thereafter asserting its unreasonableness.

[1] The plaintiff's criticism must therefore lie with the finding of the court that the 3-cent fare yielded fair returns to the carrier, and with its reasons for reaching that conclusion. The record in the Louisville & Nashville Case showed that this rate of fare was one of the carrier's own adoption, which it had continued to maintain, after years of opportunity for experiment, and where and when it was not induced to do so by the demands of competition, and that it had, some years before the hearing, voluntarily reduced existing 4-cent rates of fare on its branch lines to 3 cents, to provide uniformity of fares over its system. These facts are persuasive that the plaintiff in the Louisville & Nashville Case, after ample opportunity to determine the reasonableness of a 3-cent fare, had arrived at a conclusion favorable to the reasonableness of that rate of fare. The court also had in mind the fact that before the era of rate regulation, the passenger carriers of the Southern states had adopted, almost without exception, a standard passenger rate of 3 cents a mile, and, except when it was reduced by rate regulation, had maintained this standard rate up to the time of the hearing, and that it was hardly conceivable that the passenger carriers of the country, with their facilities for determining whether or not a rate was remunerative, and with years of opportunity in which to experiment, would voluntarily, without the pressure of rate regulation or competition, have maintained a 3-cent fare if it was attended with confiscatory results.

These were some of the facts, which the court felt justified it in assuming in the Louisville & Nashville Case, as a basis of fair comparison, the results which attended the operation of the 3-cent fare, and in holding that when the returns under the reduced fare had substantially passed beyond the returns of the carrier's most prosperous year under the 3-cent fare, the reduced fare was shown to be reasonable, since it equaled or exceeded the returns which had been yielded to the carrier under the old and reasonable fare. After reviewing the reasons which induced us to hold in the Louisville & Nashville Case that the 3-cent fare was reasonable, and giving careful consideration to the reasons assigned by the plaintiff against the correctness of our conclusion, we remain persuaded that the action of the plaintiff in that case, and that of practically all the carriers of passengers, including the plaintiff in this case, in the South, in voluntarily maintaining for years a 3-cent maximum fare, is controlling of any evidence contained in that record tending to show its unreasonableness to the carrier. We still hold that the return to the carriers under the 3-cent fare, while it was operative, is a proper basis of comparison with the returns to the carriers under the reduced fare, by which to determine the reasonableness of the reduction. In the case we are now considering, we think it proper to consider, along with the other evidence, the action of this plaintiff in maintaining, after opportunity for experiment and when not compelled by state action or by competition, a 3-cent fare, as evidence of the reasonableness to this plaintiff of that rate of fare, while it was in force; and, after giving careful consideration to all the evidence in the record, we hold that the 3-cent fare, while kept in force on the plaintiff's railroad, was a reasonable fare to the carrier, and that the results of its operation afford proper bases with which to compare the results of the operation of the reduced fare of 2½ cents, while it was in force, with the view of determining its reasonableness in the future to the carrier.

[2] If the yield to the carrier from intrastate passenger earnings under a specific rate are reasonable in amount, then confiscation cannot result from such a rate, even though it be also true that the entire earnings derived from intrastate business, both freight and passenger, are unremunerative. The remedy for such a situation is the adjustment of freight rates, and not the disturbance of the passenger rates. A deficiency in intrastate earnings, due to unreasonably low freight rates, should be overcome by raising freight rates till they afford a reasonable return, and not by raising already reasonable passenger rates to accomplish that end.

The problem presented by the record in this case is not the effect of an entire schedule of freight and passenger rates on plaintiff's intrastate business. If this were the issue, a showing that the plaintiff did not receive, under the complete schedule, adequate returns would be conclusive of its right to redress as against the schedule. In a case like this one, in which a part only of the entire schedule is assailed, two questions must be decided before the relief is granted: First, whether or not the intrastate business of the carrier is properly remunerative; and, second, whether or not, if the returns from its entire

intrastate business are not properly remunerative, this condition is due to, or contributed to materially or substantially by, the enforcement of the portion of the schedule, which, alone, is complained of.

If it appears that the portion of the schedule alone complained of is reasonable to the carrier, and affords a fair return on the property devoted by it to the service, then the injury to the carrier's business is accomplished elsewhere, and the business affected by the rates complained of should not be made to assume any part of the burden. Where a single rate or a partial schedule is the subject-matter of contention, the reasonableness of a single rate or partial schedule is an issue, as well as the sufficiency in the aggregate of the returns upon the carrier's intrastate business. The insufficiency of the aggregate return is conclusive in favor of the carrier only as against the entire schedule. The reasonableness of a single rate or partial schedule is open to contestation, though the aggregate return may appear to be insufficient. The corollary of a contrary holding would be that the carrier would have the right to burden traffic, the rates upon which were already reasonably high, by increases, with the purpose of making up a deficiency caused by other traffic, with relation to which the rates were too low. The cost of the service, charges made by other carriers for similar service, and many elements, other than the aggregate returns from the carrier's entire business, enter into the inquiry as to the reasonableness of a specific rate, all of which would be excluded from consideration if insufficiency in the aggregate were held to be controlling.

In this case it may be that the plaintiff will receive insufficient returns on its entire intrastate business under the present schedules and the reduced passenger rate. This will or will not show the confiscatory nature of the reduced passenger rates, depending upon whether or not the insufficiency is brought about in whole or in part by the fact that the returns yielded by the reduced passenger rate are too small to properly remunerate the carrier for the service performed under that rate. If the returns to the plaintiff from intrastate passenger business under the reduced rate are ample to remunerate it for the service performed, and afford a fair return to it upon the property devoted to that traffic, the plaintiff must look for redress for any insufficiency in its aggregate intrastate earnings to the other rates, which affect unfavorably its intrastate freight traffic. The passenger rates alone being the issue in this case, the reasonableness of that rate is the vital question, upon which the alleged insufficient aggregate return to plaintiff, on its entire intrastate business, is merely one among many circumstances to which the court should look. If, after considering all the pertinent facts, the court is of the opinion that the 21½-cent fare is reasonable, then the plaintiff's right to relief in this case fails, though its entire intrastate business does not yield it a fair return on the property devoted to that class of business.

The plaintiff has offered evidence tending to show separately that the 21½-cent fare will not yield it a fair return on the value of the property, which it asserts is devoted to intrastate passenger business. The defendants, on the other hand, contend that, under a proper dis-

tribution of expenses and values, the 2½-cent fare will produce an adequate return, upon the value of the property attributable to intrastate passenger business. The plaintiff's net income, over all charges, for the fiscal year of 1912, from all sources, amounted to \$565,876, which is approximately 16 per cent. on its outstanding capital stock of about \$3,500,000. The net return for that year would, after deducting all charges, except interest on plaintiff's bonds, amount to about \$1,200,000, and would pay 5 per cent. upon the total valuation of plaintiff's property, as estimated by it, of approximately \$24,000,000. The net passenger train earnings for the same year, after deducting therefrom the proportionate share of taxes on the revenue basis, were \$564,538, which would yield in excess of 6 per cent. upon the plaintiff's valuation of the property devoted to passenger business, using the method adopted by plaintiff to distribute value and expense between passenger and freight business. These figures quite clearly show that a showing of confiscation from the reduced rate depends upon whether the values and expenses are properly distributed by plaintiff's method as between passenger and freight and inter and intra state business. As to this the parties are in disagreement. The plaintiff contends that all supposed errors as to values and expenses as between inter and intra state and passenger and freight business, which may have occurred in the Louisville & Nashville Case, have been corrected in this case, and that there is an indisputable showing of inadequate return, as a result of the corrected methods. The defendants contend that errors in plaintiff's figures as to valuation and distribution still exist, and make results of its methods worthless. Such consideration of the respective contentions as the limited time allowed us permits us has been given, and still leaves our minds in a state of uncertainty as to the correct conclusion to be deduced as to plaintiff's methods of valuation and distribution and the results predicated upon them.

The following facts are indisputably shown by the record bearing upon the effect of the reduced rate on intrastate passenger earnings during the time it was in force, and in comparison with like earnings under the 3-cent fare: There has been a steady increase of passengers carried annually from 1907 to 1913, except for panic years. This applies to both inter and intra state passengers. The increase in intrastate passengers carried for the year 1912 over 1907 was 247,473, or approximately 30 per cent. The increase in intrastate passenger miles during the same period amounted to 9,061,824, or 42 per cent. The increase for 1913 in passengers over 1907 was 383,970, or 45.99 per cent., and in passenger miles 12,510,738, or 58.12 per cent. The increase in intrastate passenger revenue for the year 1912 (under the 2½-cent rate, except for 2½ months) over the year 1907 (under the 3-cent fare) was \$143,154.35, or approximately 25 per cent. For the year 1913 (under the 3-cent fare) the increase in revenue over that of the year 1907 was \$285,931, and when reduced to a 2½-cent basis, assuming that all travel was at the 3-cent fare, the increase would be \$137,167, which is in excess of 20 per cent. The plaintiff's own figures conclusively show that gross intrastate passenger earnings under the 2½-cent fare, while in force, exceeded in the year 1912 sub-

stantially all previous records of intrastate passenger earnings under the 3-cent fare, even for the most prosperous years. The plaintiff's figures for 1913 for passengers and passenger miles and for passenger revenue, after being reduced to the $2\frac{1}{2}$ -cent basis, for all travel, show a greater condition of increase. The year 1909 is the only year during the period of the $2\frac{1}{2}$ -cent fare that shows less gross intrastate passenger earnings than the year 1907, the most prosperous year under the 3-cent fare. The year 1910 shows approximately equal gross intrastate passenger earnings with those of 1907, though the fare was half a cent less. The years 1911, 1912, and 1913 (the latter after reduction to the $2\frac{1}{2}$ -cent basis) show very substantial increases on gross intrastate passenger revenue over that of 1907. If the 3-cent fare yielded plaintiff reasonable returns on intrastate passenger business in 1907, then it follows that the $2\frac{1}{2}$ -cent fare yielded reasonable returns during the years 1911, 1912, and would have yielded reasonable returns during the year 1913 if in force, unless the plaintiff was entitled to a greater percentage of return during those years than it was in 1907, or unless it cost the plaintiff so much more to earn the returns for those years than it did to earn the return for the year 1907, that, while the gross return was greater, the net was less than in 1907.

For the reasons heretofore assigned, we cannot disabuse our minds of the opinion that the 3-cent fare was reasonable to the carrier in 1907, and that the returns yielded by it afford proper bases of comparison with the returns yielded by the $2\frac{1}{2}$ -cent fare, in testing the reasonableness of the $2\frac{1}{2}$ -cent fare while in force, and now, if restored. As the $2\frac{1}{2}$ -cent fare produced, while it was in force, and would still produce if now in force, larger returns to the plaintiff than the 3-cent fare did while it was in force, the holding by us that it was reasonable necessarily implies the reasonableness of the $2\frac{1}{2}$ -cent fare, subject to the qualifications just stated.

It is quite clear that the plaintiff could not complain of a reduced rate, if the effect of it was to stimulate traffic to the extent of making up, by the increased travel due to stimulation, the loss in revenue from the reduction in rate that would otherwise have resulted. A substantial part of the increased travel, after the $2\frac{1}{2}$ -cent rate became effective, however, was doubtless due to causes other than stimulation from the reduction. The plaintiff claims that it is entitled to the benefit of all the increase not due to stimulation, free from legislative interference. It is, as against such interference, only entitled to it, if the increased returns do not yield the plaintiff a fair return on the property devoted to the class of business from which the earnings are derived. If the 3-cent fare, when in force, was reasonable, and the amount yielded by it was less than that yielded afterwards by the $2\frac{1}{2}$ -cent fare, when in force, or that would be yielded now by it if restored, then confiscation would be shown to result from its restoration only upon a showing of changed conditions, then and now.

[3] It is claimed that the plaintiff in its pioneer years received either no return or a less than a fair return for the service rendered, and upon the property devoted to the public use, and should be per-

mitted a greater return now, to compensate for prior losses. If the 2½-cent fare will yield a reasonable return to the carrier at present, we do not think that it can be said to be confiscatory, because it fails to yield in addition an amount for the purpose of recouping prior losses. The distribution of the increment due to increased population in the tributary territory and to increased density of traffic is, as between the carrier and its patrons, a matter of legislative policy, not to be controlled by the courts, unless less is left to the carrier than a fair return for the service rendered and the property employed at the time the court is called upon to act.

[4] The contention of the plaintiff that estimates should be made over a series of years rather than from a single year—that since some years are lean in returns and some fat, the only fair criterion is the average—is a reasonable one. The returns relied upon by the court under the 2½-cent fare are not for one year alone, but for each of the years 1910, 1911, and 1912, and the reduced returns for 1913. With these years' returns for the year 1907, a year of unexcelled prosperity, are compared. The returns for a series of years before and after 1907, instead of for that year alone, would be more favorable to the 2½-cent fare.

It is also contended that the comparison is between gross earnings under the two rates respectively, and that the net returns to the carrier is the test of reasonableness, as is undoubtedly the case. The record fails to show that the increased travel was handled at any considerably increased cost. The increase in train miles in the later period was substantially altogether the result of two additional trains that passed over the plaintiff's railroad during the night, and were destined to accommodate interstate traffic almost exclusively. The old trains would have well accommodated the intrastate traffic. The record also shows that the cars in intrastate trains up to 1909 were not filled to their capacity, and there is no satisfactory showing of an increase of car miles thereafter, caused by increased intrastate travel. The additional terminal and accounting expenses could not be considerable, and its amount does not satisfactorily appear. We do not think that the record shows that the increased travel since 1907 was handled at such an increased expense as to leave the net returns below the remunerative point, because of it.

It is also contended that the cost of operation has increased since 1907, because of higher wages, higher prices for material, and increased taxes, and that net returns are rendered less in proportion thereby. If the record showed that the increased gross intrastate passenger returns are now reduced in the net, below the remunerative point, because of increased cost of passenger operation, the reduced rate would be thereby shown to be unreasonably low to the carrier. There is no separate showing of the amount of the increase on the passenger operation, due to increased wages, prices, and taxes, or that the increased gross intrastate passenger earnings were reduced thereby so that the net return failed to be properly remunerative to the plaintiff. By the methods of distributing expense and value of property, as between inter and intra state passenger business, adopted

by plaintiff, the returns upon plaintiff's entire intrastate business, and by inference from the claimed equal or greater cost to earn a dollar in passenger business than in freight, upon its intrastate passenger business, are shown to be inadequate. There is a table of percentage of operating expenses to gross revenue during a period of years, showing increasing ratios. There is no showing of the effect of the increase in wages, prices, and taxes upon net receipts from its intrastate passenger traffic. In the absence of a specific showing of the amount and effect of such increased cost of passenger operation on the plaintiff's net returns from its intrastate passenger traffic, we cannot reach the conclusion that otherwise adequate gross intrastate passenger returns are reduced below the point of confiscation by increases in the cost of operation generally, as shown by increasing ratios.

Our conclusion is that the 3-cent fare was reasonable when in force; that the gross returns under the $2\frac{1}{2}$ -cent fare did, while it was in force during average years, and if it was now restored would, exceed the returns under the 3-cent fare, and that no valid reason, either because of changed conditions or increased cost of operation, appears in the record with sufficient certainty, for holding that intrastate passenger returns, held by us to be adequate during the period of the 3-cent fare, should be held inadequate now.

Our conclusion is that, if the plaintiff's entire intrastate business in Alabama was unremunerative during the period of the $2\frac{1}{2}$ -cent passenger fare, it must, so far as this record shows, have been due to its freight rather than to its passenger traffic. In this conclusion we are fortified by the plaintiff's statement, appearing as exhibits to the supplemental bill (G. W. L. 4 and 7), that during the period from 1906 to 1912, inclusive, the plaintiff suffered a loss on its entire intrastate business in Alabama in the aggregate of \$235,074.71, and averaging \$33,567.39 each year for the seven years, and that, adopting plaintiff's methods of distributing expense and value, there was during the same period a net operating profit on its intrastate passenger business ranging from \$44,489.54 in 1906 to \$238,084.06 in 1912, and averaged each year for the seven-year period \$156,407.99. The responsibility for any loss on intrastate business that may exist, as between freight and passenger traffic, would seem to be located on the freight traffic by these statistics, as against any general statement in the record that it costs as much or more to earn a dollar of revenue in the passenger than in the freight traffic. If a deficiency in intrastate earnings has existed during the seven-year typical period, it is due to the freight rather than the passenger rates in force during that period.

It is true that this case is not to be prejudged by our decision in the Louisville & Nashville Case, and yet the conditions upon the two railroads may be compared, since, if the traffic conditions on the plaintiff's railroad are more favorable to the lower rate than they are on the Louisville & Nashville Railroad Company, unless we are to repudiate our decision in that case, the comparison would result in sustaining the reasonableness of the $2\frac{1}{2}$ -cent fare, as applied to the plaintiff. The plaintiff's line consists of approximately 210 miles of track, no substantial part of which consists of branches. For the fiscal year of 1912,

passenger miles per mile of road on plaintiff's road were three times those on the Louisville & Nashville railroad; passengers per mile of road were more than $2\frac{1}{2}$ times greater on plaintiff's road than on the Louisville & Nashville; passenger train revenue per mile of road was more than $2\frac{1}{2}$ times larger on plaintiff's road than it was on the Louisville & Nashville; passenger train revenue per train mile was 25 per cent. greater on plaintiff's road. Gross operating revenue and net operating revenue, per mile of road, on business of all classes, were approximately three times larger on plaintiff's road than upon the Louisville & Nashville. These figures show a much denser traffic on plaintiff's road than upon the Louisville & Nashville. Other conditions being substantially the same, if a $2\frac{1}{2}$ -cent fare was reasonable on the Louisville & Nashville system, it would be all the more reasonable for the plaintiff's railroad. It is said, however, that conditions are not the same; that the original cost of plaintiff's road, owing to the character of the country through which it runs, was much greater, and that the cost of operation for like reasons is higher. Comparative figures as to the cost of passenger operation are not supplied. We do not doubt that the nature of the country traversed by plaintiff's railroad renders operation more costly and original construction more expensive. There is, however, so marked a difference between the density of traffic on plaintiff's road and that of the Louisville & Nashville that it seems difficult to avoid the conclusion that a rate which the Louisville & Nashville could endure without confiscation could be as well or better endured by the plaintiff.

Our conclusion is that, though it may have required a 3-cent rate to produce adequate returns to plaintiff during and prior to 1907, the country along its line of road has expanded so much since that period, as shown by the plaintiff's passenger earnings (especially its intrastate earnings), that a 3-cent fare is now shown to be no longer necessary to the plaintiff, and we are induced to believe that the increased earnings, being due, as appears from the record, to the permanent settlement of the country, as well as to the return of prosperity, will continue. At least the probability of permanency is so great as that we would not feel justified in disturbing the action of the commission while the increase still continues, and in advance of the final hearing. If, upon the final hearing, there is a showing of a decline in plaintiff's passenger earnings, under the lower rate, it will then be time enough to enjoin the enforcement of the commission's order, upon proper showing of confiscation. Pending the final hearing, the application for a temporary injunction is denied.

NILES, District Judge (concurring). [5] It is elementary that preliminary or temporary injunctions should only issue in cases of extreme urgency, where the right is clear, and where considerations of the relative inconvenience is strongly in complainant's favor, and as is laid down in 22 Cyc. 746:

"An injunction, whether temporary or permanent, cannot as a general rule be sought as a matter of right, but its granting or refusal rests in the sound discretion of the court under *the circumstances of the particular case*. Especially is this the rule in the case of a temporary injunction, where the

granting of the injunction depends upon *the determination of questions of fact and the evidence is conflicting*. This discretionary power, however, is not arbitrary and unlimited, but must be exercised reasonably and in harmony with well-established principles. And when the case made out by the complainant is perfectly clear, and he has complied with all the requirements of the law for the issuance of an injunction, he is entitled to the injunction as a matter of right."

On the other hand, the same authority limits the rule in that:

"The right asserted by complainant, however, must be perfectly clear and free from doubt, where the effect of a preliminary injunction will be more than merely the maintenance of the status quo, or where the injunction will cause defendant greater loss and inconvenience than that which will be suffered by the complainant in the absence of an injunction. In any event an injunction must be refused if the complainant's case is so doubtful that it does not appear reasonably probable that he has the right claimed, and that is being violated, *or if he does not make it appear reasonably probable that an irreparable injury is impending and will occur before the final hearing can be had.*" 22 Cyc. 753.

It is conceded that acts that will interfere with the conduct of complainant's business tending to destroy his profits, do an irreparable injury, and authorize the issuance of a preliminary injunction, and especially that the enforcement of laws fixing unreasonably low rates for service by quasi public corporations will be restrained in proper cases.

Complainant states that:

"The general rule of equity is that, on an application for a temporary injunction, it need not appear that the complainant will certainly be able to establish its claim, but only that there is a reasonable ground to believe that complainant may ultimately be successful in its claim, and, further, it is not necessary that it should clearly appear that complainant will ultimately succeed; it being sufficient if he makes out a *prima facie* right." 22 Cyc. 822.

This, of course, is the rule, but the same high authority also lays it down on page 783 that the discretionary power of the court in granting or refusing a temporary injunction should be exercised with a particular view to the relative amount of inconvenience or injury to be suffered by the parties. Especially is the rule extended to the interest of the public, respecting its injury or inconvenience.

Complainant's counsel cites many authorities, among them the decisions of the United States Circuit Court of Appeals for the Fifth Circuit, as entitling complainant to a temporary injunction in this instance. These decisions, however, only emphasize and apply the general principles and rules to the particular cases under discussion, which brings us back to the basic principle of injunctions that the "granting or refusal rests in the sound discretion of the court *under the circumstances of the particular case.*"

[6] In the instant case, the Railroad Commission of the State of Alabama, under its authority, ordered complainant, South & North Alabama Railroad Company, to reduce its passenger rates between all points in the state of Alabama from 3 cents per mile to 2½ cents per mile, on the ground that the 3-cent rate was *unreasonable*. Eliminating all other contentions of complainant as shown by its bill, which are unnecessary to be discussed for the purpose of this decision, the

issue here presented is whether the sought to be established rate of $2\frac{1}{2}$ cents is an unreasonable one.

Complainant is, without doubt or dispute, entitled to a fair return upon the reasonable value of its property devoted to the public service in Alabama. If the reduction of one-half cent per mile in its passenger rates operates to prevent a fair return on its capital or value of its property in Alabama, then complainant is entitled to the benefit of the protection of the courts.

A 3-cent passenger rate had been heretofore charged by complainant. This rate, complainant admits, is fair, reasonable, and just, though such rates between points in Alabama (quoting complainant)—

"have never yielded as much as a fair, just return on the value of complainant's property within the state of Alabama devoted to the service."

To obtain the extraordinary relief sought herein, complainant must clearly establish the fact that its business in the state of Alabama, based upon a 3-cent rate, is an unprofitable one—that is, one not yielding a fair return on its *value*—and that a reduction of its passenger rate of one-half cent per mile would be such a substantial factor in further rendering its business an unprofitable one as to be confiscatory.

At the very outset the question arises as to the value of complainant's property upon which it is entitled to a reasonable and fair return. What is the *value* of the total investment of complainant? What is the amount of its earnings, freight and passenger? What proportion of expenses is charged to each department, and how finally is a result obtained which will establish the reasonableness or unreasonableness of its passenger rate? The valuation of the property, therefore, must be first considered. If an excessive valuation appears, then all estimates based thereon are necessarily open to attack, and cannot show true conditions.

It was held in Minnesota Rate Case that present value is only to be considered, but that:

"The cost of reproduction method is of service in ascertaining the present value of the plant when it is reasonably applied, and when the cost of reproducing the property may be ascertained with a proper degree of certainty."

Complainant estimates the total value of its property on June 30, 1912, at \$24,031,001.58. Defendants object to this valuation upon the basis of cost to reproduce all the physical property, less the amount of depreciation, as being excessive by from 4,000,000 to 5,000,000. Complainant's estimate included the value of its franchise estimated at about 4,000,000, which was arrived at by taking the value as assessed by the State Tax Commission, which was supposed to be 60 per cent. of the full value, and raising it to 100 per cent, thereby improperly (as defendants contend) adding nearly 2,500,000 to its estimate. Other items objected to were: (1) Interest during construction; (2) the value of the right of way; (3) addition of cost for "seasoning;" (4) apportionment of equipment to complainant by Louisville & Nashville Railroad; (5) material and supplies, and other minor items.

The court has carefully read the testimony and examined the record on this point, and it would seem the complainant has given itself the

benefit of every doubt in arriving at its valuation, and thus has placed a "railway value" on its property when present value should govern.

Aside from this question, however, taking the valuation as fixed by complainant upon which it should be allowed a reasonable return, has complainant shown that the net passenger earnings on a 3-cent basis are not a fair return on the value of its property? It must establish this proposition before a $2\frac{1}{2}$ -cent rate could be claimed as confiscatory. Adopting its own valuation and its method of apportionment of passenger earnings and expenses, the court fails to see wherein a $2\frac{1}{2}$ -cent rate would be so unreasonable, arbitrary, and unjust as to entitle complainant to the injunction as prayed. The volume of business of complainant as shown by the record is increasing, it is enjoying a growing business. It is beyond dispute that the more business of this character done, the less the expense, for the reason that as passenger trains have to be run on schedule time, a certain equipment used, a train of coaches crowded with passengers can therefore be hauled and operated at the same expense required to operate a train of coaches with few or no passengers. Under the proof, under existing conditions, considered in the light of past experience, with both a $2\frac{1}{2}$ -cent rate and a 3-cent rate in effect, it is difficult to conceive that a reduction in its rate of one-half cent alone could or would operate to that extent as to render a fair return impossible on complainant's property devoted to passenger business.

On the theory that complainant, by reason of a $2\frac{1}{2}$ -cent rate, would lose \$92,500 annually, with its passenger business steadily increasing with the country's development, if for no other reason, the future for it would indeed have a melancholy tinge. Passenger business would have to be discouraged, in fact refused, or bankruptcy would surely follow, graphically illustrating the paradox, "The more you win, the more you lose." Certainly no hindrance or obstruction should be ever placed in the way of a transportation company, upon which the development of a country's resources so much depend. A vital necessity exists for them, and unjust and discriminatory laws enacted against them should be frowned upon, and public sentiment be directed to the community of interest and interdependence, one upon the other. Railroad companies should be allowed as a matter of simple right, as they are entitled under the law, to a reasonable return on their capital, and the court has most carefully considered this case, with this idea in mind, but is unable from the record to sustain complainant's contentions on the application for a temporary injunction.

Great stress has been laid in this case to the fact that, since August 12, 1913, a $2\frac{1}{2}$ -cent rate has been in force on the Louisville & Nashville Railroad Company, which company is principal owner and operates complainant's railroad. An application was made by the Louisville & Nashville Railroad Company for an injunction pendente lite to restrain the enforcement of an order of the Railroad Commission of Alabama, establishing a $2\frac{1}{2}$ -cent rate for that road. This application was heard before Circuit Judges PARDEE and SHELBY, and District Judge GRUBB, who held that the $2\frac{1}{2}$ -cent rate was not confiscatory, and the injunction was denied; that because of the relations of the Louisville & Nashville Railroad Company and this complainant,

no rate which had been held not confiscatory as to the Louisville & Nashville Railroad Company could be, when applied to complainant, a mere division of the Louisville & Nashville Railroad Company; that because the Louisville & Nashville Railroad Company accepted the 2½-cent rate for itself and all its other branch lines in Alabama, and because, too, the density of traffic, both passenger and freight, of the complainant is enormously greater than on the aggregate other Louisville & Nashville Railroad Company Lines in Alabama, and that of any other road in Alabama, this complainant should not ask nor expect a higher passenger rate than its less fortunate competitors.

It was not considered necessary to discuss the Louisville & Nashville Railroad Company Case in order to arrive at a conclusion in this case, though in passing, the Louisville & Nashville Railroad Company Case presents many similar points of controversy, and the court is in full accord with that decision.

For the reasons advanced herein, the court is of opinion that the temporary injunction should be denied, and the restraining order dissolved.

UNITED STATES v. REID et al.

(District Court, D. Delaware. December Term, 1913.)

No. 3.

1. SEAMEN (§ 34*)—OFFENSES—MUTINY—ELEMENTS.

Cr. Code, § 292 (Act March 4, 1909, c. 321, 35 Stat. 1146 [U. S. Comp. St. Supp. 1911, p. 1676]), provides that whoever, being of the crew of a vessel of the United States on the high seas, unlawfully confines the master or other commanding officer thereof, shall be punished; and section 293 declares that whoever, being of the crew of a vessel of the United States on the high seas, unlawfully and with force usurps the command of such vessel from the master or other lawful officer in command thereof, or deprives him of authority and command, or prevents him in the free and lawful exercise thereof, is guilty of mutiny. *Held*, in order to warrant a conviction under either of such sections, it must appear that the offense was committed on the high seas on a vessel of the United States, that defendants were members of the crew, and that the person so deprived of command was the master of the vessel or officer in command on board thereof, and while so in command defendants or some of them feloniously confined him and deprived him of the free and lawful exercise of his authority, and also that defendants were apprehended when first brought into the district where the prosecution was instituted.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 220-231; Dec. Dig. § 34.*]

2. CRIMINAL LAW (§ 561*)—INSTRUCTIONS—REASONABLE DOUBT.

While a person charged with crime cannot be convicted, except on proof beyond a reasonable doubt, such doubt must be one based on reason, or which is reasonable in view of all the evidence, and is not a mere whimsical, arbitrary, or purely speculative doubt, or a mere conjecture or guess.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. CRIMINAL LAW (§ 554*)—TESTIMONY OF ACCUSED—CONSIDERATION.

While accused may testify in his own behalf, his testimony should be weighed in accordance with his interest and the question of its inherent probability or improbability, and as to whether or not it has been corroborated or contradicted by other evidence in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1255, 1256; Dec. Dig. § 554.*]

4. SEAMEN (§ 34*)—MUTINY—GROUNDS.

Profanity or the use of opprobrious epithets, inconsiderate, insulting, rough, and improper treatment on the part of the officers of a vessel, and occasional violence, not of an unusual character, or the omission to furnish the crew with full allowances required by law, will not justify a mutiny, which can only be defended in case continued service will probably result in loss of life, limb, or other grave bodily harm, in which case the crew may take such action without unnecessary violence as will protect themselves and provide in a reasonable way for their safety, although it may involve placing physical restraint on the master.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 220-231; Dec. Dig. § 34.*]

5. COURTS (§ 352*)—FEDERAL COURTS—TRIAL—INSTRUCTIONS—EVIDENCE.

While a federal court is entitled to call to the jury's attention portions of the evidence which may aid them in arriving at a just verdict, it is nevertheless the duty of the jury to determine for itself the questions of fact, giving the evidence only such weight and effect as they consider it entitled to.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926-932; Dec. Dig. § 352.*]

6. CRIMINAL LAW (§ 423*)—DECLARATIONS—MEMORANDUM BOOKS.

In a prosecution of members of a crew of a vessel for mutiny on the high seas, so-called logs, kept by two of the defendants, purporting to recount the occurrences on the ship after leaving port and until the mutiny, were admissible only as against them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 989-1001; Dec. Dig. § 423.*]

7. CRIMINAL LAW (§ 857*)—TRIAL—VERDICT—DELIBERATION OF JURORS.

Where a majority of the jurors, after deliberation, differ from the minority, it is proper for the latter to review the grounds of their own conclusion, in order, if possible, that a verdict may be reached; but no juror should acquiesce against his individual judgment in the conclusion reached by his fellows, whether they constitute a majority or a minority of the whole body.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2054, 2055; Dec. Dig. § 857.*]

John David Reid and others were indicted for mutiny on the high seas. Verdict, Guilty.

John P. Nields, U. S. Atty., of Wilmington, Del.
J. Frank Ball, of Wilmington, Del., for defendants.

BRADFORD, District Judge (charging jury). The defendants in this case, John David Reid, Richard Williams, Albin Anderson, Joseph Horsfall, John Edlin, Charles H. Lyons and William Joyce have been indicted for alleged violation of sections 292 and 293 of the criminal code of the United States. The indictment originally contained nine

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

counts, of which only two, namely, the fifth and ninth are open for your consideration, the district attorney having abandoned the others. Section 292, so far as pertinent to this case under the two counts remaining open for your consideration, provides, in substance, that "whoever, being of the crew of a vessel of the United States, on the high seas, * * * unlawfully confines the master or other commanding officer thereof" shall be punished as in that section set forth. Section 293, so far as pertinent to this case under the above mentioned two counts, provides, in substance, that "whoever, being of the crew of a vessel of the United States, on the high seas, * * * unlawfully and with force, * * * usurps the command of such vessel from the master or other lawful officer in command thereof, or deprives him of authority and command on board, or * * * prevents him in the free and lawful exercise thereof, * * * is guilty of a revolt and mutiny," and shall be punished as in that section set forth. The fifth count charges, in substance, that the defendants on the twenty-fifth day of October, 1913, on board of a vessel of the United States called Manga Reva, then bound on a voyage from Philadelphia, Pennsylvania, to San Francisco, California, while on the high seas, namely, on the Atlantic Ocean, the defendants being of the crew of the Manga Reva feloniously did unlawfully confine Henry C. Townsend, the master of the said vessel, and being the officer in command and on board thereof, and that after the commission of the above mentioned offense the defendants were, on the eleventh day of November, in the same year, first brought into the district of Delaware and then and there were apprehended.

The ninth count charges, in substance, that the defendants, on the twenty-fifth day of October, 1913, on board the said Manga Reva, then bound on the above mentioned voyage from Philadelphia to San Francisco, while on the high seas, as above mentioned, the defendants being of the crew and on board of the Manga Reva, feloniously did unlawfully and with force prevent Henry C. Townsend, the master of the said vessel, and on board thereof, in the free and lawful exercise of his authority and command as such master on board the said vessel; and that after the commission of the above mentioned offense the defendants were on the eleventh day of November, 1913, first brought into the district of Delaware and there were apprehended.

[1] In order to warrant a conviction of the defendants, or any of them, under both or either of the counts of the indictment now remaining open, all of the essential ingredients of the offense or offenses therein charged must have been established to your satisfaction beyond a reasonable doubt. To justify a conviction under either of the counts it must appear to your satisfaction that the offense therein charged was committed on the vessel Manga Reva on the high seas, namely, the Atlantic Ocean, and further, that at the time of the commission of the alleged offense the Manga Reva was a vessel of the United States. The uncontradicted evidence is that the Manga Reva was at the time of the commission of the offenses so charged an American vessel, and further that she was at that time on the high seas, namely, on the Atlantic Ocean. It must also appear to your satisfaction, in order to

justify a verdict of guilty against the defendants, or any of them, under both or either of the above mentioned two counts, that they or he were or was at the time of the commission of the alleged offense or offenses members or a member of the crew of the Manga Reva.

It appears from the uncontradicted evidence that all of the defendants signed the shipping articles, in due form of law in all respects, in Philadelphia before the commencement of the voyage in question and became members of the crew of the Manga Reva. It is necessary, also, in order to find a verdict of guilty against all or any of the defendants under the fifth count that you should be satisfied from the evidence that Henry C. Townsend was the master of the Manga Reva and the officer in command on board thereof, and that, while the said Townsend was master of the said vessel and in command thereof on board thereof, the defendants or some one or more of them feloniously did unlawfully confine the said Townsend. The evidence is uncontradicted that Townsend was in command of the vessel and on board of her when the mutiny occurred October 25, 1913, whereby the defendants, or some of them, did confine him.

It is necessary, also, in order to find a verdict of guilty against all or any of the defendants under the ninth count that you should be satisfied from the evidence that Henry C. Townsend was the master of the Manga Reva and on board thereof, and that the defendants or some one or more of them feloniously did unlawfully and with force prevent the said Townsend while master on board of the said vessel, in the free and lawful exercise of his authority and command as such master on board the said vessel. As before stated, the evidence is uncontradicted that Townsend was in command of the vessel and on board of her when the mutiny occurred October 25, 1913, whereby the defendants, or some one or more of them, did with force prevent him while so master and on board of the vessel in the free exercise of his authority and command as master so on board.

It is further necessary to justify a verdict of guilty against all or any of the defendants under both or either of the two counts remaining open for your consideration, that after the commission of the offense charged they or he were first brought into the district of Delaware, and then and there were or was apprehended. This appears from the uncontradicted evidence.

[2] The law presumes that persons charged with crime are innocent until they are proved by competent evidence to be guilty. This presumption stands as their sufficient protection unless it has been overcome by the evidence in the case, taken as a whole, proving their guilt beyond a reasonable doubt. To justify a verdict of guilty the evidence in the case as a whole must be such as to exclude every reasonable hypothesis but that of the guilt of the defendants, or one or more of them, as charged in the indictment; and from this it, of course, follows that if the jury find that all the evidence in the case when taken together is as compatible with the theory of innocence as with the theory of guilt there should be an acquittal. The commission of a criminal offense can be proved by circumstantial evidence as well as by direct evidence, provided the circumstances proved, together with all reasonable inferences to be drawn from them, are such as to leave no

reasonable doubt in the minds of the jury that the defendants, or one or more of them, are or is guilty. You are to take into consideration all the evidence in this case, both direct and circumstantial, documentary and oral, together with all reasonable inferences to be drawn from that evidence, in arriving at a conclusion.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. It is not a whimsical, arbitrary or purely speculative doubt, nor a mere conjecture or guess. If after an impartial comparison and consideration of the evidence you can candidly say that you are not satisfied of the defendants' guilt you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence you can truthfully say that you have a fixed conviction of the defendants' guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt, and in that case should find a verdict of guilty. Absolute certainty is not required for such a verdict. Proof beyond a reasonable doubt as above defined is sufficient.

[3] The law permits a defendant at his own request to testify in his own behalf. The defendants here have availed themselves of this right. Their testimony is before you and you must determine how far it is credible. The deep personal interest which they have in the result of the case should be considered by you in weighing their evidence and in determining how far, or to what extent, if at all, it is worthy of credit. In considering the credibility of or weight you should attach to the testimony of the defendants you should regard, among other things, the inherent probability or improbability of their statements, and to what extent they have been corroborated or contradicted by other evidence in the case whether documentary or oral. Where a witness has a direct personal interest in the result of a case, especially of a criminal case, the temptation is strong to color, pervert or withhold the facts.

[4] We live in an age strongly characterized by mawkish sentimentality and disregard for law, when sound judgment and the sense of justice only too often yield to undeserved sympathy for those convicted or accused of grave crime; and it is important that juries and others charged with the administration of the criminal laws of the land should as far as possible divest themselves of any such tendency and, while according to those on trial for alleged crime the full legitimate force of the presumption of innocence, nevertheless, when guilt is established beyond a reasonable doubt, at once vindicate the majesty of the law and promote the enforcement of the principles of public policy. These remarks are especially applicable in the case of alleged offenses in their nature calculated to be so destructive of life and property and injurious to commerce as mutiny on the high seas. The safety of the lives of the crew and of the officers, as well as of the vast property afloat in the commercial marine, largely depends upon strict discipline enforced by masters of vessels, and the obedience of the crew to their orders. There must be no insubordination, no disobedience, no violence, toward those who by law and contract are to rule and not be ruled on board the ship. This broad principle is subject to the

qualification dictated at once by humanity and common sense that where during the voyage unlawful acts or threats of the master produce a reasonable conviction existing at the time of a mutiny in the minds of the crew that continued service on the vessel will result in loss of life, limb or other grave bodily harm to them, they may take such action without unnecessary violence as to protect themselves against him and provide in a reasonable way for their safety, although it involve placing physical restraint upon him. But, as above indicated, there must be cause of the most imperative nature to justify a resort to mutiny on the high seas. Profanity or the use of opprobrious epithets will not suffice. Nor will the circumstance that the officers of a ship may have been merely rude, rough, insulting and inconsiderate afford such justification; nor occasional violence not of an unusual character on the part of the officers or an omission to furnish to the crew as required by law the full allowance, according to the measure prescribed in the shipping articles, of wholesome food and water to which they may be entitled.

For the furnishing of insufficient or unwholesome food, or for unjustifiable blows, or rough and abusive treatment suffered by the crew at the hands of the master, not sufficient to reasonably create in their minds a conviction that further association with him on the vessel would result in loss of life or limb or other grave bodily harm, the statutes of the United States provide for ample redress to the seamen upon the arrival in port of the vessel. Further, before resorting to a mutiny, whether for insufficient food or water, or other cause not *immediately* destructive of life or limb, or *immediately* productive of other grave bodily harm, it is incumbent upon those who are dissatisfied, to make, if practicable, application in a quiet and orderly manner to the master or other officer in command of the ship for a redress of their supposed grievances, and to afford him a fair opportunity of considering the subject and taking proper action in the premises. Without making application and affording such an opportunity under such circumstances there can be no justification for precipitating a mutiny, which might otherwise be avoided. You are to determine whether it was or was not practicable for the defendants or some of them in behalf of the rest to make such an application to Captain Townsend, and if so, whether they performed their duty in that regard. A crew must exhaust all reasonable efforts for relief from alleged hardships before resorting to mutiny; otherwise there can be no justification for it either in law or common sense. Mutiny involves too grave consequences to be lightly and unnecessarily indulged in.

[5] While the court will bring to your attention some of the evidence on both sides you are instructed that you are not in the least bound by anything which has been or shall be stated by the court in that connection, but are to exercise your own independent judgment as to its force and effect. While it is my duty to call to your attention certain portions of the evidence which in the judgment of the court may aid you in arriving at a just verdict, you are to give to the evidence only such weight and effect as you consider it entitled to. It is for you to determine whether the testimony of the defendants and certain other members of the crew as to shortage of food and water,

abuse, rough usage and violence on the part of the captain and first mate is literally or substantially true, or, on the other hand, a plausible fabrication concocted for the purpose of shielding them from the consequences of unlawful and criminal action in the seizure of the *Manga Reva* and her officers.

It is fair to assume that the defendants would not have engaged in the mutiny if they had been satisfied with the condition of things and course of events on the *Manga Reva*. But this assumption leaves open the question whether they had any justifiable cause for embarking on such a perilous and desperate enterprise as the seizure of the ship, confining and putting the master in irons and stripping him of his lawful authority. A mutiny on the high seas is a matter of gravest moment, fraught with peril to life, ship and cargo, and can be excused or justified only by the most exigent circumstances. In considering the contention of the defendants that there was justification for the mutiny you are met at the threshold with the question of inherent probabilities. The inherent probability or improbability of the truthfulness or correctness of oral evidence is always proper to be taken into account by the jury, and where the oral evidence is conflicting the consideration of such probability or improbability is often of much importance.

You may well consider whether it is or is not probable that the master of such a ship as the *Manga Reva* should find it to his interest, by starvation, famishing or violence to incapacitate his crew for the successful accomplishment of the voyage; and whether any excessive stinting of the crew with respect to drinking water and food would or would not have been a penny-wise and pound-foolish course for the master or owners of the vessel to pursue. There is uncontradicted evidence that the *Manga Reva* left the port of Philadelphia amply provided with food and water for the contemplated voyage; and the testimony, not only of the captain, but of a number of other witnesses, touching the quality of the food is fresh in your recollection. There is also uncontradicted evidence that neither the food nor the water belonged to the captain of the vessel and that he had no direct pecuniary interest in decreasing the quantity of food and water for the use of the defendants.

The laws of the United States provide that it is unlawful to reduce during a voyage the allowance of provisions which any seaman is entitled to receive under the schedule forming part of the shipping articles, except under circumstances not pertinent in this connection; and the criminal code of the United States provides that the master of an American vessel on the high seas who withholds from its crew suitable food and nourishment or inflicts upon them any cruel and unusual punishment shall be fined not more than \$1,000 or imprisoned not more than five years, or both. With this highly penal provision staring him in the face and with an abundance of food and water on the *Manga Reva*, if such you find to be the fact, is it or not probable that he should have stinted the crew as testified to by or on behalf of the defendants? Under these circumstances it will be for you to determine whether the defendants engaged in the mutiny because they had a reasonable conviction at the time that otherwise they would suffer loss of life or limb or grave bodily harm, or for some other reason not acknowledged by

them, and if so, what that reason was. It appears from the testimony given by some of the defendants that they were disposed to resent the opprobrious epithets applied to them by the officers of the Manga Reva, and there is also testimony that a considerable proportion of the crew of that vessel consisted of green-hands, a majority of them being foreigners and a number of them being unable to speak or understand the English language. There is also evidence to the effect that the defendants had received an allotment of wages in advance more than covering the period from their signature of the shipping articles to the day of the mutiny. It is fair that you should consider these circumstances in connection with the question whether it is or is not more probable that their motive in engaging in the mutiny was to escape a disagreeable service without loss of wages, rather than fear of loss of life or grave bodily harm from continuing on the voyage. The defendants have unqualifiedly testified, in substance, that such an abusive and violent course was pursued toward them by the officers of the Manga Reva up to the time of the mutiny, and that they were so stinted in food and water as to create a firm belief on their part that their continuance on the voyage would result in their death or grave bodily harm, and that they made prior to the mutiny complaint of their grievances to the master of that vessel.

[6] In connection with this testimony by the defendants and sundry other members of the crew, it is proper that you should bear in mind the two so-called logs kept by the defendants Joyce and Horsfall respectively, which purported to recount the occurrences on the Manga Reva after leaving Philadelphia and until the mutiny. It is proper that I should state to you, as was stated to the counsel at the time they were offered, that these two small books were admitted in evidence only as against the two defendants who kept them as containing admissions on their part as to the condition of things on the Manga Reva. While they are evidence only as against those who made the entries therein, still the court has no hesitation in charging you that if you find from all the evidence in the case that they contain a full recital of the grievances or grounds of complaint of the defendants such grievances or grounds of complaint furnish no excuse or justification for the commission of the offenses charged in the fifth and ninth counts of the indictment. And so far as the testimony of Joyce and Horsfall is concerned it is for you to determine how far it is affected or discredited, if at all, by the entries made by them. The jury are at liberty to take into consideration the demeanor and language of the defendants on the witness stand in connection with the evidence in the case as bearing on the question how far mere abusive language and rough handling would cause them to fear for their lives. It is hardly necessary to state that the foreign seamen on board the Manga Reva were just as much, but no more, entitled to rights and protection under the law as the American seamen. No discrimination can be made by you between them on account of mere nationality.

It is unnecessary to refer save incidentally to the evidence of Lee Wallace who testified to his participation in the mutiny, for the reason that his evidence was confined to a statement of the manner in which the captain and officers of the Manga Reva were seized and dis-

posed of on that occasion; there being no substantial conflict between Wallace and the defendants as to the points covered by his testimony.

While it is the province of the court to deal with the law of the case, it is exclusively your province to pass upon the facts. It is your duty to consider the evidence in the case as a whole and not give undue importance to minor points or portions of the evidence taken piecemeal. A criminal case involving much testimony and many facts should not be decided upon the probability or improbability of any one point singled out of the evidence, but a proper decision requires due consideration to be given to all the evidence, direct and circumstantial, in the case. You are the sole judges of the credibility of witnesses and of the weight to be given to their testimony, and the effect of the evidence. And I again say to you that nothing I have said touching the evidence in this case, or inferences to be drawn therefrom, should in any manner affect your decision, excepting in so far as it may commend itself to your judgment; you being the exclusive and uncontrolled judges of the facts.

The court has been requested to give you instructions on a number of points of law in the language employed by the counsel in the case. The charge of the court embraces in substance all the propositions suggested by counsel in so far as those propositions are, in the opinion of the court, properly applicable to the case.

[7]. Your verdict should represent the opinion of each member of your body, after an intelligent and conscientious comparison and consideration in the jury-room of the views of the individual jurors. Your investigation of the evidence should be marked with due deliberation, and your minds should remain open to conviction by arguments which commend themselves to your judgment. The very object of the jury system is to secure unanimity through comparison of the views and through arguments among the jurors themselves. If a large majority of the jurors after deliberation in the jury-room differ in their conclusion with the minority, it is proper for those composing such minority, in view of the fact of such difference, to review the grounds of their own conclusions in order that, if possible, unanimity may be reached in accordance with the principles of law heretofore laid down. But no juror should acquiesce against his individual judgment in the conclusions reached by other jurors, whether constituting a majority or a minority of your whole body. For your verdict must represent the real opinion and judgment of each member of the jury. The guilt or innocence of the defendants, or of one or more of them, is to be determined by you as intelligent and conscientious men, upon the evidence adduced in this case and upon that alone. A grave and solemn responsibility rests upon you. No public clamor, no consideration of consequences which may result from your verdict, either to the government or to the defendants should be permitted in any manner to influence your deliberations or control your verdict.

If upon all the evidence in the case you are not satisfied beyond a reasonable doubt of the guilt of the defendants, or any one or more of them, there should be a general verdict of not guilty, but if upon all the evidence in the case you are satisfied beyond a reasonable doubt

that the defendants, or one or more of them, are or is guilty in manner and form as charged in the said two counts, or either of them, you should return a verdict of guilty as to them or him on the said two counts or either of them as the evidence shall warrant.

JACKSON v. CHICAGO, M. & ST. P. RY. CO.

(District Court, W. D. Washington, N. D. February 2, 1914.)

No. 2622.

COMMERCE (§ 27*)—INJURY TO SERVANT—RAILROAD CONSTRUCTION—EMPLOYERS' LIABILITY ACT.

Where plaintiff while engaged in the construction of a tunnel, to be used when completed by a railroad in interstate commerce, was injured by the alleged negligence of a railroad company, plaintiff could not recover under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), which only deals with the liability of the carrier engaged in interstate commerce for injuries sustained by its employes while engaged in such commerce, and does not apply to a railroad construction which has not yet become an instrumentality of commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

At Law. Action by L. F. Jackson against the Chicago, Milwaukee & St. Paul Railway Company. On demurrer to complaint. Sustained.

Griffin & Palmer, of Seattle, Wash., for plaintiff.

Geo. W. Korte, of Seattle, Wash., for defendant.

The following authorities are cited in support of their respective contentions: Plaintiff: *Zikos v. Ore. R. & Nav. Co.* (C. C.) 179 Fed. 893; *Colasurdo v. Central R. R. of New Jersey* (C. C.) 180 Fed. 832; *Behrens v. Ill. Cent. R. Co.* (D. C.) 192 Fed. 581; *Johnson v. Great Northern Ry.*, 178 Fed. 643, 102 C. C. A. 89; *Darr v. Baltimore & O. R. Co.* (D. C.) 197 Fed. 165; *Northern Pac. Ry. Co. v. Maekl*, 198 Fed. 1, 117 C. C. A. 237; *Thompson v. Columbia P. S. R. Co.* (D. C.) 205 Fed. 203; *Horton v. Oregon, Wash. R. R. Nav. Co.*, 72 Wash. 503, 130 Pac. 897; *Second Employers' Liability Cases*, 223 U. S. 1, 48, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. Defendant: *Employers' Liability Cases*, 207 U. S. 463, 498, 28 Sup. Ct. 141, 52 L. Ed. 297; *Pedersen v. Ry. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125; *St. Louis, S. & T. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129; *Mondou v. Ry.*, 223 U. S. 54, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Seaboard Ry. v. Duvall*, 224 U. S. 477, 32 Sup. Ct. 790, 56 L. Ed. 1171; *Lamphere v. Ry.*, 196 Fed. 336, 116 C. C. A. 156; *Zachary v. Ry.*, 156 N. C. 496, 72 S. E. 858; *Meese v. Nor. Pac.* (D. C.) 206 Fed. 222; *Johnson v. Ry.*, 196 U. S. 33, 25 Sup. Ct. 158, 49 L. Ed. 363; *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999; *Kidd v. Pearson*, 128 U. S. 25, 9 Sup. Ct. 6, 32 L. Ed. 346; *Louisville Ry. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

348, 33 L. Ed. 784; *Norfolk Ry. v. Pa.*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; *Peet v. Mills*, 136 Pac. 685, Nov. 28, 1913; *Straus v. Foxworth*, 231 U. S. 162, 34 Sup. Ct. 42, 58 L. Ed. —.

NETERER, District Judge. This is an action commenced by the plaintiff against the defendant based upon the Employers' Liability Act of April 22, 1909, in which it is alleged, in substance, that the defendant maintains a system of railways in Washington, Montana, and other states, over which it carries interstate commerce, and:

"That as a part of said system, said defendant maintains a railroad track from Rockdale in the state of Washington, to Horrick Spur in the state of Washington. That said portion of said track is maintained upon very steep grades, and around many sharp curves along and through a very mountainous country, and portions of said track are in a very great danger of being completely destroyed by slides of snow, dirt, and rock. That by reason of said conditions and locations, said track is maintained at a very great expense to said defendant, and at a great risk of the lives of the employees of said defendant, and the transportation of interstate commerce between said Horrick Spur and said Rockdale is very uncertain, dangerous, slow, and expensive, and at certain seasons of the year is greatly hampered, delayed, and interrupted, and sometimes absolutely impossible, because of the deep snow in said mountains.

"For the purpose of avoiding the dangers and delays to the transportation of interstate commerce, and escaping the heavy expense and great inconvenience of maintaining said track between the points above mentioned, and for the further purpose of facilitating and making certain and practical the transportation of interstate commerce over said line, said defendant condemned and obtained a right of way on a more direct line between said Horrick Spur and said Rockdale, and undertook and commenced the construction of a tunnel connecting its line of railroad at Rockdale with its line of railroad near Horrick Spur, and through which, when completed, the interstate commerce, heretofore carried over the circuitous, dangerous, slow, hazardous, expensive, and mountainous track between said Rockdale and said Horrick Spur, will be routed and transported to the exclusion and in the place of the present and unsatisfactory road now maintained by said defendant between said points.

"That on or about the 2d day of November, 1913, the east end of said tunnel had been advanced and driven about 400 yards into the mountain side; in advancing and driving said tunnel said defendant employed certain men, commonly known as machine men, to drill holes into the rock for the purpose of filling the same with powder, the explosion of which caused rock around said holes to be loosened and broken. Said defendant furnished said machine men for that purpose certain drill machines which weighed about 200 pounds, and which rested and stood up three straight upright supports, and to which was connected a certain tube conducting compressed air. Near the center of said tunnel and along the floor of the same, there was laid a certain narrow gauged two-railed car track, over which was transported cars containing rock and dirt removed from said tunnel. At intervals along said track were laid and maintained several switches and side tracks on which cars were placed while being loaded with rock and dirt.

"That on said 2d day of November, 1913, plaintiff, L. F. Jackson, was in the employ of the defendant as a teamster, at the agreed wages of \$3.60 per day, and was engaged in driving the horse which pulled the cars filled with dirt and rock along the track out of said tunnel. That the method provided by said defendant of removing said cars was to attach several of them together, making a train, and hitch said horse to the front car of said train by means of a chain, which permitted the cars to be pulled ahead, but which did not assist the said horse in stopping said cars, nor were there any appliances or equipment, either on said horse or cars, for the purpose of stopping said cars, it being unnecessary in the usual and ordinary operation of

said train of loaded cars to stop the same until the outer end of the tunnel was reached, where said cars were stopped by contact with other cars or an engine. That about 6 p. m. on said date, said plaintiff, while returning to the head of said tunnel with a train of empty cars, informed and notified certain drill men and machine men, who were at work about 150 yards from the head of said tunnel, and who had just removed their machine from the track to allow him to pass, that he would immediately return with a train of loaded cars, and directed them not to replace the machine upon said track, or to obstruct the same in any way until he had passed out with his loaded train. Plaintiff proceeded for about 75 yards to near the head of said tunnel, where he obtained a train of loaded cars, and proceeded to drive said horse along said track toward the outer end of said tunnel. That upon approaching and within a few feet of the point where he had passed the said drill men and machine men mentioned, he, owing to the lack of sufficient light, and because of the said track and the whole floor of said tunnel being covered with several inches of muddy water, for the first time noticed and observed that the said drill men, contrary to request and direction, had replaced the said drill machine upon the track, and the same obstructed and prevented the passage of the train of cars under his supervision, and made it necessary to stop said train immediately. That in order to stop said train, plaintiff stopped the horse pulling said train, descended from the car upon which he was riding, and, there being no brakes or other appliances furnished to stop said train, nor any means by which the horse could so do, plaintiff took hold of said car with his hands, and, bracing himself with his feet, was attempting to stop said train when his right foot was caught in a switch joint between the rail of the main track and the rail of one of the switches heretofore mentioned, unobserved by him because of the same being entirely covered with muddy water. That by reason of plaintiff's right foot being so caught in said switch, plaintiff's body was thrown violently forward, along and over said track, and the car wheels upon the left side of said car rolled over and upon his said right foot, and along his said leg, until said car wheel was near plaintiff's right knee, when said train stopped.

"That because of said car wheel rolling upon plaintiff's said ankle, foot, and leg, the flesh and muscles of the same were cut, bruised, torn, and lacerated, the tendons, ligaments, cartilage, were dislocated, sprained, crushed, bruised, and torn, made weak and sore. That said injuries caused this plaintiff great pain and suffering which he still experiences and endures, and will continue to experience and endure for a long time to come. The injuries to plaintiff's said foot and ankle, except the bruises and cuts, are permanent, and will cause his said ankle to be weak and painful, and will interfere with plaintiff's work and cause him to be lame for the remainder of his life. That by reason of said injuries plaintiff has been to date, compelled to cease work for one month, and will not be able to return to work of any kind for about one month. To his damage in the sum of \$216. That in addition to said special item of damage, plaintiff has suffered damages in the sum of \$10,000."

The complaint further alleges that the injuries to plaintiff were caused by the negligence and carelessness of the defendant, and not through any negligence of the plaintiff which contributed thereto, and that the injuries resulting to the plaintiff were sustained while—

"the said defendant and all of its agents and employes mentioned herein, including this plaintiff, were engaged in interstate and foreign commerce in such a manner that their mutual connection with intrastate work was not separable and distinguishable from interstate or foreign commerce. That the plaintiff is entitled to bring this action under the act of Congress of the United States regulating the liability of their employes of common carriers engaged in interstate and foreign commerce."

To this complaint the defendant has interposed a demurrer upon two grounds: (1) That said complaint does not state facts sufficient

210 F.—32

to constitute a cause of action; (2) that the court has no jurisdiction of the subject-matter of the action.

The question to be determined is: (1) Do the foregoing facts show that the plaintiff was injured by the defendant while it was engaged in commerce between any of the several states? (2) Was such injury sustained by the plaintiff while he was employed by the carrier in such commerce?

The demurrer to the complaint confesses all facts properly pleaded. Any statement of a conclusion which is not supported by facts set forth in the complaint to sustain it, under the rule that a demurrer admits only facts well pleaded, is to be disregarded. *Straus v. Foxworth*, 231 U. S. 162, 34 Sup. Ct. 42, 58 L. Ed. —.

Stripped of the conclusions in the complaint, we have the fact that the defendant is engaged in constructing a "cut-off" on its line of road so as to shorten the route used by it now and eliminate some of the inconveniences, and possible expense, in the operation of the line at the present time. There is no statement that this line, upon which the work is being performed, is now used, but the complaint in paragraph 3 says, "and through which, when completed, the interstate commerce * * * will be routed." The plaintiff was not himself engaged upon any interstate commerce, nor was he injured by any one connected with the operation of any of the agencies which actually transported interstate commerce. The building of this cut-off is a facility which is to be used by the defendant, when completed, as an engine or cars, or any other appliance under construction might be considered for use when completed. Can it be said that a person engaged in the building of engines or cars, or any other facilities to be used by a common carrier engaged in interstate commerce, comes within the provisions of the Employers' Liability Act? The act deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employes while engaged in such commerce. *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. The act is not "concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities, and during their use as such." *Pedersen v. Del., Lack. & West. R. R.*, 229 U. S. 146, 152, 33 Sup. Ct. 648, 57 L. Ed. 1125. The language of the complaint, "when completed, the interstate commerce * * * will be routed" through the tunnel, conclusively shows that it is not now so employed; hence the act cannot apply, and Supreme Court decisions *supra* are decisive.

Tested by the requirements of the act, I do not think that the tunnel was used as an appliance in transporting interstate commerce, nor was the plaintiff employed in such commerce. All of the cases cited, I think, are in harmony with this conclusion.

An order may be entered sustaining the demurrer,

COVINGTON v. BRIGMAN.

In re EAGLE PHARMACY.

(District Court, E. D. North Carolina. January 30, 1914.)

No. 349.

1. BANKRUPTCY (§ 303*)—VOIDABLE PREFERENCES—ACTIONS TO SET ASIDE—EVIDENCE.

In an action by a trustee in bankruptcy to set aside as a fraudulent preference a mortgage on a stock of goods, registered some time after its execution, evidence *held* to show that the mortgagee at the time of such registration had reasonable cause to believe that the mortgagors were insolvent, and that the registration of the mortgage would effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

2. BANKRUPTCY (§ 166*)—VOIDABLE PREFERENCES—KNOWLEDGE AND INTENT OF PARTIES.

Under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445) as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799, and Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506) which provides that if a bankrupt shall have made a transfer of any of his property, and if at the time of the transfer, or of the recording or registering of the transaction, if by law recording or registering is required, and being within four months before the filing of the petition, the bankrupt be insolvent and the transfer then operate as a preference, and the person receiving it shall then have reasonable cause to believe that the enforcement of such transfer would effect a preference, it shall be voidable by the trustee, where a chattel mortgagee, at the time of registering the mortgage some time after its execution, had reasonable cause to believe that the mortgagors were insolvent, and that the mortgage registered at that time would effect a preference, it was not necessary that the mortgagors should have intended to give a preference, or, if they did so intend, that the mortgagee should have had reasonable cause to believe that such intention existed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

3. BANKRUPTCY (§ 166*)—VOIDABLE PREFERENCES—NECESSITY OF REGISTRATION OF MORTGAGE.

Under the registration laws of North Carolina, a chattel mortgage is required to be registered within the meaning of such section of Bankruptcy Act, July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799, and Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

4. BANKRUPTCY (§ 166*)—VOIDABLE PREFERENCES—KNOWLEDGE AND INTENT OF PARTIES.

Under such section, where a chattel mortgagee, who registered his mortgage some time after its execution, had reasonable cause to believe that the mortgagors were insolvent, and that the mortgage would then operate as a preference, it was a voidable preference, though at the time of its execution it did not effect a preference; as "then" in the statute refers to the date of registration.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. BANKRUPTCY (§ 168*)—VOIDABLE PREFERENCES—DISPOSITION OF PROCEEDS OF PROPERTY RECOVERED.

Where a transfer by a bankrupt is found to be a voidable preference, the trustee is entitled to recover the value of the property for administration in accordance with the provisions of the bankruptcy law, though some of the bankrupt's debts were contracted subsequent to the transfer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 234; Dec. Dig. § 168.*]

6. CHATTEL MORTGAGES (§ 185*)—VALIDITY AS TO CREDITORS.

Where, though a chattel mortgage on a stock of goods contained no provision that the mortgagors were to remain in possession, sell the goods, and use the proceeds, such was the understanding of the parties, and there was a tacit understanding that the mortgage would be withheld from record, it was fraudulent as against creditors.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 367, 369-371; Dec. Dig. § 185.*]

In Equity. Bill by Leake S. Covington, trustee in bankruptcy of the Eagle Pharmacy, to set aside as a voidable preference, a mortgage on a stock of merchandise, etc., executed to J. W. Brigman by the bankrupts. Decree for plaintiff.

Carlsler & Cansler, of Charlotte, N. C., for plaintiff.

John P. Cameron, of Rockingham, N. C., and H. F. Seawell, of Carthage, N. C., for defendant.

CONNOR, District Judge. [1] On January 16, 1911, defendant sold to his son, Orlando Brigman, and B. T. Dawson, a stock of drugs and fixtures, including a soda water fountain, located in a storehouse, the property of his wife, in the town of Rockingham, N. C. He had, for some time prior thereto, been carrying on the pharmacy and drug business, under the name and style of the Eagle Pharmacy. The stock, fixtures, and fountain constituted the only assets of said business, subject to an indebtedness of about \$2,700. An inventory of said stock, fixtures, and fountain, taken a short time prior to said date, showed its cost price to be, approximately, \$6,300. The actual cash value of the stock was estimated by B. T. Dawson to be about \$2,000, and fixtures, including the soda fountain, about \$1,300. The operation of the business had not been profitable. Dawson was, at the time of the sale, and had been for some eight months prior thereto, employed by defendant as clerk. The sale was made for the sum of \$3,500, payable in 12 quarterly installments of \$300 each (the last being \$200), for which amounts the purchasers executed their notes, payable to defendant. For the purpose of securing the payment of said notes, said purchasers, trading as the Eagle Pharmacy, executed to defendant a mortgage on said stock and fixtures, bearing date January 16, 1911. Said mortgage was deposited by defendant in the bank, without registration.

On August 3, 1911, upon the advice of his attorney, who was the attesting witness thereto, and after default in the payment of two of the notes at maturity, defendant caused his mortgage to be probated and recorded in the office of the register of deeds for Richmond county. Pursuant to an understanding with defendant, the purchasers took

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

immediate possession of the stock of goods, rented the storehouse from defendant's wife, at a monthly rental of \$50 and continued the business, in the name of the Eagle Pharmacy—selling the goods and making purchases of other goods intermingled with the original stock in the usual course pursued by a retail drug store.

On November 25, 1911, defendant instituted an action, in the state court, against the said purchasers and mortgagors, on the notes then due, and for the foreclosure of said mortgage. He took possession of the stock of drugs then on hand, fixtures, and soda fountain. At the date of the sale of said stock, January 16, 1911, neither said Orlando Brigman nor T. B. Dawson owned any property other than the stock purchased from defendant. Their financial condition was well known to defendant. They paid, on account of the notes, prior to November 25, 1911, \$700, and, pursuant to an understanding had with defendant, at the time of making the purchase, drew from the proceeds of sales of goods each, \$100 a month, and discharged approximately all of the indebtedness of \$2,700 assumed by them. They made purchases of goods approximating \$7,000, and were indebted on account thereof, November 25, 1911, in the sum of about \$2,800. At the date of the registration of the mortgage, August 3, 1911, the Eagle Pharmacy was insolvent. An examination of the claims filed indicates that a considerable portion of their indebtedness is for purchases made subsequent to August 3, 1911. Defendant says that the reason which induced him to have the mortgage registered was that they had not paid him the notes falling due in July and August, and that they were not giving proper attention to the business; that after he told his attorney that the mortgage was not registered, he became uneasy—thought it would have been better if he had registered it instead of leaving it in the bank—his attorney told him that he “had better have it registered.” He did not give his reasons for so advising him. He thought, after he got the mortgage on the record, he would come in ahead of the general creditors—that was the reason he put it on record. He says that he had no intention of hindering and delaying other creditors when he put the mortgage on record. Dawson testifies that, at the time of making the sale, defendant said to him—

“there was no need to mention how we bought the property. There was no need for anybody to know anything about it.”

Orlando Brigman did not testify in this cause. The appraisers appointed, in the proceeding in bankruptcy, assessed the goods on hand, at the date of the adjudication, at \$2,731.70, of which \$394.85 were purchased subsequent to January 16, and prior to August 3, 1911, and \$864.14, between August 3, and December 2, 1911. They assess the soda fountain at \$837.50, and the show cases at \$517.50. There was, at the date of the sale, a valid lien on the soda fountain, for \$217, which was due and unpaid at the date the defendant took possession of the property. Dawson testifies that the value of the goods and fixtures on hand August 3, 1911, was about \$4,000, and the debts about \$6,000. They inventoried more than that amount.

On June 28, 1911, Dawson made a statement to J. W. Cole, representative of Bradstreet, that the firm owned “merchandise at cost, and

fixtures, \$6,000," notes and accounts \$800; that their indebtedness amounted to \$1,500, and that there were no notes, liens, or mortgages outstanding upon the stock and fixtures; that the sales, during the year, amounted to \$12,000. Dawson knew that said statement was made as a basis of credit and was untrue. This statement was issued by Bradstreet & Co. to their subscribers. John M. Scott & Co., one of the petitioning creditors herein, took said statement from Bradstreet & Co. None of the creditors knew of the existence of the mortgage until after November 25, 1911.

On December 2, 1911, a petition was filed by certain creditors of Brigman and Dawson, trading as the Eagle Pharmacy, in the District Court of the United States for the Eastern District of North Carolina, praying that said firm be adjudged involuntary bankrupts, and on February 8, 1912, upon proceedings had therein, said parties were adjudged bankrupts, and on February 20, 1912, plaintiff, Leake S. Covington, was duly elected and qualified as trustee of said bankrupts. Pursuant to an order made in said proceeding, plaintiff took the said stock and fixtures into his possession, and thereafter sold the same, free of incumbrances, for the sum of \$3,000, and holds the proceeds subject to the orders of the court. On July 6, 1912, the plaintiff filed this bill, praying that the said mortgage be declared invalid as against himself as trustee. The cause was, upon the maturity of the pleadings, brought to a hearing, etc.

Plaintiff attacks the mortgage of January 16, 1911, registered August 3, 1911, for that: First. It is a voidable preference under the provisions of section 60b of the Bankrupt Act of 1898, as amended in 1903 and 1910. Second. That it is fraudulent and void as against creditors under the statute in force in this state. Revisal 1905, § 960.

[2] The terms of the mortgage do not include purchases made subsequent to the date of its execution. It is therefore manifest that, quoad the portion of the stock on hand, at the institution of the proceeding in bankruptcy, December 2, 1911, purchased subsequent to January 16, 1911, the plaintiff is entitled to recover. The value of such portion is assessed by the appraisers at \$1,258.99. The solution of the question in regard to the remaining portion is dependent primarily upon the construction of section 60b of the Bankrupt Act, as amended by the Acts of 1903 and 1910. It is manifest that, at the date of registering the mortgage, the debtors being insolvent, a preference was given defendant, and upon proceedings began within four months thereafter they were properly adjudicated involuntary bankrupts. Whether the mortgage is a voidable preference at the suit of the trustee is dependent upon whether defendant, at the date of its registration, had reasonable cause to believe that the mortgagors were insolvent, and that the mortgage registered, at that time, would effect a preference within the definition of that term as used in the Bankrupt Act. It will be well to keep in mind the fact that, since the amendment of 1903 to section 60b, it is not necessary to allege or show, either that the debtor, in making the transfer or executing the mortgage which operates as a preference, intended to make a preference, or, if in fact he had such intention, that the creditor receiving such preference had reasonable cause to believe that such intention existed. Meeting and making

provision against the effect of the decisions of the Supreme Court, which, in the opinion of Congress, rendered the act, in its original form, ineffective to remedy the evils which it was intended to eliminate, in regard to liens withheld from registration, the amendment of 1903 and 1910 were adopted and incorporated into section 60b, which deals with voidable preferences, and provides that:

"If a bankrupt shall have * * * made a transfer of any of his property and if, at the time of the transfer, * * * or, of the recording or registering of the transaction, if, by law recording or registering thereof, is required, and being within four months before the filing of the petition in bankruptcy, * * * the bankrupt be insolvent and the * * * transfer *then* operate as a preference, and the person receiving it, or to be benefited thereby * * * shall *then* have reasonable cause to believe that the enforcement of such * * * transfer would *effect* a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." Collier, Bankruptcy (9th Ed.) 784.

There would seem to be but little room for construction of this language. It is quite clear, especially in the light of the judicial construction of the language used in the statute prior to the adoption of the amendments and the evident purpose of the Congress in making them.

[3] That the mortgage, with which we are dealing, in the light of our registration laws, comes within the language of the statute is clear. As said by Judge Hook, in *Bank v. Connett*, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148, 15 Am. Bankr. Rep. 662:

"To be sure an unregistered mortgage is not pronounced void absolutely and under all circumstances, but it is 'required to be recorded' in the sense in which that phrase is customarily used, and the language of requirement is similar to that employed in the registry law of most of the states."

Two of the elements entering into a voidable preference—insolvency of the debtor, at the time of registration, and registration within four months before the filing of the petition in bankruptcy—are shown either by uncontradicted evidence or by the record. The only question open to discussion is whether defendant had reasonable cause to believe *then*—that is, at the date of registration—that the enforcement of his mortgage would effect a preference. The state of his mind, in that respect, must be ascertained from an examination of his own evidence and the surrounding conditions and circumstances. The circumstances attending the sale and execution of the mortgage—the fact that the business had not been successful, the relation which the accumulated indebtedness bore to the value of the property sold, the agreement by the purchasers to pay \$300 quarterly, the agreement that, in addition to the rent of \$50 a month, the partners were to withhold each, \$100 per month, for their personal use, the assumption of \$2,700 indebtedness then due, the absence of any outside resources upon which they could draw to meet such a large draft on the business—were well calculated to create a belief in the mind of any reasonably intelligent man that the venture would soon be wrecked. He must have known that they would be compelled to replenish the stock by making purchases on credit. This is emphasized by the uncontradicted testimony of Dawson that, when the sale was made, defendant said to him and his son, the other purchaser, "that there would be no use telling people

about it—no use in mentioning the transaction, but just go on with the business.”

The mortgage was kept off the record, and the business was continued under the same name and style, the assumed indebtedness of \$2,700, and the rent, was paid, \$700 of the purchase money paid before the mortgage was recorded, and each partner drew out \$100 a month. The defendant lived in the same town with the purchasers, and “occasionally came in,” etc.; one of them had been his clerk, the other was his son. Two notes were overdue when defendant consulted his attorney and, upon his advice, caused his mortgage to be probated upon the oath and examination of his attorney and recorded. Conceding that there was no express agreement between the parties at the date of its execution that the mortgage was not to be recorded, the fact is that it was not registered until more than six months after its execution. That he registered it “because he believed that he would get a lien on the property then”; they (mortgagors) “didn’t come up, and I talked with Mr. Cameron [his attorney], and I went and had it recorded. * * * After he told me, I was uneasy. I thought it would have been better, maybe, if I had had it registered instead of leaving it in the bank.”

To the question, “You thought after you got that paper on record you would come in ahead of the general creditors?” He answered, “Yes.” He says that he had no intention to hinder or delay the other creditors when he put the mortgage on record. There is abundant evidence, coming from defendant, that, although an illiterate man, he had previously, acting for his wife, engaged in a number of transactions in which he had taken mortgages and had them recorded. The inference is irresistible that he knew that the law required its registration to make it effectual against the creditors of the mortgagors.

[4] A careful consideration of the evidence, heard by me orally, together with the demeanor of defendant as a witness, compels me to reach the conclusion that he knew, or certainly had reasonable cause to believe, on August 3, 1911, that the mortgagors owed debts, including his own, in excess of their assets. As he said, he was “uneasy” about his mortgage after talking with his attorney; he thought that, by its registration, “he would come in ahead of the general creditors.” It is argued for defendant that knowledge of the fact that the enforcement of the mortgage would effect a preference relates to the date of its execution, and not its registration. From this postulate, it is further argued that, on January 16, 1911, the purchasers did not owe any debts other than the purchase money, and therefore the mortgage could not effect a preference. The difficulty encountered by defendant is that the word “then,” found in the statute, manifestly refers to the date of registration. If the mortgage is required to be registered and the mortgagor be insolvent, and *then* operate, that is, at the date of its registration, as a preference and if the party benefited thereby *then*, that is, at the time of its registration, have reasonable cause to believe, etc., it is a voidable preference. This was so held in *Bank v. Connett*, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148, 15 Am. Bankr. Rep. 662. There the question is clearly presented and decided. The mort-

gagor was insolvent at the date of the transaction, but the creditor had no knowledge, or reasonable cause to believe, that such was his condition. At the date of the registration of the mortgage, he was likewise insolvent, and his condition was *then* known to the mortgagee; this was within four months prior to the petition in bankruptcy. Judge Hook says:

"The preference arose when the mortgages were recorded, and not as of the date they were given. In other words, the amendment of 1903 was intended to remedy the evil resulting from secret instruments of transfer of the bankrupt's property, the withholding of them from record until shortly before the institution of bankruptcy proceedings, and the then assertion of them as of the prior date of their execution and delivery. And this was accomplished by making the rights of a creditor, thus favored, determinable by the conditions existing when he caused the transfer to him to be recorded as required by the state law, rather than by those existing at the time he secured it."

The learned judge states a condition, existing in that case, which accurately describes the conditions in the instant case.

"The mortgages of the bank, required by law to be recorded, having been recorded within four months of the filing of the petition in bankruptcy, and at a time when the mortgagor was insolvent, the effect thereof being to enable the bank to obtain a greater percentage of its claims than other creditors of the same class, a preference arose under section 60a. Was it voidable under section 60b? In other words, did the bank have reasonable cause to believe that it was intended thereby to give a preference? The bank knew that the mortgagor was insolvent, and that a preference was in fact then created, but, in a strict sense, it cannot be said that it had reasonable cause to believe that one was intended. While the situation is somewhat anomalous, we believe that it was within the spirit of the amended act, and that the voidable element is established by the knowledge of the bank when its mortgages were recorded that the mortgagor was insolvent and contemplated a disposition of his property."

The same view is adopted by Judge Cochran in *Ogden v. Reddish* (D. C.) 200 Fed. 977. After defining a voidable preference under section 60b, as amended, he says:

"These three things must have existed at either of two particular times, to wit: Either at the time of making the mortgage, or at the time of its recording."

These decisions commend themselves to the judgment as being correct interpretations of the present provisions of section 60b. They are in accordance with a natural and reasonable construction of the language of the section, and are sustained by the history of the statute and its amendment to meet conditions presented by the decisions of the court.

[5] The fact is stressed in the argument that a large portion of the debts due the petitioning creditors were contracted subsequent to the registration of the mortgage. An examination of the proofs of debts, aggregating some \$2,800, discloses that a portion of the indebtedness of the bankrupts was contracted prior to August 3, 1911, and the bankrupts were, by the withholding of the mortgage from registration by defendant, permitted to, and did in fact, hold themselves out and obtain credit as being solvent and their property free from liens or incumbrances. The evil which Congress intended to prevent is found in this

case. Without discussing the question as to the rights of creditors, whose debts were contracted after the registration of the mortgage, it is sufficient to say that the trustee represents all of the creditors and recovers for their benefit. The question upon which this decision goes does not involve the validity of defendant's debt, or the intent with which the mortgage was executed by the bankrupts, or accepted or recorded by defendant. The rights of the trustee are controlled by the establishment of the essential facts, prescribed by the statute, constituting a voidable preference. As they are found in the record, the result follows that the mortgage creates a voidable preference, and the plaintiff trustee is entitled to recover the value of the property, or, upon the facts appearing, to retain the proceeds in his hands and administer them in accordance with the provisions of the Bankrupt Law.

[6] This conclusion renders it unnecessary to consider the other contention made by plaintiff that the mortgage is fraudulent and void, under the construction of section 960 of the Revisal, by our state courts. In respect to the stock of drugs, it would be difficult to distinguish the case from *Cheatham v. Hawkins*, 76 N. C. 335, and other cases found in the North Carolina Reports. It is true that there is no provision in the mortgage that the mortgagors are to remain in possession and continue to sell the goods and use the proceeds; it is manifest that such was the understanding, between the parties, at the time the mortgage was executed, and it is uniformly held that such understanding has the same invalidating effect as if it was inserted in the instrument. The effect upon the parties and upon creditors is the same in either case. *Mitchell v. Mitchell* (D. C. N. C.) 147 Fed. 280, in which Judge Purnell says:

"Except for sinister purposes it is difficult to imagine why a party, holding a mortgage on a stock of merchandise, when the statute provides for its registration, should wish to secrete the mortgage, carry it in his pocket, instead of putting it on record, thus giving notice to the commercial world of the financial condition of the mortgagor. The well-earned character of the state of North Carolina and of its native population for honesty, favoring a square deal, is in keeping with the law as decided in *Cheatham v. Hawkins*, 76 N. C. 335," etc.

In *re Duggan*, 183 Fed. 405, 106 C. C. A. 51 (C. C. A. 5th Cir.), it is held that:

"A chattel mortgage given by a bankrupt on his stock of merchandise, and withheld from record for several months by the mortgagor, under a tacit agreement to do so because of the effect which the record would have on the mortgagor's credit, is fraudulent and void, both as to prior and subsequent creditors."

Judge Shelby, after citing decided cases, concludes:

"When the mortgage is declared void, the trustee holds the mortgaged property unincumbered by the mortgage, and it is subject to pro rata distribution just as any other property of the bankrupt." *Bank v. Shackelford*, 208 Fed. 677, 125 C. C. A. 575.

In *Hafner v. Irwin*, 23 N. C. 496, cited in *Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080, it is said:

"There was evidence tending to show that it was a condition of this instrument, and as understood between the parties thereto, that it should not

be registered nor put in use, but kept a secret from the world until after the 20th February, ensuing, etc. * * * We feel ourselves justified in holding that, when secrecy is a part of the consideration of such securities, the securities are contaminated thereby, and ought not to be regarded as given bona fide."

Such is the law as held by all courts; it is most salutary in its effect upon commercial credit, and promotes honest, fair dealing, and the protection of unsecured creditors, who extend credit to persons under the impression that their property is unincumbered. While it is argued here that there is no sufficient evidence to show an agreement to withhold the mortgage from the record, it must be conceded that there is much in the evidence and the conduct of the parties to sustain the inference that there was at least "a tacit understanding" to that effect. It requires no strained construction of the uncontroverted evidence to reach the conclusion that the purchasers of the stock could not have conducted the business without purchasing goods on credit, and that with this mortgage on the record they would have been unable to do so—no reasonably prudent merchant would have extended them credit—and all of this was well known to defendant. I have not considered the matters referred to in the amended answer. The defendant is not in a position, in this action, to raise the questions suggested by the averments therein. The sole question which can be litigated between plaintiff trustee and defendant is the validity of the mortgage of January 16, 1911, as against the rights of creditors represented by him as trustee.

A decree will be drawn declaring that, for the reasons stated herein, plaintiff is entitled to retain the proceeds of the property sold by him pursuant to the order heretofore made in the proceeding in bankruptcy, and to administer same in accordance with the provisions of the Bankruptcy Act. The plaintiff will recover his cost, etc.

McWEENY v. STANDARD BOILER & PLATE CO.

(District Court, N. D. Ohio, E. D. January 15, 1914.)

No. 8,611.

1. **MASTER AND SERVANT (§ 87½, New, vol. 16 Key-No. Series)—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—"WILLFUL ACT."**

The words "willful act," as used in Workmen's Compensation Act (102 Ohio Laws, p. 528) § 21—2, providing that the act should not prevent a recovery at law for injuries sustained by an employé from the willful act of the employer or his officers or agents, etc., is not limited to an act done intentionally with a purpose to inflict injury, but include acts which are not mere negligence, but which evince an utter disregard of consequences so as to inflict the injury complained of.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7468-7481, 7835, 7836.]

2. **MASTER AND SERVANT (§ 87½, New, vol. 16 Key-No. Series)—INJURIES TO SERVANT—STATUTE—SAFEGUARDS—FAILURE TO PROVIDE—WORKMEN'S COMPENSATION ACT.**

Gen. Code Ohio, § 12593, provides that whoever, employing or directing another to do or perform labor in erecting any structure, negligently or

knowingly furnishes unsuitable or improper scaffolding, hoists, etc., which shall not give proper protection to life or limb of the employé shall be fined, etc. *Held*, that where defendant, in erecting an iron chemical storage tank compelled the use of a derrick, knowing that the mast was leaning some two feet from perpendicular and that one of the guy lines was weak, and by reason of these defects the scaffolding and derrick collapsed, causing injury to plaintiff employed thereon, such injury resulted from failure of the master to comply with a statute for the protection of the safety of employes within Workmen's Compensation Act (102 Ohio Laws, p. 528) § 21—2, providing that compliance with the act should not be a defense to an action for injuries to an employé resulting from the employer's failure to comply with a statute for the protection of the life or safety of the employes.

3. DAMAGES (§ 132*)—EXCESSIVENESS—PERSONAL INJURY.

Plaintiff, while employed by defendant in the construction of a chemical tank, was injured by the fall of a derrick and certain scaffolding. It appeared that he would be a cripple for life, and in order to do any sort of manual labor it would be necessary for him to wear a steel brace on his leg as long as he lived, and he would suffer pain continuously during the remainder of his life. *Held*, that a verdict awarding plaintiff \$14,000 was not so excessive as to indicate prejudice or passion.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

At Law. Action by John J. McWeeny against the Standard Boiler & Plate Company. A verdict was returned in favor of plaintiff, and defendant moves for a new trial. Denied.

Harry F. Payer and R. B. Newcomb, both of Cleveland, Ohio, for plaintiff.

Fillius & Fillius, of Warren, Ohio, for defendant.

DAY, District Judge. This case was tried to a jury, and the jury returned a verdict in favor of the plaintiff in the sum of \$14,000.

A motion for a new trial has been filed by the defendant.

At the trial and in the petition the plaintiff claimed that, although the defendant company had complied with the provisions of the Ohio Workmen's Compensation Act, nevertheless it was liable to respond in damages to the plaintiff: First, because its foreman, one Fisher, was guilty of a willful act in ordering the plaintiff to work about a derrick and scaffolding; and, secondly, because the defendant violated the provisions of section 12593 of the Ohio General Code.

The plaintiff and other employes of the defendant company together with a man named Fisher, the foreman, having charge of the work, were engaged in erecting a large sheet-iron tank to be used for the storage of chemicals. This tank was composed of large iron plates which were lifted in position by means of a derrick and boom erected upon a scaffolding placed within this large metal tank. Shortly before the accident occurred, the attention of Fisher, the foreman, was several times directed to the fact that the mast of the derrick was leaning two feet, that one of the guy lines was weak, and several of the men said to him that the mast should be straightened and the guy lines should be tightened and replaced. Fisher refused to do this, and, notwithstanding the fact that his attention was called to the defects in

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes

this derrick several times and that a strain of a ton load was being placed upon the guy lines and the derrick, the foreman with an oath directed McWeeny and the other men to proceed with the lifting of the heavy iron plate. They did so, and while engaged in this work the scaffolding and derrick collapsed, injuring McWeeny and several other of the men.

The evidence tends to show that the foreman at the time of this unfortunate occurrence was himself in a place which was of no danger to him.

[1] Section 20—1 of the Workmen's Compensation Act (102 Ohio Laws, p. 528) provides:

"Any employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall pay into the state insurance fund the premiums provided by this act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injuries or death of any such employé, wherever occurring, during the period covered by such premiums, provided the injured employé has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice, shall be deemed a waiver by the employé of his right of action as aforesaid."

Section 21—2 provides:

"But where a personal injury is suffered by an employé, or when death results to an employé from personal injuries while in the employ of an employer in the course of employment, and such employer has paid into the state insurance fund the premium provided for in this act, and in case such injury has arisen from the willful act of such employer or any of such employer's officers or agents or from the failure of such employer, or any of such employer's officers or agents, to comply with any municipal ordinance or lawful order of any duly authorized officer, or any statute for the protection of the life or safety of employés, then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employé, or his legal representative in case death results from the injury, may, at his option, either claim compensation under this act or institute proceedings in the courts for his damage on account of such injury, and such employer shall not be liable for any injury to any employé, or to his legal representative in case death results, except as provided in this act."

From an examination of these sections it is apparent that, where an employer has complied with the provisions of this act in paying the premiums into the fund and in posting the necessary notices, the employé in case of injury, or his representative in case of death, cannot recover for negligence or the want of ordinary care; but if the injury results from a willful act, or from the violation of a statute or ordinance or order of any duly authorized officer, which statute, ordinance, or order was enacted for the protection of the life or safety of the employé, then in such event the employé can either take the benefits provided under this act or sue in court to recover.

The defendant contends that the willful act in contemplation of this statute must have been an act done intentionally with a purpose to inflict injury. The court charged at the trial, in part:

"To constitute a willful act in this case, you must find that the action of Fisher was such an action as to evince an utter disregard of consequences so as to inflict the injuries complained of. In other words, the negligent action was such recklessness reaching in degree to utter disregard of conse-

quences which might probably follow. If the action of Fisher in ordering McWeeny to work on this scaffold and in connection with this derrick was done under such circumstances as to evince an utter disregard for the safety of McWeeny and the other employes working there in connection with him, then that action was a willful act."

It must be borne in mind that the Workmen's Compensation Act, although it had in view the establishment of an insurance fund, was passed primarily to protect the life and limb of the employé. Soon after this act was passed, constitutional objections were raised to it, and in the case of *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694, the Supreme Court of Ohio in passing upon the constitutionality of the act, had occasion to consider section 21—2. Several times the meaning of this section was referred to by the Supreme Court. At page 393 of 85 Ohio St., page 605 of 97 N. E. (39 L. R. A. [N. S.] 694), the court said:

"If the parties are operating under the act, the employé contributes to an insurance fund for the benefit of himself or his heirs, and, in case he is injured or killed, he or they will receive the benefit even though his injury or death was caused by his own negligent or wrongful act, not willful. And that is not all. Under section 21—2 if the parties are operating under the act and the employé is injured or killed, and the injury arose from the willful act of his employer, his officer or agent, or from failure of the employer or agent to comply with legal requirements, as to safety of employes, then the injured employé or his legal representative has his option to claim under the act or sue in court for damages.

"Therefore the only right of action which this statute removes from the employé is the right to sue for mere negligence (which is not willful or statutory) of his employer, and it is within common knowledge that this has become in actual practice a most unsubstantial thing. It is conceded by counsel that the particulars named in section 21—2 are such as form the basis for a large portion of claims for personal injuries."

And again at page 400 of 85 Ohio St., page 607 of 97 N. E. (39 L. R. A. [N. S.] 694), the court says:

"So that the only thing withdrawn by this law, and to which withdrawal he (the employé) consents by his voluntary election to operate under the law, is his right of action for mere negligence, and in place of it he receives the substantial protections and privileges under the state insurance fund."

Again speaking of the rights of the employé, the court says at page 404 of 85 Ohio St., page 608 of 97 N. E. (39 L. R. A. [N. S.] 694):

"But he is not confined to that method of proceeding. If he claims that the injury was caused by the willful act of the employer or officer or agent or from failure to comply with legal requirements as to safety of employes, etc., he may waive his claim under the act and sue in court for his damages. But in his petition in such case he could not claim damages for mere negligence, he having elected to waive that cause of action, having elected, as it were, to assume the risk of his employer's mere neglect in return for the benefits and protection to himself and his heirs afforded by the terms of the act."

It seems quite plain, from reading this interesting and instructive opinion, that the Supreme Court regarded the words "willful act" to mean willful negligence.

The Ohio statute contains no definition of willful act, but New Jersey in its Workingmen's Compensation Act (P. L. 1911, p. 134) has de-

fined the term "willful negligence." See Bradbury's Workingmen's Compensation Act, p. 339, § 3:

"23. What constitutes willful negligence: For the purposes of this act willful negligence shall consist of (1) the deliberate act or deliberate failure to act, or (2) such conduct as evidences reckless indifference to injury, or (3) intoxication operating as approximate cause of injury."

Bearing in mind the attitude of the Supreme Court on the term "willful act," and realizing that this legislation is primarily for the safeguarding of the employé, the definition given in the charge of the court of willful act construing it to mean willful negligence is supported by many of the decisions of the state courts. Without discussing these decisions in detail, the following cases form a sound basis for the definition given in the court's charge: *Cook v. Big Muddy Mining Co.*, 249 Ill. 41, 94 N. E. 90; *Bolin, Adm'r, v. Railway Co.*, 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911; *Conchin v. El Paso & S. W. Ry. Co.*, 13 Ariz. 259, 108 Pac. 260, 28 L. R. A. (N. S.) 88; *Louisville, New Albany & Chicago Ry. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807; *Parker, Adm'r, v. Penna. Co.*, 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552; *Thompson on Negligence*, § 20; *Geddings v. Atlantic Coast Line R. Co.*, 91 S. C. 477, 75 S. E. 284; *Odin Coal Co. v. Denman*, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45; *Bessemer Coal, Iron & Land Co. v. Jennie Doak*, 152 Ala. 166, 44 South. 627, 12 L. R. A. (N. S.) 389; *Roberts, Johnson & Rand Shoe Co. v. Dower (C. C. A.)* 208 Fed. 270.

If the contention urged by defendant that a willful act had to be an act coupled with an intention to injure the employé were the correct construction of those terms of the statute, then the employers of laborers, so long as they themselves or their employés did not criminally injure their employés, could incur no liability no matter how recklessly or carelessly they conducted their business without any regard to the safety of those they employed.

[2] Section 12593 of the General Code provides:

"Whoever, employing or directing another to do or perform labor in erecting, repairing, altering or painting a house, building or other structure, knowingly or negligently furnishes, erects or causes to be furnished for erection for and in the performance of said labor unsuitable or improper scaffolding, hoists, stays, ladders or other mechanical contrivances which will not give proper protection to the life and limb of a person so employed or engaged, shall be fined not more than \$500.00 or imprisoned not more than three months, or both."

This statute was passed plainly to safeguard an employé engaged upon work upon the various structures mentioned in the statute. Being passed for the benefit of the employé, it should receive such a construction as would render the statute of some real benefit, and its violation under all of the decisions would constitute negligence. The statute was limited and its application carefully outlined to the jury in the charge of the court.

[3] It is contended that the verdict is excessive. The evidence tended to show that McWeeny was rendered a cripple for life, and that in order to do any sort of manual labor he would have to wear a steel brace on his leg as long as he lived; that he would suffer pain con-

tinuously for the remainder of his life. Under this state of facts, the jury saw fit to assess the damages in the sum of \$14,000. This question of damages was one for the jury, and it does not appear that it was given by reason of any prejudice or passion.

The jury returned special verdicts, finding both the presence of a willful act, under the definition of the court, and the violation of the section of the Ohio statute referred to. The jury were plainly instructed that the plaintiff could not recover for mere negligence or the failure of the company to exercise ordinary care in reference to the derrick and in the manner of doing the work. They were told that the negligent action of Fisher must be recklessness reaching in degree to utter disregard of consequences which might probably follow. They were also told that if the foreman, Fisher, believed the derrick was reasonably safe for the purpose of placing the plate in position, and acted upon his judgment, then he was not guilty of a willful act.

Extreme cases of this sort will seldom arise. I cannot believe that the Legislature intended that the term "willful act" should be narrowed down to mean a deliberate intent to do bodily injury and nothing else. This compensation act was passed for a purpose; its primary purpose was to protect the men engaged in the various occupations in Ohio.

In my opinion, the case was fairly tried, and the issues fairly submitted, and the motion for a new trial will be overruled.

In re BURMAN et al.

(District Court, D. Massachusetts. November 15, 1913.)

No. 18,949.

1. BANKRUPTCY (§ 381*)—COMPOSITION—CONFIRMATION—JURISDICTION.

Where certain bankrupt members of a firm for some time prior to the filing of a bill in the state court for the appointment of a receiver knew that they were about to fail, and thereupon collected all the money they could, paid a certain sum to near relatives, and divided the balance between them for their personal use, with knowledge that the firm was insolvent, such acts, though not concealed and appearing from the firm's books, constituted fraudulent conveyances of the firm's assets, which were sufficient to bar a discharge in bankruptcy, and hence deprived the bankruptcy court of jurisdiction to confirm a proposed composition, though such confirmation would be for the best interests of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 591; Dec. Dig. § 381.*]

2. BANKRUPTCY (§ 381*)—COMPOSITION—OBJECTIONS—AMENDMENT.

Where a creditor of bankrupts objected to a composition on the ground that the latter had been guilty of a fraudulent concealment of assets, but it appeared that their misconduct consisted of a fraudulent misappropriation of funds of the firm with knowledge of its insolvency and contemplated bankruptcy, which acts were disclosed by the firm's books and were fraudulent conveyances rather than a fraudulent concealment of assets, the creditor was entitled to amend his objections to conform to the proof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 591; Dec. Dig. § 381.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Bankruptcy. In the matter of bankruptcy proceedings of Simon Burman and Benjamin Welling, doing business as the Puritan Clothing Company. Application for confirmation of composition. Denied.

Bates, Nay & Abbott, of Boston, Mass., for objecting creditors.

Friedman & Atherton and A. K. Cohen, all of Boston, Mass., for bankrupts.

MORTON, District Judge. Burman and Welling, the alleged bankrupts, have filed an offer in composition proposing to pay their unsecured creditors 40 per cent. of the debts proved. This offer was referred to the referee who, after hearing the offerors and the objecting creditor, has reported in favor of confirming the composition. A single creditor, having a claim of about \$400, appears in opposition to such confirmation.

The first ground of objection is that the composition proposed is not for the best interests of the creditors; in other words, that the creditors will obtain a larger dividend by the regular course of administration. The referee has found against the objecting creditor on this ground, and I agree with his conclusion.

[1] The second ground of objection is that the bankrupts have been guilty of acts which would be a bar to their discharge. If so, the court has no power to confirm the composition. *Re Comstock* (D. C.) 19 Am. Bankr. Rep. 65, 154 Fed. 747. Many such acts are alleged of which I find it only necessary to consider one, viz., that based upon the alleged taking by the bankrupts, from cash belonging to the firm, of sums aggregating \$909 each, on the 7th and 10th of December, immediately preceding the appointment of receivers by the state court on December 11, 1912.

There is little controversy as to the facts surrounding these transactions. On December 5th, \$1,000 in cash was paid by the bankrupts to L. Wilensky, brother of the bankrupt Welling; on December 7th, the defendants divided between them \$1,622 cash belonging to the firm; and on December 10th (the same day the petition for the appointment of a receiver was filed in the state court), the defendants divided between themselves the further sum of \$197 cash belonging to the firm—making the total amount received by each from the two payments \$909. Counsel for the objecting creditor stated, as his claim before the referee:

"That he (the bankrupt Welling) scraped in all the money he could get in and rake in, from the first of December on, say until he got \$2,600 or \$2,800 in cash, then he paid his brother \$1,000, and divided the rest between himself and his partner and went away."

Counsel for the bankrupts said:

"We admit those facts. They are not concealed. They appear on the books."

The bankrupt Welling further testified, in regard to the division of cash between himself and his partner on December 7th (\$811 to each), that what he received was in repayment of a loan made two or three years before; that "it was not on any particular loan"; that on December 7th, and again on December 10th, he took all the money there

was and divided it between himself and his partner; that on November 6th he had paid his uncle, of the same name as himself, two payments of \$500 each; that shortly before the receivership the bankrupts accumulated cash and had more than \$2,600 in cash in the safe, which was used in the above payments to the bankrupts and to L. Wilensky, the brother; that all firm creditors were paid except the merchandise creditors and the trust company; that the \$909 which he himself received, and which comprised, as he knew, one-half of all the cash the firm had, except an insignificant sum, was used in paying his personal bills; that he was unable to state any person to whom, or any account on which, this money was paid.

Burman testified, as to the \$909 which he got from the firm on December 7th and 10th, that he did not deposit it in any bank; that he used it to pay off some personal bills, including \$500 to a young man who worked in his store; that the money was taken by himself and Welling because they expected trouble and knew that receivers were to be appointed at that time; that it was because receivers were to be appointed that he and Welling took all the money there was in sight and divided it; that he did not know the firm was insolvent until the inventory was taken by the receivers in January, 1913.

It is clearly apparent that, for some time before the filing of the bill in equity praying for the appointment of a receiver, the alleged bankrupts, who seem not to have been on unfriendly terms with each other, were stripping their partnership of cash as fast as it came in, were paying large sums to near relatives, and were keeping for themselves whatever cash remained; that they did this, understanding and having in view that legal proceedings for a receivership and the winding up of the firm were about to be instituted; that the money was taken from the firm's assets for the personal use and benefit of the bankrupts and to prevent it from going into the hands of the receiver; that the firm received no present consideration for the money taken from it; and that neither of the partners received any present consideration for the payments alleged to have been made by them individually from the money in question. The firm was at this time insolvent. Active members of an insolvent firm are presumed to be aware of its insolvency (*Re Gilbert* [D. C.] 112 Fed. 951), and even without such a presumption the conduct of the defendants shows that they knew of the insolvency in this case.

All the transactions appear on the books and were disclosed to the receiver. It is strongly urged that this openness is sufficient evidence of good faith, and, in connection with the testimony of the bankrupts, rebuts the strong inference of fraud which the conduct of the parties affords. The bankrupts are interested witnesses, and their assertions of honesty and good intentions are to be carefully scrutinized and weighed. *Oxford Iron Co. v. Slafter*, 13 Blatchf. 455, Fed. Case. No. 10,637. Some, at least, of the crucial entries in the books appear not to have been altogether regular, and throughout their testimony (which I have carefully examined) there repeatedly occur facts or expressions of a suspicious character. For the two partners in an insolvent firm, on the eve of a receivership, to take all the cash, divide it between themselves, and not turn it over to the receiver or creditors,

is, upon its face, such a fraudulent transaction as to require clear, reliable, and convincing evidence of good faith to justify it. I do not think, in spite of the referee's finding to the contrary, that such evidence exists in this case. It is unnecessary to determine whether the application, by the partners in an insolvent firm, of partnership assets to their individual debts, is a conveyance in fraud of the creditors of the firm.

I therefore find and rule that the aforesaid sums, aggregating \$909 each, taken by the bankrupts from the firm assets on December 7 and 10, 1912, were received and kept by each of them with the actual intent thereby to defraud the firm's creditors by taking said sums for their own personal use and benefit and withholding them from the receiver and the creditors of the firm; and that the taking of said sums was a transfer, removal, or concealment of property of the bankrupts, made with intent to hinder, delay, and defraud their creditors, and is a bar to a discharge. I do not find that said sums were taken by the bankrupts with the intention of applying the same to their personal indebtedness. They took the money intending to use it for whatever they saw fit.

There is much reason to believe that some of the other grounds of objection to the composition are well taken, but it is unnecessary to go farther because the points decided are sufficient to dispose of the case.

The composition appears to be for the best interests of the creditors, but it cannot be confirmed.

"This may be regarded as working in some cases a hardship to creditors, since a fraudulent bankrupt will often pay a dividend larger than may be secured upon full administration, and since it may be more profitable to condone fraud than to expose and punish it. But the policy of the act, that a fraudulent bankrupt shall be denied a discharge even if creditors lose thereby, is sound if the question of bankruptcy administration be broadly considered. A general readiness of creditors to condone fraud, and to accept compromises which yield profit to bankrupts, is a chief encouragement to schemes of fraudulent bankruptcy. To permit even a single creditor to defeat it tends to make such a scheme more difficult of fulfillment, and thus to discourage it." *Brown, J., in Re Comstock (D. C.)* 19 Am. Bankr. Rep. 65, 154 Fed. 747.

See, too, to the same effect, *Re Godwin (D. C.)* 10 Am. Bankr. Rep. 253, 122 Fed. 111.

[2] The transactions in question are alleged in the objections to the confirmation of the composition as fraudulent concealments, and not as fraudulent conveyances. Inasmuch as they were entered upon the books and were disclosed by the respondents to the receivers, there may be doubt whether they constitute fraudulent concealments or fraudulent conveyances. The objections, being meritorious and having been fully considered both by the referee and by the court, ought not to fail on account of defective pleading. The objecting creditor may amend the specifications of objection.

Upon such amendment the application for confirmation of the composition is denied, with costs.

NATIONAL LOCK WASHER CO. v. HOBBS MFG. CO.

(District Court, D. Massachusetts. January 2, 1914.)

No. 103 (C. C. 556).

1. TRADE-MARKS AND TRADE-NAMES (§ 21*)—RIGHT TO REGISTRATION—NAME USED UNDER EXPIRED PATENT.

The owner of a patent who, during the life of the patent, used a name for the patented article, which, by reason of such use, became descriptive of the article, cannot extend the monopoly after the expiration of the patent by registering such name as a trade-mark, nor can the use of the name during the life of the patent be availed of to make up the 10 years of actual and exclusive use necessary to authorize its registration under Act Feb. 20, 1905, c. 592, § 5b, 33 Stat. 725 (U. S. Comp. St. Supp. 1911, p. 1461).

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 24; Dec. Dig. § 21.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 97*) — INFRINGEMENT — WORD HAVING DESCRIPTIVE MEANING.

Conceding that the time of such use may be included to make up the 10 years necessary to authorize the registration of the name as a trade-mark, the most that can be claimed for the registration is that it confers on the descriptive word the attributes of a technical trade-mark, and as such the owner's right is limited to restraining others from so using it as to mislead the public as to the origin of the article.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. § 97.*]

In Equity. Suit by the National Lock Washer Company against the Hobbs Manufacturing Company. Decree for defendant.

Gifford & Bull, of New York City, for complainant.

Clarke, Raymond & Coale and Coale & Hayes, all of Boston, Mass., for defendant.

BINGHAM, Circuit Judge. This is a bill in equity brought by the complainant to restrain the defendant from using the word "National" in any way in connection with the manufacture and sale of lock washers, even though the use made of the word is in no way calculated to deceive the public as to the origin of the article dealt in by the defendant. In other words, it is conceded that there is no evidence in the case from which it can be found that the use made by the defendant of the word "National" indicates that the complainant was the manufacturer of the article so as to mislead or deceive the public as to its origin. The question of unfair competition is therefore eliminated from the case.

[1] It appears that on April 20, 1886, one Harvey procured a patent from the United States Patent Office on a nut lock; that the complainant purchased it and during the life of the patent manufactured and sold the patented article, under the name of "the National Lock Washer," in interstate and foreign commerce; that during the life of the patent the complainant marked the boxes, kegs, and containers in which it sold the lock washers with the words "the National Lock Washer Company, Newark, New Jersey," and with the date of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

patent, and inclosed in the packages a circular on which was printed the words "the National Lock Washer," with a cut showing the lock washer as applied to a bolt, and the word "Patented" beneath it.

The patent expired April 20, 1903. After the expiration of the patent, the complainant made an application to the United States Patent Office, in which it stated that it had adopted the word "National" as a trade-mark, and that the class of goods to which the mark had been appropriated and used was lockwashers and nut locks. The application was made under the 10-year clause of section 5 of the Trade-Mark Act of February 20, 1905, and contained a statement that the mark had been continuously used in the business of the complainant since the year 1886, and actually and exclusively used by it or its predecessors in title for 10 years next preceding the passage of the act of 1905.

On May 8, 1906, letters of registration were issued to the complainant. After registration was allowed, the complainant changed its stencils, and marked all packages with the name of the company and with the words "the National Lock Washers, Reg. U. S. Pat. Office," and inclosed in all the packages a circular having on it the words "the National Lock Washers," with a cut of the article, and under it the words "Reg. U. S. Pat. Office."

The defendant manufactures and sells lock washers. In shipping its goods the boxes are stenciled "American Wire Washers," with the words "National Pattern," "Plain Pattern," and "Positive Pattern," to indicate the kind of washer in each box, and the words "From Hobbs Manufacturing Company."

The defendant contends that this case is governed by the decision in *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; that under the rule of that case, upon the expiration of the Harvey patent in 1903, the word "National," as applied to lock washers constructed under that patent, became public property, and that it had the right thereafter to make lock washers covered by the patent and to sell them under the designation of the National Pattern, provided it clearly indicated, as it did, that the article it dealt in was of its own manufacture; that neither the patentee nor his successor in title, the complainant, could acquire a monopoly in the word "National" on the theory that it had become a trade-mark denoting origin; that, whether it denoted origin or, by reason of its use during the existence of the patent, had become descriptive of the kind of washer manufactured thereunder, neither the patentee nor his successor could acquire a monopoly in the word by having it registered under the act of 1905 as a technical trade-mark, or as a descriptive word under the 10-year clause; and that its use under the patent, being a monopoly, cannot be availed of as proof for the purpose of extending the monopoly for an additional 20 years by registration under the 10-year clause of the act of February 20, 1905.

This contention meets my approval. The underlying principle in the *Singer-June Case* is that it is against the policy of the law to extend the monopoly of the patentee or his successor in title in the pat-

ented article after the expiration of the patent through a name, which during the existence of the patent has become descriptive of the article.

Then again, in construing the Trade-Mark Act of 1905, it is a reasonable inference that Congress did not intend that the provisions of that act should operate to continue the monopoly through registration under it, or that the use of a word in connection with a patented article and during the life of the patent should be availed of to make up the 10 years of actual and exclusive use necessary to authorize registration.

[2] If, however, the use of a word descriptive of a patented article and used by the patentee or his successor in title during the life of the patent may be availed of by him to make up the 10 years of actual and exclusive use necessary to authorize registration of such a word under section 5 of the act, the most that can be claimed for registration thereunder is that it confers upon the descriptive word the attributes of a technical trade-mark. *Coca-Cola Co. v. Nashville Syrup Co.* (D. C.) 200 Fed. 153, 154; *American Lead Pencil Co. v. Gottlieb* (C. C.) 181 Fed. 178; *Thaddeus Davids Co. v. Davids* (C. C.) 190 Fed. 285. But in the *Singer-June Case* a technical trade-mark which, during the life of the patent, had been so used in connection with the patented article as to become descriptive of it was held, to the extent that it had become descriptive, to be dedicated to the public together with the right to manufacture and sell the patented article, and that the owner's right under the trade-mark was limited to restraining others from so using it as to mislead the public. And so here the word "National," to the extent that it denotes origin or, by reason of its use in connection with lock washers, has come to denote origin, and by registration has become a statutory trade-mark possessing the attributes of a technical one, would be protected in the same way, and only to the extent of restraining the defendant from so using it as to give the public to understand that the article it deals in was that of the complainant.

In *Yale & Towne Manufacturing Co. v. Worcester Manufacturing Co.*, 195 Fed. 528, 115 C. C. A. 491, the original record in the case discloses that, after the expiration of the "Blount" patents for door checks, the Yale & Towne Company, the owners of the patent, procured a registration of the word "Blount" under the 10-year clause of the act of 1905. But it would seem that neither counsel nor court regarded the registration as adding anything to the complainant's rights.

The complainant relies upon the case of *Hughes v. Smith* (D. C.) 205 Fed. 302, to support its contention. But the facts in the *Hughes Case* are not the same as those in this case, and consequently the question decided is not the same as the one here presented. There *Hughes* was not the owner of the patent or the manufacturer of the patented brush on which he used the mark, and the word "Ideal" was not used by the owner of the patent and manufacturer of the brush to designate it as a patented article or to designate the manufacturer of the article. It was adopted by *Hughes'* predecessors in title for their own

benefit and as their trade-mark on goods which they had purchased from the manufacturer and owner of the patent and sold in the markets of this country; and, after the purchase of the business of his predecessors, Hughes continued to use the mark in the same way to designate the particular brush sold by him, and not the brush as a patented article, or to designate the manufacturer. This clearly appears on page 311 of 205 Fed. of the opinion, where the court uses this language:

"As there must be a manufacturer before the merchandise passes to the hands of merchants for sale, and as a trade-mark may be adopted by a particular merchant to designate and distinguish the particular goods owned and sold by him, the trade-mark adopted here by Reid and his associates (Hughes' predecessors in title) designated, not the brush as a patented brush or the manufacturer, but the particular brush sold by Reid and his successors, not the manufacturer or the origin of the brush, but the merchant who owned, sold, or dealt in those particular brushes in the United States. And it was not the name given to a patented brush to designate it from others not patented."

Then again, at the bottom of page 311 and top of page 312 of 205 Fed., the court proceeds to distinguish the case from that of *Singer v. June*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, and, after commenting on that case, it says:

"But this patented hair brush never bore the name 'Ideal' as its generic name during the life of the patent. It was not the name by which it was known, except as to one variety thereof sold in the United States and Canada, and was not there applied to it by the patentees. It was not used or applied to designate the brush, that particular style or make of brush, but as the trade-mark of the merchant who dealt in and sold it in the United States and Canada, and solely to indicate the firm or persons who dealt in or sold it, the origin of sale. This is not an attempt by Reid and his associates, or their successor in right, to perpetuate a monopoly in its brush after the expiration of the patent."

The court then suggests the query if the name which an inventor applies to a patented article belongs to the public after the patent expires, whether an arbitrary name used by a person having the sole and exclusive right to sell an article in the country where patented and by which name it becomes known there, does not also pass to the general public on the expiration of the patent. I fail to find any answer in the opinion to this query. The conclusion finally reached was (205 Fed. 315) that as Hughes was not the owner of the patent or the manufacturer of the brushes, and was the owner of the trade-mark, the word "Ideal," "under the facts and circumstances of this case, was entitled to registration, and, being entitled to registration by Hughes, is entitled to protection."

The bill is dismissed, with costs.

EBERHARD et al. v. NORTHWESTERN MUT. LIFE INS. CO.

(District Court, N. D. Ohio, E. D. January 19, 1914.)

No. 90.

1. INSURANCE (§ 26*)—FOREIGN CORPORATIONS—SUIT FOR ACCOUNTING—JURISDICTION.

Certain Ohio semitontine policy holders in a Wisconsin life insurance company were not entitled to maintain a bill in the federal courts sitting in Ohio, to compel an accounting of the corporation's funds applicable to such policies, and to restrain the corporation from holding an election of trustees, and from soliciting proxies for such election, and for the appointment of a receiver of the semitontine dividend funds involving a judicial interference with the internal management, administration, and control of the corporation, but complainants would be required to seek such relief in the courts sitting in the state of the corporation's domicile.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 33; Dec. Dig. § 26.*]

2. INSURANCE (§ 26*)—LIFE INSURANCE COMPANIES—DUTY TO ACCOUNT—WHAT LAW GOVERNS.

A suit by semitontine policy holders of a Wisconsin life insurance company to compel each to account for semitontine dividend funds, and for other relief involving an interference with the internal management of the company, is governed by the law of the state of the corporation's domicile.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 33; Dec. Dig. § 26.*]

In Equity. Suit by Charles W. Eberhard and others, for themselves and other semitontine life policy holders in the Northwestern Mutual Life Insurance Company, against such company, to compel an accounting of the funds of the company applicable to such policies, and for other relief. On demurrer to bill. Sustained.

Wing, Myler & Turney, of Cleveland, Ohio, for plaintiff.

Squire, Sanders & Dempsey, of Cleveland, Ohio, and George H. Noyes, of Milwaukee, Wis., for defendant.

DAY, District Judge. A demurrer was filed to the bill of complaint herein, and overruled on the theory that the relationship existing between the company and the complainants was not that of debtor and creditor, and that therefore the action would lie. The petition for rehearing was allowed, and the question is now presented that the demurrer should be sustained, inasmuch as the granting of the relief prayed for in the bill of complaint would require an inquiry into the internal affairs of the corporation, and that for such purpose the court sitting in Wisconsin is the only proper forum having the right and jurisdiction to entertain the suit. The complainants herein filed the bill as members of the corporation—

"not only on their own behalf, but also in behalf of those members of the defendant corporation who have held, or who are now holding, matured or unmatured semitontine policies issued by the defendant, who may wish to participate in the relief herein prayed against the Northwestern Mutual Life Insurance Company."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

They allege that each is a member of the corporation, by reason of having had issued to each an insurance policy by the defendant company on the semitontine plan. The bill further alleges:

"The defendant corporation since its creation has issued many thousands of policies on the semitontine plan, some of which have matured, and some of which are as yet unmatured, and that many thousand of such policies have been issued to residents of the aforesaid district, and that all of those to whom such policies have been issued are entitled to share with your orators in the trust fund arising from the saving made by the defendant, etc.

"That the said tontine dividend fund is a trust fund in which all of those to whom life insurance policies have been issued as cestui que trusts, and that in ascertaining the interest of each of those to whom policies have been issued, which policies have matured, it will be necessary and proper that an account be taken of the several amounts distributable, not only to those whose policies have matured, but also to those whose policies have not matured, and to whom some portion of such fund will be distributable, in the event that they survive the tontine period provided in the policy, without forfeiting their interest in said fund.

"That many thousands, both in this district and elsewhere, to whom policies on the semitontine plan had been issued by the defendant company, have survived the tontine period pretending to the same, and who have kept all the conditions of the policy, to whom the defendant has paid an amount, falsely pretended and represented by said defendant to be the true and proper proportion of the tontine trust fund, but which, in truth and fact, was not the true and proper proportion payable to such policy holders, and each of them, * * * is entitled to their full share of said trust fund.

"And your orators show that in awarding the relief herein prayed for, it will be necessary to take into account the interest in said fund of all of those to whom policies have been issued on the semitontine plan by defendant, and your orators show that all of those to whom have been issued policies by the defendant on the semitontine plan have an interest in common with your orators in the correction of the method pursued by the defendant," etc.

The so-called reserve fund is then described, which is alleged to be placed in a fund, for the tontine dividend fund—

"which, with its accumulations of interest, is held in trust, to be divided among those who may survive the tontine period, and who shall have paid the premium, according to the terms of their policy."

There follow allegations of misconduct on the part of the officers of the defendant company, in connection with said alleged trust fund, of an inequitable distribution of the semitontine funds; that the apportionment of this fund among the members entitled thereto is based upon erroneous principles, and there are other allegations of fraud, misconduct, and mismanagement on behalf of the company, its officers and trustees, in connection with said fund.

The bill prays:

"That an account may be taken of the various amounts which have been diverted by the defendant from the tontine dividend fund in violation of its trust, and of the various amounts which have been wrongfully withdrawn from said fund by the defendant, and the amounts which have been earned and received as interest from the investment of said bond, and the amounts which have been wrongfully charged to said tontine dividend fund, under the guise and pretense that such amounts have been expended for the benefit of such fund, when in truth such charges were not based upon any expense whatsoever pertaining to said fund, and of the savings made by said defendant on account of the loaning of premiums upon the basis of the mortuary tables, different from the actual rate of death of those insured, as experienced by the

defendant among those to whom it issued policies on the semitontine plan, and the amounts that said defendant has withdrawn from said tontine dividend fund for the purpose of paying dividends to the holders of annual dividend policies, and the amounts paid to agents by the defendant, which have been taken from or charged to the tontine dividend fund, and that said defendant, its officers, agents, and servants, be enjoined from making further diversions of said fund, etc.; that the defendant be required to make a full and complete disclosure of the manner in which it has conducted its said trust with respect to said tontine dividend fund; that a *mandatory injunction* be issued commanding said defendant to restore to said fund all amounts found by a proper accounting and under the direction of the court, to have been wrongfully withdrawn and diverted from said fund; and that said defendant be *enjoined from holding election of its trustees* in the manner herein complained, and that it, the said defendant, *be enjoined from permitting its officers and agents* to solicit proxies at such election; and that the persons elected to be trustees of the defendant by the wrongful methods hereinbefore set forth, *be held and decreed not to be officers of said defendant corporation; and that a receiver be appointed to hold and administer under the orders of this court said tontine dividend fund issue*; that the trust under which said tontine dividend is held by the defendant for your orators and for those in whose behalf they complain, be in all respects, according to its intent and purpose, under the laws, conditions, and contract obligations created; *and that under the direction of this court an account be taken for the interest in said fund of those who contributed thereto*; and in the event that it should be found that said trust should be terminated, *that said fund be divided to such interest so ascertained.*"

The prayer also asks for a temporary injunction to be issued against the defendant—

"restraining it from expending any part of said tontine dividend fund for any purpose other than those connected with the insurance issued by it on the semitontine dividend plan, and from expending any of said funds in and about the soliciting and writing of insurance upon the annual dividend plan, and from withholding from said fund, for any purpose whatsoever, any of the interest received by it from the investment made, and which hereafter may be made to said tontine dividend fund."

It is plain that the accounting asked for by the bill requires inquiry into the entire operation of the company and the handling of its funds. It requires an accounting as to dividends received, and as to the payments made upon policies of every kind issued by the company. The bill asks for an injunction against the officers, agents, and trustees of the corporation, who are not parties to this suit, and prays for a receiver to take charge of the fund, and to distribute the same among the various policy holders.

[1] It has been frequently held by the courts that in cases similar to the one under consideration, the court could not grant the prayer of the bill without interfering with the internal management, administration, and control of a foreign corporation, and therefore would not take jurisdiction. *Mining Co. v. Field*, 64 Md. 151, 20 Atl. 1039; *Condon v. Mutual Reserve Fund Life Ass'n*, 89 Md. 99, 42 Atl. 944, 44 L. R. A. 149, 73 Am. St. Rep. 169; *Wilkins v. Thorne*, 60 Md. 253; *State ex rel. Minnesota Mutual Life Ins. Co. v. Denton*, 229 Mo. 187, 129 S. W. 709, 138 Am. St. Rep. 417; *State ex rel. Hunt et al. v. Grimm et al.*, 243 Mo. 667, 148 S. W. 868; *State ex rel. Hartford Life Ins. Co. v. Shain*, 245 Mo. 78, 149 S. W. 479; *Taylor v. Mutual Reserve Fund Life Ass'n of N. Y.*, 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621; *Howard et al. v. Mutual Reserve Fund Life Ass'n*, 125 N. C.

49, 34 S. E. 199, 45 L. R. A. 853; *Royal Fraternal Union v. Lunday*, 51 Tex. Civ. App. 637, 113 S. W. 185; *Clark v. Mutual Reserve Fund Ass'n*, 14 App. D. C. 154, 43 L. R. A. 390.

The same principle has been applied by the courts in cases where the stockholder files a bill for an accounting against a corporation organized under the laws of another state where the accounting called for relates to the internal affairs and management of the corporation. *Kelly v. Thomas*, 234 Pa. 419, 83 Atl. 307; *Wolf v. Railroad Co.*, 195 Pa. 91, 45 Atl. 936; *McCloskey v. Snowden*, 212 Pa. 249, 61 Atl. 796, 108 Am. St. Rep. 867; *Bidwell v. Railway Co.*, 114 Pa. 535, 6 Atl. 729; *Kimball v. St. Louis & S. F. Ry. Co.*, 157 Mass. 7, 31 N. E. 697, 34 Am. St. Rep. 250; *Pierce v. Equitable Life Assurance Soc.*, 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433. Federal decisions to the same effect are *Republican Mountain Silver Mines v. Brown*, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776; *Leary v. Columbia River & P. S. Nav. Co. (C. C.)* 82 Fed. 775; *Gaines v. Supreme Council Royal Arcanum (C. C.)* 140 Fed. 978; *Babcock v. Farwell*, 245 Ill. 14, 91 N. E. 683, 137 Am. St. Rep. 284, 19 Ann. Cas. 74; *Edwards v. Schillinger*, 245 Ill. 231, 91 N. E. 1048, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308.

The precise question raised by this demurrer was considered by the Circuit Court of Appeals for the Sixth Circuit in the case of *Castagnino et al. v. Mutual Reserve Fund Life Ass'n et al.*, 157 Fed. 29, 84 C. C. A. 533. If the facts of the present case and the relief prayed for were similar to the facts and the relief prayed for in the case considered by the Circuit Court of Appeals the opinion of Judge Richards would be decisive in this case. However, in the case of *Castagnino v. Mutual Reserve Fund Life Association* the facts are essentially different, and the relief prayed for is essentially different. The bill was filed in the Western District of Tennessee against the association to interpret and enforce the contract in the form of a policy of insurance issued by the defendant corporation for \$5,000 on the life of Emanuel Castagnino in favor of the other plaintiff, his wife. The defendant demurred, and the court below sustained the demurrer on the ground that the court could not grant the prayer of the bill without interfering with the internal management and administration of a foreign corporation. The Circuit Court of Appeals reversed the judgment and construed the suit to be one brought in order to construe and enforce the policy, and not one to interfere with the internal management of the company.

[2] In the case under consideration no hardship would be done the complainants if this suit were brought before the proper court in the state of Wisconsin. They are suing on behalf of themselves and others similarly situated and the relief asked for is such as to affect all of a similar class. If this were a suit asking only for the interpretation and the enforcement of a policy of insurance, the complainants might well have recourse to this court because it is only just and fair that a citizen of Ohio, who takes a policy in a foreign corporation, after the company had agreed that service of process in Ohio might be made upon it, should have ready resort to the courts of Ohio for redress. It is admitted by the complainants in their brief that the prayer of the bill may include many things which this court could not do.

Such being the situation, the questions raised by the bill should be settled by the courts of the state in which the corporation is domiciled.

The law of Wisconsin furnishes the rule for the decisions of the questions raised. The complainants have every opportunity to have their rights fairly passed upon by the proper court, and, in view of the many questions raised and of the difficulties which would follow if this court would endeavor to carry into effect whatever conclusion it might reach, I must decline to take jurisdiction, and the demurrer will be sustained.

CUYAHOGA RIVER POWER CO. v. CITY OF AKRON et al.

(District Court, N. D. Ohio, E. D. November 25, 1913.)

No. 192.

1. EMINENT DOMAIN (§ 84*)—CONDEMNATION PROCEEDINGS—CITY WATER SUPPLY—RIGHT PREVIOUSLY TAKEN—COMPENSATION.

Where complainant had appropriated the water of a stream for the operation of a hydroelectric plant, a city could not condemn any of the rights so secured by complainant without first paying due compensation therefor.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 227-230; Dec. Dig. § 84.*]

2. EMINENT DOMAIN (§ 63*) — WATER RIGHTS — APPROPRIATION — CITY ORDINANCES—EFFECT.

A city ordinance purporting to appropriate all the waters of a river from a specified point did not constitute an appropriation as against complainant, which had appropriated waters of the stream for hydroelectric plant, but merely directed the appropriation to proceed, and therefore did not destroy or affect any rights secured by complainant prior to actual condemnation and the payment of compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 161-164; Dec. Dig. § 63.*]

3. EMINENT DOMAIN (§ 67*) — APPROPRIATION — EXTENT — LEGISLATIVE QUESTION.

The extent to which property may be appropriated for public use is a legislative and not a judicial question.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 165-167; Dec. Dig. § 67.*]

4. JURY (§ 19*)—RIGHT TO JURY TRIAL—EMINENT DOMAIN.

An owner of property sought to be condemned for public use is not entitled to a jury trial on the question of appropriation, but only on the question of the amount of compensation to which he is entitled.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 104-133; Dec. Dig. § 19.*]

5. EMINENT DOMAIN (§ 169*)—WATER RIGHTS—CONDEMNATION FOR MUNICIPAL USE—ORDINANCE—RESOLUTION.

A city ordinance or resolution providing for the appropriation of the waters of a stream for municipal use is not objectionable for failure to directly recite a finding by the council that the appropriation was necessary, since the passage of the resolution or ordinance is equivalent to a recital that the necessity had arisen and had been declared and acted upon by the city council.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 461; Dec. Dig. § 169.*]

6. EMINENT DOMAIN (§ 68*)—NECESSITY OF APPROPRIATION—REVIEW.

Necessity of appropriation of the water of a stream for municipal purposes by a municipal corporation cannot be questioned except for collusion or fraud.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 168-170; Dec. Dig. § 68.*]

7. EMINENT DOMAIN (§ 47*)—RIGHT TO CONDEMN—MUNICIPAL CORPORATIONS—PROPERTY APPROPRIATED TO PUBLIC USE.

A municipality has a paramount right to appropriate property needed for city water supply, though it had been previously appropriated by a quasi public corporation for the development of hydroelectric power.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

In Equity. Suit by the Cuyahoga River Power Company against the City of Akron, a municipal corporation, and others. On motion to dismiss bill. Granted.

Chapman, Howland & Niman, of Cleveland, Ohio, Frank & Ream, of Akron, Ohio, Davies, Auerbach & Cornell and Collin, Wells & Hughes, all of New York City, and Enslow, Fitzpatrick, Alderson & Baker, of Huntington, W. Va., for complainant.

Jonathan Taylor, City Sol., of Akron, Ohio, for defendants.

DAY, District Judge. A motion to dismiss the bill of complaint of the plaintiff has been filed by the defendant. This is a bill in equity brought by the plaintiff, a private corporation organized under the laws of Ohio, against the city of Akron, a municipal corporation of Ohio, seeking to have the defendant enjoined from constructing a dam upon the Cuyahoga river and from appropriating or diverting the waters of that river. No interlocutory order has been asked for by the complainant. The aid of this court is invoked upon the ground that this suit arises under the Constitution and laws of the United States.

The bill alleges the incorporation of the plaintiff, its purposes and various acts and proceedings which it has done and instituted. The purposes are, briefly, to develop hydroelectric power on the Cuyahoga river and to dispose of the same to various customers; and the acts and proceedings are the procuring and adoption of plans and surveys, the passing of certain votes, the determination to proceed with the construction of dams and reservoirs, the adoption of descriptions and development programs, and the commencement of proceedings in certain courts of Ohio to acquire certain rights on the river. It is alleged that, in procuring the plans and surveys, the plaintiff has been put to great expense and has caused some of its securities to be sold; that, by virtue of its organization and the various proceedings recited, the plaintiff has acquired a prior right and franchise to appropriate the necessary lands and waters and is substituted to the rights of certain riparian owners on the river "absolutely as to third parties and conditionally as to then holders of title." The bill then sets forth a portion of section 3677 of Page & A. Gen. Code of Ohio, par. 13, providing:

"For providing for a supply of water for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reser-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

voirs, reservoir sites and waterworks, and for the protection thereof, and to provide for a supply of water for itself and its inhabitants, any municipal corporation may appropriate property within or without the limits of the corporation; and for this purpose any such municipal corporation may appropriate in the manner provided in this chapter, any property or right or interest therein, theretofore acquired by any private corporation for any purpose by appropriation proceedings or otherwise."

Also section 3679 of the General Code of Ohio, providing in part:

"For waterworks purposes and for purposes of creating reservoirs to provide for a supply of water, the council may appropriate such property as it may determine to be necessary."

The bill then sets forth a resolution of the council of the city of Akron, declaring its intention to appropriate property for water supply purposes, and an ordinance of the city of Akron, passed by its council, to appropriate waters of the Cuyahoga river for purposes of public water supply for the city of Akron. The bill then alleges that the defendant has also committed certain acts in addition to the passage of this resolution and this ordinance, which, taken together with the statutes of the state of Ohio referred to in the bill, are in violation of article 1, § 10, of the Constitution of the United States, guaranteeing to plaintiff that no state shall pass any law impairing the obligation of contracts, and also that by these various proceedings the defendant threatens to and has appropriated, without compensation, the property of plaintiff in violation of the fourteenth amendment of the Constitution of the United States in that it threatens to and has appropriated the property of plaintiff without due process of law, and denies to plaintiff the equal protection of the law.

It is not alleged that any lands or waters or water rights have been acquired or are owned by the plaintiff, with the exception that the bill does state that, by virtue of its organization and the various proceedings recited in the bill, the plaintiff has acquired a prior right and franchise to appropriate, and is substituted to the rights of certain riparian owners on the river absolutely as the third parties and conditionally as to then holders of title. The defendant is alleged not to be a riparian proprietor, not to require the waters of this river, that by its acts it threatens irreparable injury to the plaintiff.

The main question presented is whether a law which in terms gives to a municipal corporation, after paying compensation, the right to appropriate that which has already been appropriated, or which a private corporation intends to appropriate, deprives the private corporation of any right in which the Constitution of the United States protects it.

[1] The plaintiff contends that the city proposes to divert the waters of the river and is not able to pay damages. The statute in controversy plainly requires that compensation be made the plaintiff before the city can acquire the right to divert, and, if the city attempts to do so without compensation, it is quite plain that it may be enjoined in the courts of the state of Ohio for exceeding its lawful powers under the Ohio law. Even if the plaintiff has obtained a prior right by priority of action, the statutes of Ohio make it necessary that, before the city may take this right, it must compensate the plaintiff. The

plaintiff, under these statutes, can be deprived of nothing until it has been paid. It is contended that the defendant has already taken the waters described in the ordinance of the council.

[2] It does not appear that the appropriation is made merely by passing the ordinance, but it rather appears, from a consideration of these sections of the Ohio statutes, that the ordinance only directs the appropriation to proceed. No rights are acquired by the municipality until compensation is made in pursuance of a judgment of a court after the verdict of a jury. The ordinance of the city of Akron purporting to appropriate all the waters of the river from a certain point cannot destroy any right of the plaintiff; compensation must be made and the property taken after compensation. Should the resolutions, ordinances, and acts of the city of Akron amount to threats to take the property of the plaintiff, this would only mean that these various proceedings evidence an intention to appropriate these rights of the plaintiff, and this can only be done under the statutes of Ohio. In other words, anything that the defendant does affecting the property rights of the plaintiff it must pay for under the laws of Ohio now in force. Assuming that the ordinance of the city of Akron is adequate to accomplish the purpose for which it was passed, is the law, under which the city of Akron acted in passing the ordinance, contrary to the provisions of the fourteenth amendment of the Constitution of the United States? The plaintiff contends that it is contrary to those provisions, because it provides for no judicial determination of the extent to which the appropriating power may be exercised.

[3] That the determination of this matter is a legislative and not a judicial question has been frequently held by the courts.

[4] It is not upon the question of appropriation of lands for public use but for compensation of lands so appropriated that the owner is entitled to a hearing in court and the verdict of a jury. *Zimmerman v. Canfield*, 42 Ohio St. 463, 471; *Chandler v. Railroad Commissioners*, 141 Mass. 208, 5 N. E. 509; *Secombe v. Railroad Co.*, 23 Wall. 108, 23 L. Ed. 67; *State v. Jones et al.*, 139 N. C. 613, 52 S. E. 240, 2 L. R. A. (N. S.) 313; *Dillon on Municipal Corporations* (5th Ed.) § 1036; *Lewis on Eminent Domain*, § 567; *Cooley on Constitutional Limitations*, pp. 759, 760; *Kaw Valley Drainage District v. Water Co.*, 186 Fed. 315, 108 C. C. A. 393; *People v. Adirondack Co.*, 160 N. Y. 225, 54 N. E. 689.

[5] In the resolution and ordinance passed by the city council for the appropriation of property, it is not necessary that any finding be directly made by the council on the necessity of the appropriation, nor is the property owner entitled to a hearing on this question, as the passage of the resolution or ordinance is equivalent to an averment that the necessity had arisen and had been declared and acted upon by the council. *Zimmerman v. Canfield*, 42 Ohio St. 463, 471; *Dillon on Municipal Corporations*, § 1037; *Young v. St. Louis et al.*, 47 Mo. 492.

[6] Nor can the necessity of appropriation of property by a municipal corporation be questioned except for collusion or fraud. *Pansing v. Miamisburg*, 79 Ohio St. 430, 87 N. E. 1139, 11 Cir. Ct. R. (N. S.) 511.

It must be borne in mind that, in the case of the appropriation of property by a private corporation, one of the preliminary questions to be found by the court is "the necessity for the appropriation." Ohio Page & A. Gen. Code, § 11,046. The law is different as to a municipal corporation. In the case of a municipal corporation, appropriating property for a street crossing the right of way of a railroad company, the railroad company may go into court in an independent action for injunction and litigate the question of whether the proposed street "will not unnecessarily interfere with the reasonable use of the property so crossed by such improvement"; and they may go into court on this question only because the statute specially makes it a preliminary and judicial question. Gen. Code of Ohio, § 3677, par. 1. As to all other cases of municipalities appropriating property, no such requirement is made by the statute, and therefore no judicial question arises until we arrive at the stage of fixing the compensation.

It is contended that the city of Akron is unable to pay for the property when appropriated. If this be so, then, under the law of Ohio, the property of the plaintiff can never be taken by the city of Akron, and the plaintiff cannot in any way be interfered with by this defendant. It is contended that the defendant has taken rights or property of the plaintiff and has manifested an intention to interfere with the exercise of certain rights and property. These rights, as claimed by the plaintiff, appear to be certain rights which the plaintiff says it has acquired by virtue of its incorporation and organization, the making of surveys, the adoption of plans and programs by action of its directors, and the institution under the laws of the state of Ohio of certain proceedings for appropriation; it claiming that it has appropriated property absolutely as against this defendant, and conditionally as against the holders of title thereto. The Constitution of Ohio, art. 1, § 19, provides that, before property is taken for public use, compensation shall first be made. There is no allegation that the plaintiff has taken property in this manner. A consideration of sections 11,042, 11,046, 11,057, 11,059, 11,065, 11,068, 11,070, 11,072 of the Ohio General Code indicates that no property is appropriated and no rights acquired under this Ohio law until compensation is made in pursuance of a judgment of a court after the verdict of a jury.

[7] The plaintiff is a private hydroelectric corporation organized under the general laws of Ohio; having been granted its charter it had the right to be a corporation; and, except so far as limited by law, it had the right to proceed or not, as it saw fit, by appropriation or otherwise with the accomplishment of the purposes which it has itself declared. It was not by virtue of its incorporation or by virtue of its franchise bound to carry out its scheme of development. A large number of cases have been cited in support of the doctrines that, by virtue of its adoption of plans, the company has thereby acquired a right to appropriate the property of others included in this plan, and that this right has thereby acquired a priority over all others, except the state acting directly upon this property. This might be true as between private corporations; but as between a private corporation vested with the right of eminent domain for the carrying out of the purposes of a quasi public nature and the subdivision of a sovereign state, like a mu-

nicipal corporation, which exercises the power of eminent domain to carry on the vital needs of its population for a supply of water for domestic purposes, this priority cannot exist. The municipality is given a paramount right to appropriate property needed for that purpose, although the same property has become the subject of earlier appropriation proceedings by a private corporation.

It is eminently just that it should not be otherwise. The right given is proportionate to the need and must be effective. The action of the city of Akron was for the commendable purpose of supplying its inhabitants with pure water; the purpose of the plaintiff corporation was to conduct its hydroelectric operations for gain. The bill presents no federal question. If the defendant takes any property of the plaintiff, it may do so under the statutes of Ohio, and no statute is before this court which violates any provision of the federal Constitution.

If any of these laws are violated by the defendant, the plaintiff has a full, adequate, and complete remedy in the courts of Ohio.

The motion to dismiss the bill will be sustained.

In re RANKIN.

(District Court, N. D. Ohio, E. D. November 20, 1913.)

No. 4,910.

BANKRUPTCY (§ 60*)—INVOLUNTARY PROCEEDINGS—"ACT OF BANKRUPTCY"—RECEIVERSHIP.

Under the express provisions of Bankruptcy Act July 1, 1898, c. 541, § 3a(4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1493), it was an act of bankruptcy for a debtor whose property was below the amount of his debts, and who was unable because of the pressure of some of his debts to continue a going business, to apply to a state court for a receiver for his property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*

For other definitions, see Words and Phrases, vol. 1, p. 118; vol. 8, p. 7562.]

In Bankruptcy. Proceeding to have E. H. Rankin adjudicated a bankrupt. Adjudication of bankruptcy granted.

Thompson, Hine & Flory, of Cleveland, Ohio, for petitioners.

DAY, District Judge. In this proceeding Rankin on the 28th of July, 1913, applied for a receiver in a certain action then pending in the court of common pleas of Portage county, Ohio, and the issue presented is whether or not this application for receiver and the appointment of a receiver was an act of bankruptcy.

It is agreed by both parties to this contention raised on the answer of the receiver in the state court that Rankin was insolvent at the time of the filing of this petition in bankruptcy and also at the time of his application for a receiver; and the petitioning creditors in their pe-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—34

tition sought to have Rankin adjudged bankrupt on the sole ground that, being insolvent, he had applied for a receiver for his property.

The Bankruptcy Act, § 3a, provides in part:

"Acts of bankruptcy by a person shall consist of his having: * * *
(4) Made a general assignment for the benefit of his creditors; or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, or territory, or of the United States; * * *"

The language of the act carefully distinguishes the act of bankruptcy turning on the application of an insolvent himself for a receiver from the appointment of a receiver.

In the present case, it is quite apparent, from an examination of the petitions filed by Rankin in the common pleas court, that we have a debtor, whose property is below the amount of his debts, who is unable because of the pressure of some of these debts to continue as a going business, and who therefore seeks to place his property within the protection of the state court. It would naturally follow that the receiver holds this property impressed with the right of the creditors to payment. He owes them the duty of payment of the debts out of the property in his hands, and it follows that the result of such an application for a receivership in the state court is the distribution of the estate to the creditors, and it is the purpose of the bankruptcy act to allow this distribution to be had in bankruptcy rather than in a state court.

The text-writers on bankruptcy have followed the plain meaning of this statute. Loveland on Bankruptcy, § 155, says:

"A person commits an act of bankruptcy if, being insolvent, he applies for a receiver or trustee for his property.

"It will be observed that an act of bankruptcy is committed when an insolvent applies for a receiver or trustee. It is not necessary that the receiver or trustee be actually appointed. The reason for the appointment, or whether the court appointing the receiver or trustee is authorized by law to do so, is immaterial. If he makes the application while insolvent, he commits an act of bankruptcy.

"Where the debtor has applied for a receiver or trustee of his property, the only question is whether he was insolvent at the time. If the court of bankruptcy finds that the debtor's property was not sufficient at a fair valuation to pay his debts at the time he applied for a receiver or trustee, he was insolvent and committed an act of bankruptcy."

Collier on Bankruptcy, p. 102:

"This clause makes the application for a receiver or trustee by a bankrupt who is insolvent an act of bankruptcy; if such an application is relied upon, it must be alleged that the application was made by the debtor. If the application for a receiver or trustee is made by any other person than the bankrupt, it must be alleged and shown that the application was based upon the insolvency of the bankrupt."

Remington on Bankruptcy, § 159:

"If the receivership is applied for by others than the debtor himself and the application therefor is not made on the ground of insolvency, it is not an act of bankruptcy, although the debtor may be in fact insolvent."

A number of cases have been referred to by counsel for either side. In *Re Spaulding*, 139 Fed. 244, 71 C. C. A. 370, the application was made by a creditor. The court said, in part:

"Giving subdivision a (4) the construction which its language demands, we are of the opinion that it does not make a receivership an act of bankruptcy unless it was procured upon the application of the insolvent himself, and while insolvent; and does not make the putting a receiver in charge of the property of an insolvent an act of bankruptcy unless this was done because of insolvency."

Moss National Bank v. Arend, 146 Fed. 351, 76 C. C. A. 629. In this case a partnership was insolvent, and after the death of one partner the other partner refused to take the assets of the partnership at the appraisal; thereupon the administrator of the deceased partner applied for the appointment of a receiver under the Ohio statute. This Ohio statute has not any connection with the solvency or insolvency of the partnership. Judge Tayler, of this jurisdiction, in deciding the case, held the act of the surviving partner was not an application on his part, and that therefore there was no act of bankruptcy. The Court of Appeals for the Sixth Circuit, in reviewing the holding of Judge Tayler, said, in part:

"But it is submitted that, since the firm and the surviving partner were insolvent, and the latter joined in the application, he 'being insolvent applied for a receiver or trustee for his property,' and therefore committed an act of bankruptcy. But, as held by the court below, the surviving partner never really applied for a receiver. He had no power under the Ohio statute to apply for a receiver."

In *re Edw. Ellsworth Co.* (D. C.) 173 Fed. 699, 23 Am. Bankr. Rep. 284. In this case the application for the receiver was by the creditors. The court said, in part:

"It is only when a receiver has been appointed in another court because of insolvency, as that term is defined in the bankruptcy act, or where the corporation on its own initiative has applied for the appointment of a receiver or custodian of its property, that an act of bankruptcy under section 3a (4) has been committed. This provision of the bankruptcy act must be strictly construed."

In *re Boston & Oaxaca Mining Co.* (D. C.) 181 Fed. 422, 24 Am. Bankr. Rep. 923. The application in this case was made by the minority stockholders, and the sole ground of bankruptcy was the appointment of a receiver. The court said:

"The application for a receiver to the South Dakota court was not made by the alleged bankrupt, but by three of its stockholders. There is no allegation in the petition, nor would the facts have warranted such an allegation, that it, 'being insolvent, applied for a receiver for its property.'"

In *re Gold Run Mining Co.* (D. C.) 200 Fed. 162. The creditors applied for appointment of a receiver, alleging that the company was insolvent. The company consented to the receivership, and it was argued that this was equivalent to application for a receivership. The court said:

"The first act of bankruptcy alleged is that the company, while insolvent, consented to the appointment of a receiver of its property in the state court upon the ground of insolvency. This, however, cannot avail for the following reasons: (a) This is not an act of bankruptcy. The statute makes it an act of bankruptcy 'to apply for a receiver.' This is defined by Collier * * * to be 'voluntary application * * * of a corporation under resolution of its board of directors.' Mere consent, which is passive, is not tantamount to application, which is affirmative."

Blackstone v. Everybody's Store, 207 Fed. 752, 125 C. C. A. 290. In this case, the debtor himself applied to the court for a temporary receivership. The court said:

"This case (that of *Everybody's*) differs from the *Butler* Case in another respect, in that a temporary receivership was applied for under the debtor's own will in equity, rather than that of its creditors, and thus the particular question here is made to rest upon that clause of section 3a of the bankruptcy act, * * * which declares that it shall be deemed an act of bankruptcy for the person, being insolvent, to apply for a receiver or trustee for his property."

The court later in its opinion refers to the possibility of winding up the affairs of the alleged bankrupt in some other manner than in the bankruptcy court; but this language is doubtless used by the court in refusing to take up the question referring to the validity of a certain transfer of assets, which would make the company solvent. It is plainly stated on page 755 of 207 Fed., at page 293 of 125 C. C. A., of the opinion that:

"Under a petition like this, where the application is by the debtor itself, the question of adjudication depends solely upon the question of solvency or insolvency."

At the same time the Circuit Court of Appeals, for the First Circuit, considered this case of *Blackstone et al. v. Everybody's Store et al.*, it considered the case of *Butler & Co.*, 207 Fed. 705, 125 C. C. A. 223, wherein the application for a receivership was by a creditor. A creditor's application was procured by the corporation itself, and the court held that this was not equivalent to an application by the debtor itself, but said that such an application, if made by the debtor, would have been an act of bankruptcy.

In the case of *Exploration Mercantile Co. v. Pacific Hardware & Steel Co.*, 177 Fed. 825, 101 C. C. A. 39, 24 Am. Bankr. Rep. 216, the application made the following allegation:

"That, owing to the debtor's condition in business and the inability of said defendant corporation at the present time to collect the amounts owing to it, the said corporation is in danger of its assets being wasted through attachment or litigation, as the aforesaid claims and other claims are due, and the said corporation is liable at any time to be attached and therefore be unable to carry on and continue its business or to be put to very large and useless expense by way of litigation, and the assets of the property to be wasted thereby,' and 'that by reason of the facts aforesaid the said corporation should be dissolved, and that a receiver should be appointed to take charge of the business and affairs of said corporation, that its property may be preserved, its creditors paid, and its assets cared for.'"

The court held that this application was an act of bankruptcy, and said further:

"With respect to the application for a receiver it may be conceded that, if it appears from the record and is established by proof that the application is made under some statutory authority or general equity jurisdiction having no relation to insolvency, then the act of applying for a receiver is not an act of bankruptcy. But when it appears that the application for a receiver has relation to insolvency, and that the purpose of the proceeding is to have the corporation managed with a view to its dissolution and the distribution of its assets among the creditors of the insolvent, then the application for a receiver is clearly an act of bankruptcy."

The application in this case which is submitted for decision has a relation to insolvency. It is plain that the statute clearly fixes the essential elements of this act of bankruptcy, and judicial construction cannot enlarge the plain language used by Congress. Great inconvenience and injustice often results from the fact that by state receiverships creditors are often long delayed and deprived of their usual remedies, without receiving the benefits of the prompt administration of the estate in the federal court. Often an insolvent has sought a state receivership, gained the appointment of a friendly receiver, and in that manner the business has been conducted without particular regard to the interests of any one else except the insolvent. In the present case Rankin, while insolvent, applied for a receiver. This is made an act of bankruptcy by the act, and is plainly established by an examination of the petition filed in the common pleas court.

It therefore follows that an adjudication of bankruptcy may be entered.

In re DESNOYERS SHOE CO.

(District Court, S. D. Illinois, S. D. January 15, 1914.)

1. BANKRUPTCY (§ 314*)—CLAIMS—CONSIDERATION.

A bankrupt corporation, contemplating an increase in its capital, received \$50,000 from claimant under an agreement with the bankrupt's president to pay dividends on the amount as on regular stock, to pay interest for the advancement, to give claimant's son a position and every legitimate opportunity to increase in knowledge in the business of the corporation, or such general business as came before the president of the corporation, and to issue stock to claimant therefor as soon as the increase should become effective. *Held*, that while the last element of the consideration the bankrupt could not bind itself to perform, the three other elements of consideration were within its power; and, the stock not having been increased prior to bankruptcy, and the valid part of the consideration being sufficient and substantial, the claimant was not entitled to prove his claim against the corporation's estate for the whole amount of the fund so advanced, on the theory that the whole contract was invalid for want of mutuality of obligation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469-473, 478, 483-487, 489, 490; Dec. Dig. § 314.*]

2. BANKRUPTCY (§ 312*)—CORPORATIONS—STOCKHOLDER OR CREDITOR—ESTOPPEL.

Claimant contributed \$50,000 to a corporation under an agreement contemplating that it should issue stock therefor when the corporation's capital should be increased as contemplated, that in the meantime he should receive interest, and that it should also be entitled to dividends. After the payment a statement was sent out by the corporation to creditors, showing the amount paid in as an increase in capital, and claimant, though knowing that such statement would be used to enhance the bankrupt's credit, took no steps to prevent such use, but on the contrary held himself out as connected with the business. *Held* that, as to creditors relying on such conduct, he was estopped to claim that he was a creditor of the corporation and not a stockholder.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496-500; Dec. Dig. § 312.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. BANKRUPTCY (§ 245*)—RIGHTS OF TRUSTEE—SPECIAL CREDITORS—EQUITIES—ENFORCEMENT.

A bankrupt's trustee represents all persons interested in the estate, and may therefore enforce equitable rights in favor of certain creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 245.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Desnoyers Shoe Company. A claim of L. D. Dozier against the estate was allowed by the referee, and the question certified. Decision reversed.

Following is the referee's report:

I, E. S. Robinson, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings:

The question is on the allowance of claim filed by L. D. Dozier against the estate of bankrupt in the amount of \$50,000, Dozier having agreed to subscribe for that amount of capital stock of bankrupt corporation upon said corporation increasing its capital stock from \$300,000 to \$500,000, and having advanced said \$50,000 to the company upon that agreement, and said bankrupt corporation failing to increase its capital stock, bankruptcy intervening, and no stock ever having been issued to Dozier. The Desnoyers Shoe Company was an Illinois corporation. It operated shoe factories in Springfield and Belleville, Ill., and St. Louis, Mo. Springfield, Ill., was named as its principal place of business in its charter, but for about two years prior to bankruptcy its offices were located in St. Louis, and its business was conducted principally from there. Willis L. Desnoyers was the president of the corporation and its active manager, so much so that he managed and conducted it practically as his private business.

In the latter part of 1910 the company was somewhat in financial straits, and Desnoyers desired to obtain some more capital. The capital stock of the company was then \$300,000. Lewis D. Dozier, of St. Louis, a man of means and retired from active business, in some way was informed that the company intended to increase its capital, and, having a son whom he wanted to establish in business, interviewed Desnoyers, with an idea of investing in the company, and at the same time placing his son in a position to learn the shoe manufacturing business. He was told by Desnoyers that the company wanted to increase its capital to \$500,000, which would be done at the next annual meeting of the stockholders to be held in Springfield in July, 1911. After discussing the matter several times, it was agreed between Desnoyers and Dozier that Dozier was to take \$50,000 of the proposed increase of capital stock, and that Dozier and his son were both to become directors of the company, and the son to be placed in the office of the company and given an opportunity to learn the shoe business. Upon this understanding Dozier, on January 23, 1911, advanced the company \$50,000, and Desnoyers gave him the following document:

"Mr. L. D. Dozier, Sr., St. Louis, Mo.—Dear Sir: In accepting your check for fifty thousand (\$50,000) dollars, receipt of which is hereby acknowledged, we wish to cover all the points of the agreement between us, of which your payment is the initial step.

"The \$50,000 received from you and referred to above, is to become a part of the capital stock of the Desnoyers Shoe Company as soon after July 1st as we can legally arrange for an increase to our capital stock, the increase to be from the present \$300,000.00 to \$500,000.00 and to be all paid in in cash or its equivalent, except \$50,000.00, which is to be carried for the account of the undersigned until such time as the dividends on same shall have paid for the principal, or until it shall be paid for in cash, or, in the event of my death, it shall become treasury stock for the company, with exception of such parts as have already been paid for in the manner outlined above.

"The \$50,000.00 which you are now paying, it is understood, is to become special capital until such time as we are able to merge it into the general

capital stock in the manner outlined above, and it is to bear the same percentage of dividends as regular stock, beginning from the 1st of January; and, in addition to this, as a premium for prepayment, we will pay you 6 per cent. per annum for interest on the said amount from to-day until the 1st of July.

"It is further understood to become a part of this agreement, that if you or Lewis or both should desire to become officers and directors or both of this company, that such arrangements will be made.

"It is further understood that the writer is to give Mr. Lewis Dozier, Jr., every legitimate opportunity to increase in knowledge in the shoe business or such general business as comes before the writer.

"It is further understood that the salary basis under which I am now working, will be changed after July 1st, and that, in lieu of the commission I have been getting, I shall receive a salary of \$—— per year, as per my conversation with you.

"[Signed]

Desnoyers Shoe Company,

"[Signed] W. L. Desnoyers."

"W. L. Desnoyers, President.

In accordance with said writing Desnoyers, as president of the company, paid Dozier \$1,316.67 as interest from said date until July 1, 1911, on the \$50,000 advanced, and young Dozier was given a position with the company. Dozier was given credit on the books of the company for \$50,000. On June 27, 1911, Dozier was paid \$516.67 as interest on said amount from July 1, 1911, to September 1, 1911. The capital stock of the company was not increased, and on July 21, 1911, an involuntary petition in bankruptcy was filed against the company, and it was adjudged bankrupt on August 1, 1911, and the Sangamon Loan & Trust Company, of Springfield, Ill., was appointed trustee of its estate.

Dozier filed his claim for \$50,000 against the estate. Objections to the allowance of the claim was filed by the trustee, and also by American Hide & Leather Company, a creditor. I made an order allowing the claim in sum of \$49,758.35, being the full amount after deducting the interest from August 1, to September 1, 1911, as provided by section 63a (1) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]). The trustee and American Hide & Leather Company thereupon filed petition for review by the court.

Considerable evidence has been taken on behalf of the objectors and claimants, and lengthy and elaborate briefs and arguments filed, but in my opinion, there is but one question, and that a question of fact, viz.: Is Dozier by his act or acts, or by his failure to do some act or acts incumbent on him, estopped from proving his claim and receiving dividends from the estate until the other creditors are paid the full amount of their claims? There can be no question but that he had a claim or debt good as against the corporation. That, I think is conceded; at any rate the authorities so hold. *Winters v. Armstrong* (C. C.) 37 Fed. 508; *Laredo Imp. Co. v. Stevenson*, 66 Fed. 633, 13 C. C. A. 661; *Ross-Meehon Co. v. Southern Iron Co.* (C. C.) 72 Fed. 959; *Matthews v. Columbia Bank* (C. C.) 79 Fed. 558; *Wolf v. Chicago Sign Ptg. Co.*, 233 Ill. 501, 84 N. E. 614, 13 Ann. Cas. 369; *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347.

It is contended by the objectors that Desnoyers made statements showing the increase in the capital of the company and Dozier's connection with the same, and by such statements induced the American Hide & Leather Company and other creditors to extend credit to the company, and that Dozier permitted the same to be done, and is thereby estopped from proving his claim. In my judgment the proof is not sufficient to establish an estoppel. It is true that Desnoyers sought to use Dozier's name in connection with the company. Dozier was generally known as a man of wealth, who had retired from active business, and to have his name connected with the company was undoubtedly beneficial to the company and gave it a better standing for credit. Immediately after Dozier gave the check for \$50,000 Desnoyers visited the Boatmen's Bank, of St. Louis, with which the company was doing business, and from which it was seeking to borrow more money, and exhibited the check to the officers of the bank and said that the company was going to increase

its capital stock, and that Dozier was going to invest in it. Before that time the bank had agreed to extend the company credit to the amount of \$50,000, and Desnoyers was asking that it be increased to \$100,000, which was afterwards done.

Desnoyers also gave out the following statement to commercial agencies and to certain creditors:

"Statement of the Desnoyers' Shoe Company.

"Assets.		"January 1st, 1911.	
Real estate, machinery, etc.....		\$230,913	61
Bills receivable.....		2,600	00
Accounts receivable.....	\$88,712	33	
Less doubtful.....	800	00—	87,912 33
Inventories and prepaid items.....		250,941	67
Cash (L. D. Dozier).....	\$50,000	00	
Cash	11,832	02—	61,832 02
		<hr/>	
		\$634,199	63
"Liabilities.			
Accounts payable.....		\$254,539	10
Bills payable.....		20,000	00
		<hr/>	
		\$274,539	10

"The real estate item consists of modern brick factory building in Springfield, Ill., with an area of 75,000 sq. feet of floor space all thoroughly sprinklered (insurance rate 15c per hundred dollars) having a frontage of 320 feet on a paved avenue, by 420 feet on the Wabash Railroad. This is not outlying property, but is well downtown and surrounded on all sides by the homes of working people.

"All the items as listed above were compiled by Price, Waterhouse & Company, and certified by them, except the item of cash listed as L. D. Dozier. This item represents an increase to our capital stock of \$50,000 paid by Mr. Dozier of this city. This is to be special until the 1st of July, at which time it is the purpose of the company to increase its capital stock from \$300,000.00 to \$500,000.00 and this special capital will then become part of the general fund.
Desnoyers Shoe Company, W. L. Desnoyers, Pres."

This statement was in itself, to my mind, sufficient to put one about to advance or extend credit on inquiry as to Dozier's connection or relation with the company. So far as the evidence shows there was no different statement made by Desnoyers, and no statement of any kind was made by Dozier. No creditor took the trouble to make any kind of inquiry from Dozier or his son, except that Mr. Whitaker, president of the Boatmen's Bank, of St. Louis, on meeting Dozier in the washroom of the Noon Day Club, in St. Louis, shortly after Dozier's check for \$50,000 was shown to him by Desnoyers, did say to Dozier: "Bud (the name by which Dozier was known to his friends), I see you are going into the shoe business?" To which Dozier replied: "Yes, I expect to put my boy in there and educate him in the business." There is nothing to show that Whitaker indicated to Dozier in any way that Desnoyers or the company was seeking to increase its credit at the Boatmen's Bank on the strength of Dozier's connection with the company, or that Dozier knew such to be the fact. It would appear to have been a casual remark by one to an acquaintance or friend, and a natural reply to such remark. The creditors seem to have assumed without inquiry that Dozier was connected with the company, and that his connection justified more liberal dealings with the company. It is possible that Desnoyers sought to convey that impression, even to the extent of deceiving the creditors without letting Dozier know of it. The testimony of Madison B. King, head salesman for the American Hide & Leather Company, the objecting creditor, would seem to show that fact. In his testimony he says that Desnoyers and young Dozier came to his office in Chicago in the early part of 1911; that Desnoyers introduced him to young Dozier and (quoting his language) "in an aside to me, which I do not believe young Dozier heard, he stated that he had interested Mr. Dozier, Jr.'s father

in the concern, and that young Dozier would henceforth enjoy a good position with him." If Dozier knew that his name was being used to help the credit of the company, I know of no reason why Desnoyers should not have made the statement referred to by King openly in the hearing of young Dozier. It is true that Dozier, Sr., was a visitor at the St. Louis office and factory, frequently took some interest in looking over the volume of business being done, and made some inquiry as to how the business was going, but that does not seem to be remarkable in view of the fact that he was intending to invest a large sum in the business and try and arrange for the future of his son. So far as I can find from testimony there is no evidence tending to show that Dozier had knowledge that his connection with the company was being used by Desnoyers, unless it is the testimony of Mr. Whitaker, and that is not strong enough to establish an estoppel. Reference is made to the fact that Dozier himself does not testify. That naturally excites some suspicion, but the sworn statements of Dr. W. H. Fischel and Dr. Gwin Campbell that Dozier was not in condition to testify explains his failure to testify, and must be accepted as true without proof to the contrary. When estoppel is relied upon the burden of proof is on one seeking to establish an estoppel, and must be established by clear and unequivocal evidence. *Coal Belt Railway Co. v. Peabody Coal Co.*, 230 Ill. 164, 82 N. E. 627, 13 L. R. A. (N. S.) 1144, 120 Am. St. Rep. 282; *Stanley v. Marshall*, 206 Ill. 20 [69 N. E. 58]. The company being an Illinois corporation, the laws of Illinois control.

And upon the petition of the trustee and the American Hide & Leather Company, the said question is certified to the judge of said court for his opinion thereon.

Dated at Springfield, Ill., this 12th day of November, A. D. 1913.

Wilson, Warren & Child and O. S. Humphrey, of Springfield, Ill., for trustee.

Winston, Payne, Strawn & Shaw, of Chicago, Ill., and Patton & Patton, of Springfield, Ill., for American Hide & Leather Co.

Lehmann & Lehmann, of St. Louis, Mo., for Boatmen's Bank.

A. and J. F. Lee and Charles M. Polk, of St. Louis, Mo., for claimant.

SANBORN, District Judge. [1] The claimant, L. D. Dozier, filed his claim for money had and received, stating therein that the bankrupt solicited a subscription for 500 shares of the proposed increase of capital stock, and that claimant paid therefor \$50,000; that the amount so paid became part of the general funds and property of the bankrupt, and was used by it in payment of its outstanding bills and current expenses from time to time; that the money was furnished as a payment in advance for a proposed stock increase; that the bankrupt paid to the claimant \$1,316.67 and also \$516.67 as payments in advance for interest on \$50,000 paid in. It is further stated in the claim that it was agreed between claimant and the bankrupt that the latter would cause the increase of stock to be legally authorized, and stock certificates would be delivered to the claimant immediately after such authorization; that the president of the bankrupt informed the board of directors of said advance payment, and the terms under which it was made, and the board ratified and approved the action of the bankrupt in accepting such advance payment, and the bankrupt, with the knowledge and approval of the board, continued to retain the money so paid. The claim then states that no such proposed increase has been made, and that bankruptcy has occurred; that the \$50,000 has never been repaid, and claimant has never become or acted as a stockholder, and has nev-

er received any consideration whatever for the payment, except the interest. Therefore it is claimed that the sum of \$50,000 is legally due and owing to the claimant.

The claim was evidently made upon the theory of the case of *Chicago Sign Painting Co. v. Wolf*, 135 Ill. App. 366, affirmed 233 Ill. 501, 84 N. E. 614, 13 Ann. Cas. 369, and *Railroad v. Sneed*, 99 Tenn. 7, 41 S. W. 364, 47 S. W. 89. These cases hold that an agreement to pay or a payment for corporate stock to be increased at a future time affords no consideration for Dozier's payment, so far as the corporation is concerned, and that he could recover from it if no rights of creditors were involved.

The claim is presented upon the theory that there was no other consideration for the payment except a promise to deliver the stock when it should be increased, and, such agreement being void as to the corporation, and the latter being the bankrupt, claimant is entitled to file for his payment. It appears, however, from the agreement made between him and the president of the bankrupt that there were four elements to the consideration, being a promise to pay dividends as on regular stock, a promise to pay interest for the advances, a promise to give the claimant's son every legitimate opportunity to increase in knowledge in the shoe business, or such general business as came before the president of the company, and the issue of stock. The last element of consideration the bankrupt could not bind itself to perform, and upon this the claimant bases his whole right of recovery. The three other elements of consideration were within the power of the shoe company to perform, and they were being performed when bankruptcy occurred. The contract, therefore, was based upon a consideration partly valid and in course of performance, and partly invalid. The valid part was a sufficient and substantial consideration. *Alderton v. Williams*, 139 Mich. 296, 102 N. W. 753; *Washburn v. Wilson*, 48 N. Y. Super. Ct. 159; *Pittsburg Stove Co. v. Pa. Stove Co.*, 208 Pa. 37, 57 Atl. 77; 9 Cyc. 370; *Harris v. Tyson*, 24 Pa. 347, 64 Am. Dec. 661; *Jackson v. Jackson*, 222 Ill. 46, 78 N. E. 19, 6 L. R. A. (N. S.) 785.

The claimant might have an action for a partial breach of the contract, and might have filed a claim under section 63b of the bankruptcy act for damages on account of such partial breach. He cannot, however, treat the contract as a whole as invalid, as he has done by filing a claim, and recover the money paid by him, on the ground of the want of mutuality of obligation. The referee should have disallowed the claim as a whole.

[2] It appears also from the record that after the money was paid by claimant the bankrupt gave wide publicity to the fact that the claimant had become connected with the shoe company. The claimant also frequently visited the office of the bankrupt, and attended directors' meetings. The money was intended to be used in the business of the company. It was to be permanently invested in the business, and the contract in question does not contemplate that the relation between the parties should be that of debtor and creditor. A statement was sent out by the bankrupt that the \$50,000 paid in by the claimant represented an increase of the capital, and was to be special capital until July 1, 1911,

and it was the purpose of the company on that date to increase its capital, when the special capital would become part of the general funds. It does not appear that the claimant made any statement of his relation to the company, except to the officer of the Boatmen's Bank, as quoted in the referee's report. Claimant was a business man of large experience and wealth, and must have fully understood that his connection with the shoe company would be used to enhance its credit. The record shows that five of the creditors, the Boatmen's Bank, Pfister & Vogel, Gardner-Beardsell Company, Thayer-Foss Company, and the American Hide & Leather Co., relied upon the fact of the claimant's connection with the company in their dealings with it. I think that the claimant was held out to the creditors as having become connected with the company, and that he has so conducted himself in the whole transaction that he must be held to have authorized such holding out. The claimant is therefore estopped to urge his claim as to all creditors who relied upon such holding out.

[3] The point is made by counsel for the claimant that as only one of the creditors, the American Hide & Leather Co., has specially objected to the allowance of the claim, the estoppel, if any, should not operate in favor of any other creditors, and that the trustee does not represent a part only of the creditors, because he can enforce the common rights and claims of all creditors, and cannot plead or urge the personal claims of individual creditors which are not common to all. On this point claimant relies upon the dissenting opinion of Judge Sanborn in *Scott v. Latimer*, 89 Fed. 843, 33 C. C. A. 1, in the Eighth circuit. A contrary rule was laid down by the Court of Appeals of that circuit in the case of *In re Bothe*, 23 Am. Bankr. Rep. 151, 173 Fed. 597, 97 C. C. A. 547, and I think this rule should be followed in this matter.

The decision of the referee should be reversed.

IN RE WATMOUGH.

(District Court, N. D. Ohio, E. D. October 3, 1913.)

No. 4667.

1. BANKRUPTCY (§ 140*)—SALES TO BANKRUPT—FRAUD—RECOVERY OF PROPERTY.

Where claimant was induced to sell certain goods to the bankrupt by reason of his fraudulent concealment of his financial condition, and, almost immediately after the goods were delivered, buyer was declared bankrupt, the claimant was entitled to disavow the contract and recover the property on discovering the fraud, provided it acted within a reasonable time.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 140*)—FRAUDULENT SALES—RECOVERY OF PROPERTY OR PROCEEDS.

Where goods have been sold to the bankrupt by reason of fraudulent concealment of his financial condition, the seller may recover the particular

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

property, if it can be found, or, if it has been sold, may recover the proceeds, if known, and not lost or so intermingled with other funds as to be indistinguishable either in kind or amount.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

3. BANKRUPTCY (§ 298*)—SALES OF PROPERTY—FRAUD—RESCISSION—WAIVER.

On December 4, 1912, the bankrupt purchased from claimant a bill of fixtures which were shipped to him and received by the bankrupt on the 9th following. On the same day a petition in bankruptcy was filed, and on the 11th a receiver was appointed, who used the materials in completion of certain contracts held by the bankrupt. The seller received notice of bankruptcy proceedings on December 10th or 12th, but did nothing until January 13, 1913, when it wrote the trustee making claim for the goods. No intervening petition, however, was filed claiming the goods or proceeds thereof until May 24, 1913. *Held*, that claimant's right to rescind and to recover the goods or the proceeds was lost by delay.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 430-443; Dec. Dig. § 298.*]

In Bankruptcy. In the matter of bankruptcy proceedings of William Watmough. On claim of the Sterling Sanitary Manufacturing Company for payment in full of a bill of goods alleged to have been purchased by the bankrupt by fraudulent representations as to his credit. Finding of special master in favor of claimant reversed.

Washington Hyde, of Warren, Ohio, for the bankrupt.

Charles Fillius, of Warren, Ohio, for trustee in bankruptcy.

Warren Thomas, of Warren, Ohio, for petitioning creditor.

DAY, District Judge. The bankrupt, William Watmough, was doing a plumbing business in the city of Warren, Ohio. On the 9th day of December, 1912, he filed his petition in bankruptcy. On December 4, 1912, he purchased from the Sterling Sanitary Manufacturing Company, through a traveling salesman, a bill of goods for which he agreed to pay \$150. On December 6th the sanitary company shipped these goods to the bankrupt's place of business, and they were received there on December 9th. The goods were sold to Watmough, f. o. b. Pittsburgh. On the 11th day of December, a receiver was appointed to carry on the business of the bankrupt, pending the election of a trustee, and on the same date the receiver was also authorized to complete a number of contracts for plumbing in various residences in Warren, including the furnishing of materials and labor in the completion of these contracts.

The sanitary company received notice of the filing of the petition in bankruptcy on the 10th or 12th of December. Nothing was done by the Sterling Sanitary Manufacturing Company to recover the property itself, either from Watmough or the trustee, but on January 13th, more than a month after the knowledge of the bankruptcy reached the sanitary company, the sanitary company wrote a letter in substance as follows:

"We hereby notify you that we make claim to 12 low down siphonic water closets delivered to William Watmough, Warren, Ohio, on the date he went into bankruptcy, December 9, 1912, amounting to \$150."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This letter was received by the trustee elected in the interim. At the time of the receipt of this letter, the trustee did not know the particular property; he did not keep an account of its sale, and did not know then, and did not know at the time of the hearing before the special master, what he received for it. Nothing further was done by the Sterling Sanitary Manufacturing Company until it filed its petition with the referee in bankruptcy, claiming in substance that on the 4th day of December it entered into an agreement to sell certain goods, describing them, to Watmough, for which he (Watmough) agreed to pay the sum of \$150; that on December 6th it shipped the goods to Watmough, at Warren, Ohio; that at the time he purchased the goods he was bankrupt and unable to pay for them, and had no expectation of paying therefor, nor did he intend to pay therefor; that the goods were ordered for the purpose of defrauding the plaintiff, or the intervener; that on December 9th Watmough was adjudged a bankrupt; that on the same day the goods were delivered from the freight station, at Warren, to the bankrupt's place of business, and placed among his stock in trade, and the same was thereafter taken possession of by the trustee in bankruptcy and sold, and that by reason of such sale he was unable to get possession of the goods and is now unable to get possession of the same; that, by reason thereof, the petitioner prays that he may be adjudged to have a valid claim against the trustee for the contract price of \$150. This intervening petition was filed with the referee in bankruptcy on the 24th day of May, 1913. Nothing was done by the manufacturing company, except to send the letter referred to and to file this petition.

[1] The trustee in bankruptcy contends that the manufacturing company is entitled only to share in the assets of the bankrupt the same as the other general creditors. The intervening petitioner claims that he has the right to this \$150 to be paid to him, by reason of the well-settled doctrine that, where property has been obtained from one by fraudulent representations and fraudulent practices, the vendor, upon discovering the fraud, may disavow the contract and recover the property. This doctrine is well established and well recognized in the bankruptcy courts.

It is plain from the record that the vendor was induced to sell his property by reason of the fraud of the vendee in concealing his financial condition. *Talcott v. Henderson*, 31 Ohio St. 162, 27 Am. Rep. 501; *Wilmot v. Lyon*, 49 Ohio St. 296, 34 N. E. 720.

When the sanitary company parted with the possession of its goods, by reason of the fraudulent inducement of the bankrupt, it was entitled to disaffirm the sale and recover such property from the vendee's trustee in bankruptcy. *Loveland on Bankruptcy*, § 407; *In re Spann*, 183 Fed. 819; *Halsey v. Diamond Distilleries Company*, 191 Fed. 498, 112 C. C. A. 142.

It was the legal duty of the vendor to rescind the contract within a reasonable time (that is, before the lapse of a time after the true state of things is known), so long that under the circumstances of the particular case the other party may fairly infer that the right of rescission is waived. *Pollock's Principles of Contracts*, 515; *Ward v. Sher-*

man, 192 U. S. 168, 176, 24 Sup. Ct. 227, 48 L. Ed. 391; Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798; McLean v. Clapp, 141 U. S. 429, 432, 12 Sup. Ct. 29, 35 L. Ed. 804.

[2] The vendor had the undoubted right, on learning of the fraud practiced upon him, to rescind the contract of sale, to recover the particular property, if it could be found, or, if it had been sold, to recover the proceeds, if known, and not lost and so intermingled with other funds as to be indistinguishable either in kind or amount.

[3] Outside of the letter written to the trustee a month after the bankruptcy was discovered, the vendor did nothing to pursue the identical property, or to recover the proceeds arising from its sale, until the intervening petition was filed in May, 1913.

A proper administration in estates in bankruptcy requires that all parties shall be treated fairly. There was plainly no wrong on the part of the trustee who stands as the representative of all the creditors. The particular goods were never pointed out to him, nor were they asked to be separated from the other goods in his possession. If the special master is sustained in his findings, the intervening petitioner would recover the entire amount of the purchase price of these goods, and this amount would be paid out of the general assets of this bankruptcy case.

The evils growing out of these reclamation proceedings are quite hard to overcome. A claiming creditor should be required in the first instance to be diligent in the pursuit of his remedy, where he desires to rescind the contract of sale and recover the property passing under this contract.

Under all the facts and circumstances of the case, I am of the opinion that the intervener lost his right to rescind this contract by reason of his delay in proceeding.

The finding of the special master that this should be paid in full is reversed, and the intervening petitioner may file his claim as a general creditor. An order may be drawn accordingly.

FIRST NAT. BANK OF DUNN, N. C., v. FIRST NAT. BANK OF
MASSILLON, OHIO.

(District Court, N. D. Ohio, E. D. November 24, 1913.)

No. 8663.

BILLS AND NOTES (§ 68*)—ACCEPTANCE—PROMISE TO ACCEPT.

Where plaintiff bank, on presentation to it by the W. Company of checks on defendant bank, wired defendant, "Will you pay W. Company checks?" stating the amount, and received a reply: "Forward your checks. They will undoubtedly be taken care of by the company when presented"—whereupon plaintiff advanced the amount of such checks to the W. Company, defendant was liable to plaintiff for the amount of the checks, since it might have put the matter beyond all possibility of doubt, and what it said in addition to "forward your checks" was not in direct answer to plaintiff's telegram.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 110-115; Dec. Dig. § 68.*]

At Law. Action by the First National Bank of Dunn, N. C., against the First National Bank of Massillon, Ohio. On demurrer to the petition. Demurrer overruled.

G. M. Anderson, of Akron, Ohio, for plaintiff.

M. B. & H. H. Johnson, of Cleveland, Ohio, and George Kratsch, of Massillon, Ohio, for defendant.

DAY, District Judge. The questions in this case arise upon the demurrer filed by the defendant to the plaintiff's petition on the ground that the petition does not state facts which show a cause of action in favor of the plaintiff.

The petition alleges in substance that on December 11, 1909, the Werner Company of Akron, Ohio, presented at the plaintiff's bank a certain check for \$5,921 drawn upon the plaintiff and requested the plaintiff to cash the check; and at the same time the Werner Company offered to the plaintiff two checks drawn upon the defendant and payable to the order of the plaintiff, amounting in the aggregate to the sum of \$5,921, in payment of the check drawn upon the plaintiff; that thereupon, and before cashing the check first above mentioned, the plaintiff sent to the defendant the following telegram:

"Will you pay Werner Company checks fifty-nine hundred odd dollars? Answer. First National Bank"—

and received from the defendant, in reply, the following telegram:

"Answering yours. Forward your checks. They will undoubtedly be taken care of by the company when presented."

And thereupon the plaintiff cashed for the Werner Company the first above-mentioned check and forwarded for collection the checks drawn by the Werner Company upon the defendant, but the defendant refused to pay the checks so drawn, and that the plaintiff has been unable to collect from the Werner Company any part of the sum of \$5,921 except the sum of \$221.73.

It is further alleged that the plaintiff had no knowledge of the solvency or the insolvency of the Werner Company and was unwilling to cash the check upon it, of the Werner Company, until the plaintiff was assured that the checks of the Werner Company upon the defendant would be cashed upon presentment. It is also alleged in the petition that in the telegram the defendant telegraphed the plaintiff that by that telegram the defendant accepted, guaranteed the payment of, and would pay the checks upon presentment to it.

It is the contention of the defendant that the defendant's telegram does not constitute an acceptance or promise to pay the two checks drawn by the Werner Company on the defendant; that, under the circumstances set forth, the defendant's telegram does not constitute a guaranty of the payment of the checks; and that, if the defendant's telegram should be construed as an acceptance or promise to pay, it would be illegal and unenforceable by the plaintiff because, the plaintiff having notice that there were no funds in the defendant's bank to meet the checks, such acceptance or promise to pay would be unlawful to the knowledge of the plaintiff; and also that, if the telegram

constituted a guaranty, this guaranty would be ultra vires of the defendant and void.

From an examination of the petition it seems plain that, if the telegram of the defendant constituted an acceptance, then it is unnecessary to consider the other questions raised by the demurrer filed by the defendant.

The inquiry made of the defendant was, "Will you pay the Werner Company checks?" and asked for an answer. The Massillon bank answered, "Forward your checks. They will undoubtedly be taken care of by the company when presented." From an investigation of the state and federal cases bearing upon similar transactions, the principal case which seems to have been generally recognized by the law is the case of *Garrettson v. Bank (C. C.)* reported in 39 Fed. 163, 7 L. R. A. 428, s. c. (C. C.) 47 Fed. 869, and *Bank v. Garrettson*, 51 Fed. 168, 2 C. C. A. 145. The first hearing upon this case was upon demurrer, as reported in 39 Fed. The second hearing was upon an agreed statement of facts; and the third hearing, reported in 51 Fed., was a review of the findings of the lower court by the Second Circuit Court of Appeals. Judgment was rendered in the Circuit Court in favor of the plaintiff both on the demurrer and the agreed statement of facts. The court in 47 Fed. at page 869 said:

"The facts show that the check was drawn and offered in payment for the cattle before the first telegram was sent. This fact was clearly enough conveyed to defendant by the phraseology of the telegram of September 28th: 'Will you pay James Tate's check on you, twenty-two thousand dollars?' Defendant was not inquired of simply as to the solvency of Tate, nor, in words, whether his check was or might be good; but the direct question was in effect: Will you pay his check on you for \$22,000? The answer must be read and interpreted in connection with the question asked. It was not only that Tate is good, with the necessary implication to the extent of \$22,000, but it went further and said, 'Send on your paper,' clearly indicating that it was acceptable, and would be paid on its arrival. On the faith of that assurance, the vendor parted with the cattle, and accepted the check in payment; and on the faith of the telegram the plaintiffs accepted the check in discharge of the cattle company's debt to them, and thereupon Tate was permitted to take away the cattle. A more complete estoppel could not well arise."

The telegrams involved in the *Garrettson* Case were:

"Will you pay James Tate's check on you, twenty-two thousand dollars?"

The answer read:

"James Tate is good. Send on your paper."

In the case of *Scudder v. Union National Bank*, 91 U. S. 406 (23 L. Ed. 245), the court said on page 414:

"It is a sound principle of morality, which is sustained by well-considered decisions, that one who promises another, either in writing or by parol, that he will accept a particular bill of exchange, and thereby induces him to advance his money upon such bill, in reliance upon his promise, shall be held to make good his promise. The party advances his money upon an original promise, upon a valuable consideration; and the promisor is, upon principle, bound to carry out his undertaking. Whether it shall be held to be an acceptance, or whether he shall be subjected in damages for a breach of his promise to accept, or whether he shall be held to be estopped from impeaching his word, is a matter of form merely. The result in either event is to compel the promisor to pay the amount of the bill, with interest."

In the case of *Williams v. Winans*, 14 N. J. Law, 339, commented upon with approval in the *Scudder v. Union National Bank Case*, the court said:

"A parol acceptance of a draft or bill will bind the acceptor. A promise to accept, made before the acceptance of the bill, will amount to an acceptance in favor of the person to whom the promise was communicated, and who took the bill on the credit of it. An acceptance may be implied as well as expressly given. An acceptance, after the time of payment, is good and binds the acceptor."

In the case under consideration it appears from the petition that the defendant knew that the checks had been offered to the plaintiff, and that before it accepted them the plaintiff wanted to know whether these checks would be paid on presentation. The question formulated in plaintiff's telegram called for a plain, simple answer. All the defendant had to do was to make such an answer. It had it in its power, and it was the duty in fair dealing to put the question beyond all possibility of doubt. Being presumed to know this, the defendant wired, "Forward your checks." Whatever the telegram said in reference to the solvency of the company was not in direct answer to the telegram, as the telegram inquired whether or not the checks would be paid, not whether or not the Werner Company was solvent. As this question arises upon demurrer, it is not necessary to consider at this time the other contentions urged by counsel for the defendant.

The demurrer will be overruled.

In re YUNGHAUSS.

(District Court, S. D. New York. January 26, 1914.)

ALIENS (§ 68*)—NATURALIZATION—APPLICATION—TIME—LIMITATIONS.

Naturalization Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 529) provides for a declaration of intention to become a citizen, but declares that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States, shall be required to renew such declaration; also, that not less than two years or more than seven years after he has made such declaration of intention he shall make and file in duplicate a petition in writing to be made a citizen, provided that if he has filed his declaration before the passage of the act he shall not be required to sign the petition in his own writing, etc. *Held*, that such provisions were intended not to impose any new qualifications in respect to those who had filed their declarations prior to the passage of the act, but did not relieve such persons of the obligation to make their final application for citizenship within seven years.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. § 68.*]

Petition by Charles Yunghauss to be admitted as a citizen. Application dismissed.

William Blau, of New York City, for petitioner.

H. Snowden Marshall, U. S. Atty., and J. E. Walker, Asst. U. S. Atty., both of New York City, opposed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—35

MAYER, District Judge. The petitioner made his declaration of intention to become a citizen before the Supreme Court of the state of New York on April 19, 1905. He filed in this court his petition for admission to become a citizen on October 3, 1913.

The question is whether the petition should be denied because more than seven years have elapsed between the time of the making of the declaration of intention and the presentation of the petition for admission to become a citizen.

Section 4 of the Naturalization Law of June 29, 1906, provides, among other things, as follows:

"First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: *Provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration:* * * * *Provided further,* That any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States who has resided constantly in the United States during a period of five years next preceding May first, nineteen hundred and ten, who, because of misinformation in regard to his citizenship or the requirements of the law governing the naturalization of citizens has labored and acted under the impression that he was or could become a citizen of the United States and has in good faith exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information and belief may, upon making a showing of such facts satisfactory to a court having jurisdiction to issue papers of naturalization to an alien, and the court in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen of the United States, receive from the said court a final certificate of naturalization, and said court may issue such certificate without requiring proof of former declaration by or on the part of such person of their intention to become a citizen of the United States, but such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens.

"Second. *Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition: Provided, that if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting.*"

It is claimed that those parts of these sections which are underlined, *supra*, are in conflict with each other, and that the provision "that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen * * * shall be required to renew such declaration," when read in connection with the whole statute, indicates that it was the intention of the Congress not to apply the seven-year limitation to existing declarations.

An examination of the statute indicates that what the Congress intended was that there should not be any new qualifications in respect of those who, prior to the passage of the act, had filed their declaration; and also that such persons should not be put to the trouble of filing new declarations.

For instance, while the act required that applicants thenceforth should sign the petition for final admission in their own handwriting, it did not add that requirement in the case of those who had filed their declarations prior to the passage of the act.

It is clear, however, that the Congress did not intend that old applicants could wait for a longer period than new applicants within which to file the petition.

There is no reason why there should be any distinction in this regard between old and new applicants. The purpose of the act in this respect was to require that the applicant should move within a reasonable time, and the Congress fixed seven years as such a reasonable time. It seems fair to assume that the time limit was established in order to give the appropriate officials of the government a fair opportunity to make such investigations as would inform the court in respect of the admissibility of the applying alien.

The question under consideration was referred to by Judge Trieber in the case of *In re Wehrli* (D. C.) 157 Fed. 938, and he interpreted the statute in this respect concisely as follows:

"The true intent of Congress was that aliens declaring their intention to become naturalized after the passage of the act must file their final application within seven years after the filing of the declaration of intention, and as to those who filed the declaration of intention before the enactment of the statute they must make their final application within seven years from the enactment of the act."

Realizing that a decision of this question will involve the status of a considerable number of aliens, I have conferred with Judge HOUGH and Judge HAND, and they authorize me to say that they concur in the conclusion herein expressed.

I am of the opinion that where the petition for admission is made more than seven years after the act went into effect, to wit, September 26, 1906, it is not valid for any purpose.

The petition is therefore denied, and the clerk is instructed to make known this decision to all persons affected thereby who have heretofore appeared before the court.

UNITED STATES ex rel. NG. SAM et al. v. REDFERN, Commissioner of Immigration.

(District Court, E. D. Louisiana. January 23, 1914.)

No. 15,000.

1. ALIENS (§ 32*)—DEPORTATION—WARRANT.

Where proceedings were instituted against certain Chinese aliens under the immigration law, and the commissioner found that the aliens had entered the United States at a point unknown, from Canada, without the inspection required by law, a deportation warrant, directing their return to China instead of to Canada, was erroneous.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

2. ALIENS (§ 32*)—JURISDICTION—ALIENS.

Where, in proceedings for the deportation of certain Chinese aliens under the immigration law, the warrant illegally ordered them to be deported to China, when it was found that they had entered the United States from Canada, it was the duty of the court to take jurisdiction of a writ of habeas corpus and to determine the merits of the case.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

3. ALIENS (§ 32*)—DEPORTATION—CHINESE—AUTHORITY OF OFFICERS.

While the immigration authorities may deport a Chinaman unlawfully in the United States under the general immigration act, as well as under the Chinese exclusion act, yet if they elect to proceed in the summary manner authorized by the immigration laws they must proceed strictly in accordance therewith; and hence, having found that the defendant entered the United States from Canada, there was no authority to return him to China, or to any country except that "from whence he came."

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

4. ALIENS (§ 23*)—DEPORTATION—IMMIGRATION LAW—LIMITATIONS.

Chinese persons who had been in the country three years were not subject to deportation under the immigration laws.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76-90; Dec. Dig. § 23.*]

Habeas corpus by the United States, on relation of Ng. Sam and others, to procure relators' discharge from imprisonment under deportation warrants. Writs made absolute, and relators discharged.

R. M. Moore, of New York City, and B. B. Howard, of New Orleans, La., for relators.

Jos. W. Montgomery, Asst. U. S. Atty., of New Orleans, La., for defendant.

FOSTER, District Judge. In this case the relators petition for writs of habeas corpus to release from the custody of the immigration authorities four Chinese persons, named, respectively, Ng. Sam, Ng. Tin, Ng. Sing, and Yee Ngall, who were in transit to China via San Francisco under departmental warrants of deportation. The main contention of petitioners is that the Secretary of Labor found that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said Chinese had entered the United States from Canada, and therefore the Secretary of Labor exceeded his authority in ordering them deported to China. A similar writ was asked for in the case of Mark Wing Hee.

Rules to show cause issued, and the cases were tried at one time. On the hearing, it developing that Mark Wing Hee had been ordered deported by a United States commissioner, and had not availed himself of his right to appeal to the district court, the order to show cause was recalled and the writ denied. With regard to the other four Chinamen, however, writs of habeas corpus issued, and the matter was submitted on the petition and return and a transcript of the proceedings before the department made part of same.

There is some slight difference in the spelling of the names of the parties but there is no doubt as to their identity. The return sets up substantially that they were arrested at Saratoga Springs, N. Y., on November 21, 1913, and on November 24th they were granted a hearing to show cause why they should not be deported from the United States; that thereafter, about December 4th a record of the hearings was transmitted to the Secretary of Labor through the Commissioner General of Immigration, and the then acting Secretary of Labor became satisfied that each of the said aliens was illegally in the United States in violation of the immigration laws, in that each of said Chinese persons was then and there an alien who had entered the United States, at a point unknown, from Canada, on or about the 20th day of November, 1913, at a point other than designated by the immigration authorities, without inspection as required by law, and each of the Chinese persons was likely to become a public charge at the time of said entry, and that, further, each of the Chinese persons was in the United States in violation of the Chinese exclusion laws; that the Acting Secretary of Labor issued his warrant of deportation on the 8th day of December, 1913, and the said persons are held by virtue of the said warrant.

[1, 2] From the return itself, it is evident that the warrant is irregular in that the Assistant Secretary of Labor found that the aliens entered the United States from Canada, yet they are ordered deported to China. This he was without authority to do. *U. S. v. Ruiz*, 203 Fed. 441, 121 C. C. A. 551. And therefore it is the duty of the court to take jurisdiction and look into the merits of the case. *In re Chin Yow*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369; *Redfern v. Halpert*, 186 Fed. 150, 108 C. C. A. 262.

[3] While no doubt the immigration authorities may deport a Chinaman unlawfully in the country under the general immigration act, as well as under the provisions of the Chinese exclusion laws, if they elect to proceed in the arbitrary and summary manner authorized by the former, they at least ought to proceed strictly in conformity with its provisions. On the record before me there is not a scintilla of evidence to show when these four Chinese persons came into the United States, except their own testimony, and there is nothing to show they came from Canada at all, or that they are liable to become public charges. There are indeed some suspicious circumstances connected with their taking passage on train at Port Kent, N. Y., but, giving full

weight to the innuendo and hearsay reported by the inspector who investigated them, still there is nothing to show these essential facts.

[4] Under the provisions of the immigration act, these Chinese, though unlawfully in the country, could not be deported after three years. Disregarding the claim of three of them to be American citizens, from their own testimony all of them have been in the United States more than three years, and, while the immigration officers and Secretary of Labor perhaps might arbitrarily disregard this sworn testimony, still if that is eliminated from the case, there is nothing left. Congress has indeed vested the immigration officers with enormous power, subject to no check save their own consciences, but in granting them discretion to arrest and deport any person charged with being an alien and unlawfully in the country, I cannot believe that it was ever intended that they could do so arbitrarily, and without some evidence upon which to base their decision.

Under ordinary circumstances, where the record shows clearly an alien is unlawfully in the country, but the warrant of deportation is defective, the Department of Labor should doubtless be afforded an opportunity of correcting its mistake, but in this case there would seem to be no good reason for so doing as the men can be rearrested under the provisions of the Chinese exclusion laws. And in that event they will have an opportunity of a trial in court, where they may be represented by counsel in fact as well as in theory, and will have compulsory process to obtain witnesses in their own behalf.

The writs will be made absolute, and the prisoners discharged from custody.

COLOSINO et al. v. PITTSBURGH & L. E. R. CO.

(District Court, E. D. Pennsylvania. February 2, 1914.)

No. 2322.

1. COURTS (§ 344*)—PROCEDURE—PROCESS—SERVICE—WHAT LAW GOVERNS.

Whether a summons in an action in a federal court may be served within a federal district must be determined by the law of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. § 344.*]

2. COURTS (§ 274*)—FEDERAL COURTS—JURISDICTION.

Under Judicial Code, §§ 51, 52 (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]), providing for the venue of suits brought in the federal courts, an action brought by Italian subjects residing in Italy, for death of their son, against a corporation of Pennsylvania and Ohio, must be brought in the federal district where the corporation is a legal resident.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. § 274.*]

3. COURTS (§ 274*)—FEDERAL COURT—DISTRICT—ACTION AGAINST CORPORATION.

Where a railroad company was incorporated in Pennsylvania and Ohio, having its office and transacting its business in the Western district of Pennsylvania, and transacted no business and had no office or place of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

business in the Eastern district, the fact that it was a part of a fast freight line, consisting of the traffic departments of a number of railroads, maintaining a chief clerk in the Eastern district, whose authority was limited to the solicitation of freight, did not make it a resident of the Eastern district so as to subject it to suit there by service of process on such clerk.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. § 274.*]

At Law. Action by Agostino Colosino and others against the Pittsburgh & Lake Erie Railroad Company. On motion to set aside service of summons. Granted.

Joseph W. Henderson, of Carlisle, Pa., and Francis Rawle, of Philadelphia, Pa., for plaintiffs.

Morgan, Lewis & Bockins, of Philadelphia, Pa., for defendant.

J. B. McPHERSON, Circuit Judge. This suit was brought in the Eastern district of Pennsylvania on December 2, 1912. Although the principal office of the defendant company and its tracks in this state are in the Western district, the summons was served in Philadelphia. The manner of service is shown by the marshal's return:

"At Philadelphia in my district served the within writ on the Pittsburgh & Lake Erie Railroad Company by handing a true and attested copy thereof to H. A. Barnes, chief clerk in charge of its office No. 226 Bourse Building, 5th above Chestnut St., Philadelphia, being unable upon inquiry to ascertain the residence of any of its officers residing in the district."

[1-3] The plaintiffs attempt to sustain the service by invoking the Pennsylvania act of 1903 (P. L. 139), a supplement to the act of 1901, (P. L.) 614; but, as was pointed out in *Earle v. Railway Co.* (C. C.) 127 Fed. 237—where the act of 1901 was appealed to—the first question to be decided is, not whether the summons was properly served, but whether it could be served at all within this district. This is not to be determined by the law of the state, but by the law of the United States. Turning to the relevant sections (Nos. 51 and 52) of the Judicial Code that has been in force since January 1, 1912, we find that such a suit as this—an action for the death of a son, brought by Italian subjects residing in that kingdom, against a corporation of Pennsylvania and Ohio—must be brought in the federal district where the corporation is a legal resident. Therefore, unless the defendant resides in the Eastern district of Pennsylvania, or has waived its privilege by a voluntary appearance to the action, this court cannot entertain the suit, and the attempted service of the summons is ineffective. No such appearance was entered, and the plaintiffs undertook to prove that the defendant was doing business, and was therefore residing, in this district. But in my opinion the effort was not successful. The facts are not in dispute; I find them to be as set forth by the two witnesses whose affidavits were laid before the court. C. H. Rolf testified for the defendant as follows:

"I am and was on December 2, 1912, employed by the New York Central Fast Freight Lines as commercial agent. The New York Central Fast Freight Lines is an association of the traffic departments of a number of railroad com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

panies, including the defendant corporation, the Pittsburgh & Lake Erie Railroad Company. My duties and powers consist solely of the solicitation of freight traffic for movement via the various railroads which are members of said association. I sell no tickets and receive no payments for transportation of freight, and have no power to do either. In some cases, for the convenience of shippers whose freight is consigned to prepayment points (that is to say, points where there is no agent of a railroad company with authority to receive payments for freight), I receive checks in advance for the freight, and forward them to the agent of the proper railroad company. Such checks are drawn to the order of such agent of such railroad company, and are not collected by me or through my office. In some cases, also, for the convenience of shippers who have received bills of lading from the initial line for freight routed over the defendant corporation's line, I am authorized to give exchange bills of lading over that line. There has, in fact, never been an exchange bill of lading issued by me, or by any one in my office, over the defendant corporation's line. Neither I nor any one employed in my office has power or authority to transact any business, or does or has in fact transacted any business, for the New York Central Fast Freight Lines, or for the defendant corporation, except as above stated.

"I have no written contract with the said New York Central Fast Freight Lines, but am employed by that association from month to month, upon a salary, for the performance of the duties above described. I have no contract whatever, either written or oral, with the defendant corporation. The lease for the office, Nos. 224, 226, and 228, Bourse Building, Philadelphia, is taken in the name of the New York Central Fast Freight Lines, and the defendant corporation has no control of said office, or of me, or of any other person connected with said office, except such indirect control as it may be able to exercise by its membership in said association.

"The defendant corporation, the Pittsburgh & Lake Erie Railroad Company, is a corporation incorporated under the laws of the state of Pennsylvania and state of Ohio, having its principal office, and transacting its business, in the Western district of Pennsylvania; and the said corporation transacts no business, and has no office or place of business, in the Eastern district of Pennsylvania at the present time, nor has it ever transacted business, or had an office in said district, at any time prior hereto. Said corporation has no property in the Eastern district of Pennsylvania, and has had no property therein at any time prior hereto. Its principal office has been, and still is, in Pittsburgh, Allegheny county, in the Western district of Pennsylvania, and all its tracks within the state of Pennsylvania are located in said western district.

"H. A. Barnes is the chief clerk in charge of the office of the association above referred to, under and subject to my direct and exclusive control, and his sole duties are to assist me in transacting and performing the duties above described. His wages are paid by me on behalf of the said association, which furnishes me with the funds for that purpose."

And Robert P. Hewitt testified for the plaintiffs as follows:

"Robert P. Hewitt, being duly sworn, deposes and says as follows: I am informed and believe that the offices of the defendant in Philadelphia, in connection with the New York Central Fast Freight Lines, are in rooms 224, 226, and 228, Bourse Building. These are two rooms: one of them is approximately 50 feet long by 22 feet wide, in which there are seven desks, and where about 10 clerks are at work. The other room is approximately 10 feet long by 22 feet wide, and is apparently the room where files are kept.

"On the main entrance door of the offices, there is painted on the glass the name, 'Pittsburgh & Lake Erie R. R.' This name likewise appears on the stationery. A copy of defendant's letter head is attached hereto as 'Exhibit A.' Upon inquiry of a clerk in the office, information was given that complete data for transportation of freight over defendant's line was on hand, and that that office did a great deal of business for the defendant company."

As it seems to me, discussion of these facts would be superfluous. The case is ruled by *Green v. Railway Co.*, 205 U. S. 530, 27 Sup. Ct.

595, 51 L. Ed. 916; s. c. (C. C.) 147 Fed. 767. See, also, Earle v. Railway Co., supra.

The rule to set aside the service is made absolute.

GRABSKY et al. v. BELMONT COAL MINING CO.

(District Court, N. D. Ohio, E. D. October 28, 1913.)

No. 8,676.

COURTS (§ 274*)—ACTION AGAINST CORPORATION—FEDERAL DISTRICT—RESIDENCE.

Judiciary Act March 3, 1911, c. 231, § 51, 36 Stat. 1101 (U. S. Comp. St. Supp. 1911, p. 150), provides that no civil suit shall be brought in any district against any person by original process in any other district than that whereof he is an inhabitant; but, where jurisdiction is founded only on the fact that the action is between persons of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. Section 52 declares that, when a state contains more than one district, every suit not of a local nature in the District Court thereof against a single defendant inhabitant of such state shall be brought in the district where he resides. *Held*, that where a suit for wrongful death was brought by subjects of the Czar of Russia who were residents of B. county, Ohio, and who had never resided in the Northern federal district of Ohio, against a corporation whose charter provided that its principal place of business should be located at G. in B. county, which was not in that district, defendant could not be sued in the federal courts of the Northern district, though it maintained an office and did business there.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. § 274.*]

At Law. Action by Wlodyslaw Grabsky and others against the Belmont Coal Mining Company. On Motion to quash summons. Sustained.

Herman J. Nord and Reed & Eichelberger, all of Cleveland, Ohio, for plaintiffs.

Garrett Stevens and Hoyt, Dustin, Kelley, McKeehan & Andrews, all of Cleveland, Ohio, for defendant.

DAY, District Judge. The defendant has filed a motion to quash and set aside the service of summons, and to dismiss this action, objecting to the jurisdiction of this court over the defendant, for the reason that neither the plaintiff nor the defendant in this action were at the time of the bringing of the action, nor are they at the present time, any of them residents of the Northern district of Ohio, or the Eastern division thereof.

It is stipulated by the parties that at the time of the death of the decedent, and at the time of bringing this action and for some time prior thereto, the plaintiffs were subjects of Russia, and were residents of Belmont county, Ohio, and that they were never at any time residents of any county within the Northern district of Ohio; that the de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fendant is a corporation under the laws of the state of Ohio; that its charter provides:

"Said corporation is to be located at Glencoe in Belmont county, Ohio, and its principal business there transacted."

And further that the charter provision has never changed by any action as is required under the laws of the state of Ohio.

Ohio Gen. Code, § 8625, provides in part:

"Any number of persons, not less than five, a majority of whom are citizens of this state, desiring to become incorporated, shall subscribe and acknowledge articles of incorporation, which must contain: * * * (2) The place where it is to be located, or its principal business transacted."

In *Pelton v. Transportation Co.*, 37 Ohio St. 450, the court said on page 455:

"For many purposes, a corporation is regarded as having a residence—a certain and fixed domicile. In this state, where corporations are required to designate in their certificates of incorporation the place of the principal office, such office is the domicile or residence of the corporation. The principal office of a corporation, which constitutes its residence or domicile, is not to be determined by the amount of business transacted here or there, but by the place designated in the certificate."

Sections 51 and 52 of the Judiciary Act of March 3, 1911, c. 231, 36 Stats. at Large, 1101 (U. S. Comp. St. Supp. 1911, p. 150), provide in part:

"* * * No civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

"Sec. 52. When a state contains more than one district, every suit not of a local nature, in the District Court thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides."

It is claimed by the counsel for plaintiffs herein that notwithstanding the provisions of the charter of the defendant company, that by reason of its maintaining certain offices in Cleveland, the defendant is a resident of the Northern district of Ohio, so as to give this court jurisdiction over the defendant company.

In view of the provisions of the charter of the defendant company, locating its domicile at Glencoe in Belmont county, designating that particular place as the place where its principal business is to be transacted, it is immaterial how much business the defendant carries on in the Northern district of Ohio, inasmuch as it does not appear to have its residence in this district. *Peale v. Marian Coal Co.* (C. C.) 172 Fed. 639; *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Southern Pacific Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; *In re Keasbey & Mattison Co.*, Petitioner, 160 U. S. 221, 229, 16 Sup. Ct. 273, 40 L. Ed. 402; *Galveston Ry. Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248.

The highest court of Ohio has said, in the case of *Pelton v. Transportation Co.*, 37 Ohio St. 450, hereinbefore cited, that the principal

office of a corporation which constitutes its residence or domicile is not to be determined by the amount of business there, but by the place designated in the certificate.

This principle is approved in the case of *Galveston Ry. Co. v. Gonzales*, 151 U. S. 496, at page 504, 14 Sup. Ct. 401, at page 404 (38 L. Ed. 248), the court saying:

"In the case of a corporation the question of inhabitancy must be determined, not by the residence of any particular officer, but by the principal offices of the corporation, where its books are kept and its corporate business is transacted, even though it may transact its most important business in another place. It is but a corollary of the proposition laid down in the three cases above referred to that, if the corporation be created by the laws of a state in which there are two judicial districts, it should be considered an inhabitant of that district in which its general offices are situated, and in which its general business, as distinguished from its local business, is done."

And at page 508 of 151 U. S., and page 405 of 14 Sup. Ct. (38 L. Ed. 248), the court said:

"In the case of the *Western Transportation Co. v. Scheu*, 19 N. Y. 408, a corporation organized to navigate the lakes was declared to have its domicile, for the purposes of taxation, in the city or town in which the principal office for managing the affairs of the company was located, as evidenced by its certificate of organization, although it had an office elsewhere, employing the services of 20 times as many agents, and where a much larger proportion of its moneys was received and disbursed, and where its principal officers resided during the business season. See, also, *Pelton v. Transportation Co.*, 37 Ohio St. 450." *Firestone Tire & Rubber Co. v. Vehicle Equipment Co.* (C. C.) 155 Fed. 676; *Foster's Federal Practice*, p. 603; *Lyman Ventilating Co. v. Southard*, Fed. Cas. No. 8,633; *Ware-Kramer Tobacco Co. v. American Tobacco Co.* (C. C.) 178 Fed. 117.

It is quite plain that the defendant is a corporation resident outside of the Northern district of Ohio, and that the plaintiffs were not at any time residents of the Northern district of Ohio.

The motion to quash is, accordingly, sustained.

UNITED STATES v. ROSENTHAL et al.

(District Court, S. D. New York. January 13, 1914.)

ALIENS (§ 54*)—IMMIGRATION—BONDS—CONCLUSIVENESS.

Where a bond was given to secure the admission of a minor alien, conditioned that he should attend the regular terms of the public school until he arrived at the age of 16 years, or until April 1, 1913, the bond reciting that he was then 15 years old, and also requiring that the person requesting his admission should make quarterly reports of the alien's school attendance to the Commissioner of Immigration at the port of New York, the sureties were estopped by the bond to claim that the alien was in fact 16 years old when admitted, and they were liable on proof of his failure to attend school and failure to make reports as required.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 112; Dec. Dig. § 54.*]

Action by the United States of America against Charles S. Rosenthal and Louis Rosenthal on an immigration bond. Judgment for the United States.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Frank M. Roosa, Asst. U. S. Atty., of New York City.
John M. Quinn, of New York City, for defendants.

HAND, District Judge. This is a suit upon a bond under the Immigration Law, which was given by the defendants to secure the attendance in school of one Joseph Isaac, an immigrant who was a minor. The Secretary of Commerce and Labor, in his discretion, decided to allow the alien to be admitted upon giving a suitable bond, containing among other conditions that he should attend the regular terms of the public school until he arrived at the age of 16 years, or until April 1, 1913. Another condition of the bond was that one Solomon Israel, who requested his admission, should, every three months during the period, send to the Commissioner of Immigration at the Port of New York written reports, stating that the alien had, during the preceding three months, attended school, and stating the name and condition of the school at which he had attended.

It is proved beyond any contradiction in this case, that the alien, who was admitted on the 13th of April, 1912, did not go to school until the 9th of December of that year, so that there was a clean breach of the first condition of the bond in that fact. Further than that, there was another breach in that Solomon Israel did not report every three months that the alien had been to school, and did not report at all.

There is a third question, which I am glad to say I have not to decide, and it is this: The boy went to school on December 9, 1912, and from December 15th of that year until April he worked in a cloakroom from 5 p. m. until 1 a. m. Now the second condition of the bond is this:

"That during the said period the said alien shall not engage in any employment or perform any work or labor which shall interfere with regular attendance at school."

I myself am not prepared to say how I should hold, if the question were squarely presented to me, as to whether a boy, under 16 years of age, who worked until 1 a. m. in a cloakroom was not doing work which interfered with his regular attendance at school, even though it appeared that he actually did attend regularly at school. It is perfectly clear to me that that kind of labor ought to interfere with any boy's going to school. Whether it comes within the exact condition of the bond I do not know; it might be a good suggestion to the authorities as to the exact phraseology which might be adopted in the future in regard to such bonds. I am perfectly satisfied that no boy ought to be permitted, who is expected to go to school, to have any such hours, and I might be greatly embarrassed if I had to construe that exact language, where the language was "which shall interfere with the regular attendance at school," in case it were proved that, improper as it was, the alien actually did perform such labor and in addition go to school, because with that language I might have to hold that all that was required by the bond was actual attendance, however improper it might be. That question is not up in this case, and I make no indication about how I should decide it, except to throw it out as a suggestion.

But the other two conditions have certainly been violated; the government has proved that, and there is no dispute.

Now the only real question in the case is this: That the alien now comes on the stand, and in answer to my questions and those of Senator Quinn, he says that he was already 16 years of age at the time he came here. Well, if that were true, and had been so understood at the time, I suppose no bond would ever have been exacted from him, for it is quite clear that the bond only was to procure his attendance until he was 16 years. But the recital of the bond is to the contrary, because the recital says, "Whereas the said alien, Joseph Isaac, aged 15 years, a subject of Turkey, arrived," and so forth, has applied for admission, therefore the bond has been given. And, moreover, the bond would be obviously nonsense if the boy had already been 16 years of age, because it provided only that he should remain at school until he was 16 years of age, or until April 1, 1913, whichever of the two came first. The last words I interject, but that would be the construction that I would put on such a period. Now the defendants are therefore attempting, in this case, to deny the recitals in the bond itself. They have signed the bond, the bond is a formal instrument, and I think, certainly in an action at law upon the bond, they are estopped by it. That has been the rule with formal instruments from the earliest times, and, while the bond exists and is valid, I shall therefore hold that they are estopped by the recitals in the bond to say that the boy was not 15 years old when he came.

The result is that there must be judgment in this action. But if the fact actually was that the boy was 16 when he came, and they can make good that question in a suit in equity in which they must carry the burden of proof and satisfy some judge that the fact really was so, the contradictions in the boy's testimony being what they now are, then I think they ought to be relieved from the bond, and I am going to give them an opportunity to bring such a suit if they like. For that reason I will make this provision: Judgment will go as usual in the suit, but I will direct the clerk not to issue any execution on the judgment for a period of two weeks, we will say. That is time enough to make up your mind, surely.

Mr. Quinn: I should say 30 days. I suppose Mr. Rosenthal—

The Court: It is long enough to make up their minds.

Mr. Quinn: Yes.

The Court: I will direct the clerk not to issue any execution on the judgment for 10 days after the entry of judgment. If at that time defendants have filed a bill in equity in this court to be relieved of the bond or the judgment, which is the same thing, then no execution will issue until that suit is determined. If they do not file within the 10 days any such suit, the execution will go as of course.

Judgment may be entered in accordance with this decision.

I, therefore, direct a verdict for the United States.

The jury (of one), in accordance with the direction of the court, returned a verdict in favor of the plaintiff.

In re LYNCH.

(District Court, E. D. Pennsylvania. January 26, 1914.)

No. 4622.

1. LANDLORD AND TENANT (§ 269*)—DISTRESS—PROPERTY SUBJECT.

While a landlord in Pennsylvania may not distrain his tenant's goods already in custodia legis under an execution, a mere paper levy made or maintained to obtain a mere formal lien will not prevent the landlord, or any other judgment creditor, from exercising his right to seize the goods.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1083-1097; Dec. Dig. § 269.*]

2. LANDLORD AND TENANT (§ 269*) — DISTRESS WARRANT — LEVY — PROPERTY HELD UNDER FI. FA.

A tenant being indebted to various creditors, one of them levied on certain of his goods in August, 1912, making an appraisalment, leaving the copy of the writ with him, and warning him not to remove any of the goods. After the levy, the deputy returned in company with his principal, the sheriff's officer, and ascertained that the goods levied on were intact. Nothing further was done under the levy, and, in November following, the landlord distrained, seizing the goods for rent due from February to October, 1912, but the sale under the distraint was postponed from week to week from November 20, 1912, until bankruptcy intervened in January, 1913; these postponements being at the instance of the bankrupt, whose creditors were holding meetings with the hope of a compromise, to which the landlord assented. *Held*, that such facts did not show that the execution levy was merely colorable or made in bad faith, and hence the goods were not subject to the distraint.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1083-1097; Dec. Dig. § 269.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Kender-ton S. Lynch. On certificate of referee presenting for review an order setting aside a landlord's claim for a lien under a distress levy. Affirmed.

Julius C. Levi and Levi & Mandel, all of Philadelphia, Pa., for trustee.

Edwin Fischer, Henry N. Wessel, and Wessel & Aarons, all of Philadelphia, Pa., for landlord.

J. B. McPHERSON, Circuit Judge. The bankrupt was a hotel keeper with a going business. When the petition was filed, his personal property was claimed by an execution creditor and by the landlord; the distraint being several weeks later than the fi. fa. The property was sold, and, on distribution of the fund, the only question raised was the validity of the levy; the landlord attacking it as merely colorable.

[1] Counsel agree that in Pennsylvania a landlord may not distrain upon the tenant's goods if these are already in the hands of the law. They agree also that a paper levy, made or maintained for the mere purpose of obtaining a formal lien, will not prevent the landlord, or another judgment creditor, from exercising his right to seize the same

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

goods. No doubt exists about these rules, but the Supreme Court of the state has not applied them with uniform strictness. The earlier decisions are less liberal to the first levy than the decisions of more recent date. The present state of the Pennsylvania law on this subject will be found in *Platt-Barber Co. v. Groves*, 193 Pa. at page 480, 44 Atl. 571, at page 573, where Justice Mitchell summarized it as follows:

"The rule is well established that an execution which is not put in the sheriff's hands with the bona fide intention of collecting the debt, but merely to be held as security, or to prevent other creditors from coming upon the debtor's goods, is fraudulent as to them and will be postponed to subsequent levies. And stay or unusual delay of the proceedings, allowing the debtor to sell or otherwise to deal with the goods in contravention of the levy, and other acts of similar nature, give rise to a presumption of want of good faith. *Dorrance's Adm'r v. Com.*, 13 Pa. 159; *Earl's Appeal*, 13 Pa. 483; *Freeburger's Appeal*, 40 Pa. 244. Such acts, however, are not frauds per se, but only evidence of fraud, which may be rebutted, and, if the creditor's delay is shown to be in good faith and in furtherance of a genuine intention to collect his debt, he will not be postponed. Indulgence is not in itself fraudulent, but, on the contrary, is sometimes good policy for the creditor as well as mercy to the debtor, especially where, as in the present case, the subject of the levy is a store or going business of any kind. There is no fixed time by which such acts are to be judged. The test is good faith and absence of actual hindrance of others. As long as the creditor is honestly seeking collection, even by coaxing, and is not, in fact, hindering later executions, so long his indulgence to the debtor will not be a bar to his maintenance of his priority of levy.

"The earlier cases undoubtedly applied the presumption of fraud with great strictness and exhibit a tendency to treat it as a rule *juris et de jure*. But it was never divorced intentionally from its true principle, and the later decisions have treated the question more liberally as one of fraud in fact to be determined in each case by the evidence. *Broadhead v. Cornman*, 171 Pa. 322 [33 Atl. 360]; *Landis v. Evans*, 113 Pa. 332 [6 Atl. 908]; *Stroudsburg Bank's Appeal*, 126 Pa. 523 [17 Atl. 868]."

See, also, to the same effect, *Wadas v. Sharp*, 27 Pa. Super. Ct. 236.

[2] In every case, therefore, the vital point is the good faith of the first levy, and this must depend on the facts of the particular controversy. Here the referee has found the facts to be as follows:

"Lynch was indebted to various creditors, and was being pressed for the indebtedness. One of his creditors levied upon him in August, 1912, in the regular way, making an appraisal, leaving a copy with him, and warning him not to remove any of the goods. After this levy the deputy returned in company with his principal, the sheriff's officer, and ascertained that the goods levied upon were intact. Nothing further was done under this levy. In November, 1912, the bankrupt's landlord distrained upon him. The sale under the distraint was for rent due from February until October, 1912, and was postponed from week to week from November 20, 1912, until the bankruptcy in January, 1913. These postponements were at the instance of the bankrupt, whose creditors were holding meetings, and who hoped for a compromise. To these postponements the landlord assented. * * *

"Unless, therefore, the action of the execution creditor was in bad faith, his execution must be considered a valid one.

"In deciding this question, the circumstances of the case are to be considered. The bankrupt was in failing circumstances, but making an effort to settle with his creditors, and was securing indulgence from them on this ground. The execution creditor did not proceed to a sale; and in the same manner the landlord, after the distraint, postponed his sale from week to week until the proceedings in bankruptcy supervened.

"The referee cannot believe that the failure in one case to proceed to a

sale, any more than the failure in the other case, was in bad faith. The action of the execution creditor comes directly within the language of Justice Mitchell."

As I understand the ruling in *Platt-Barber Co. v. Groves*, these findings of the referee sustain his order rejecting the landlord's claim. No other question was raised before him except the relative rank of the execution and the distraint, and this depended on the good faith of the levy. For this reason I shall not consider the other question that was referred to for the first time at the argument before me. It was evidently an afterthought. The landlord did not put his claim on any such ground, but (as I have said) confined himself to the position that his distraint was better than the levy, because the levy was purely formal and was neither made nor maintained in good faith.

The order of the referee is affirmed.

BALDWIN v. GRIER BROS. CO.

(District Court, W. D. Pennsylvania. January 3, 1914.)

No. 26.

TRADE-MARKS AND TRADE-NAMES (§ 95*) — SUIT FOR UNFAIR COMPETITION —
PRELIMINARY INJUNCTION.

Complainant built up a large trade in a patented miners' lamp, among the miners of a region who were largely foreigners, without much education and with little knowledge of the English language. Defendant put on the market in the same region a lamp identical in shape, having accessories of similar appearance, all packed in a box resembling complainant's in size and shape, and containing directions printed in different languages which were a verbatim copy of complainant's. The result was that defendant secured a considerable part of the trade which had previously been complainant's. *Held*, that the means used were unfair and apparently adopted to deceive purchasers, and that complainant was entitled to a preliminary injunction.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 108; Dec. Dig. § 95.*]

In Equity. Suit by Frank E. Baldwin against Grier Bros. Company. On motion for preliminary injunction. Granted in part.

Wesley G. Carr, of Pittsburgh, Pa., and James Q. Rice, of New York City, for complainant.

Joseph M. Nesbit and Brown & Stewart, all of Pittsburgh, Pa., for defendant.

YOUNG, District Judge. This is a motion for a preliminary injunction. The bill filed alleges infringement of plaintiff's reissue patent No. 13,542, and also alleges unfair competition, in that the plaintiffs have established a trade in acetylene lamps among the coal miners of this and adjoining districts, which lamps are of a peculiar and distinctive form, and are known to the trade as Baldwin lamps, and that said lamps, together with an extra carbide container and printed sheet of instructions in English and different foreign languages, and a needle

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

attached to a tin tag for the purpose of cleaning the lamp, have all been put up and delivered to dealers and others in a pasteboard box, and that the defendant has sold and offered for sale in this and adjoining districts acetylene miner lamps of identically the same peculiar and distinctive shape as the Baldwin lamp, placing them in a pasteboard box of the same size and shape, in which is placed an extra carbide container and a needle attached to a tin tag and a printed sheet of instructions in English and different languages, identical in form and appearance with those used by plaintiff, and has thereby usurped the trade theretofore acquired by plaintiff by the expenditure of labor and money, and is getting the trade to which plaintiff is entitled, and has fraudulently deceived the persons who desired to purchase plaintiff's lamps and the public generally. The bill thus presents two distinct grounds for relief by injunction—infringement of plaintiff's patent and unfair competition.

After a careful examination of plaintiff's patent and the evidence tending to show infringement, we are in doubt as to plaintiff's right to relief at this time upon that ground. The question of the validity of plaintiff's patent may well await the final hearing, as the patent has not yet been adjudicated. A final hearing under the new rules of the Supreme Court can be, and ought to be, reached in the near future.

As to the other question, that of unfair competition. The evidence in this case convinces us that plaintiff, at the expense of much effort and money, established a large trade among coal miners for its patented lamp. This trade was only established by plaintiff's agents coming in contact with the individual coal miners who needed and used a miner's lamp. These persons were largely men of limited education and of alien language and habits. After they became accustomed to the use of plaintiff's lamp they would naturally continue the use, and this, together with the influence their use of it had upon associates by force of example, which would induce them in turn to use the same lamp, constituted a large and valuable trade among the miners of this and neighboring states. Being persons of limited intelligence, and probably of not close observation, as well as being unacquainted with the English language, they would depend upon the shape of the lamp to guide them in purchasing. The plaintiff's lamp, known as the Baldwin lamp to the trade, is of the hour-glass shape, and readily distinguishable thereby. The defendant's lamp is identical in shape. It is not only identical in shape, but all its accessories bear such a close resemblance to the Baldwin lamp that it requires very careful inspection and examination to detect even a slight difference. It appears from the evidence that the ordinary purchaser would be easily deceived by the similarity of appearance of the Baldwin and Grier lamps, and purchase the Grier lamp believing he was purchasing the Baldwin, unless he had both lamps in view at once so that he could read the names upon them. The deception is added to when we find that the lamps are packed by the defendant in a pasteboard box resembling in size and shape the plaintiff's box; the only distinguishing feature being the printed matter on each. There is contained in the defendant's box with the lamp an extra holder, the small needle on a tin tag to clean the lamp, with a

circular in different languages to instruct the user. The defendant's circular is a verbatim copy of plaintiff's. All this convinces us that the defendant was endeavoring to get the plaintiff's trade. The evidence shows that the defendant did get the plaintiff's trade and is now enjoying the benefit of the labor and money of plaintiff.

The defense that the spark igniter attached to defendant's lamp caused the sale of the lamp is not convincing. No doubt it aided the defendant in more easily getting the trade because it was a useful addition to the Baldwin lamp. The foundation, however, of the trade had been laid by the plaintiff for the Baldwin lamp, and, as the evidence shows, almost 1,000,000 of the lamps were sold. This trade thus established belonged to the plaintiff.

After a careful and thorough consideration of the evidence, we are satisfied that the defendant has been guilty of unfair competition, and he should be restrained until the final hearing of the case for that reason.

Let an order for a preliminary injunction issue in accordance with this opinion.

In re SOFORENKO.

(District Court, D. Massachusetts. July 28, 1913.)

No. 17,790.

1. BANKRUPTCY (§ 166*)—MORTGAGES—FRAUD—RIGHTS OF MORTGAGEE.

Where a bankrupt executed a mortgage on certain of his assets pursuant to a plan to prefer certain favored creditors with the proceeds of the loan and defraud his other creditors, the mortgagee, having advanced a present consideration for the mortgage, was entitled to enforce the same against the bankrupt's estate, unless he not only knew of the mortgagor's insolvency and his plan to prefer creditors, but also that the mortgagor intended after preferring such creditors to go into bankruptcy for the purpose of defrauding his other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

2. BANKRUPTCY (§ 166*)—PREFERENTIAL PAYMENTS—PURPOSE.

Preferential payments made by an insolvent in the hope and for the purpose of continuing his business are not fraudulent, though they are under certain circumstances voidable by his trustee in bankruptcy, but preferential payments made by an insolvent who does not expect to continue in business, and who is endeavoring to provide for certain creditors at the expense of others, are fraudulent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Nathan Soforenko. On objections to the claim of one Seligman for priority under a mortgage executed by the bankrupt. Case recommitted to referee for additional findings.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Harvey H. Pratt, of Boston, Mass., for mortgagee.
Jacobs & Jacobs, of Boston, Mass., for trustee.

MORTON, District Judge. [1] It is clear that Soforenko was deeply insolvent and knew it, and that he and Levis, his manager, were engaged in an attempt to defraud the former's creditors by realizing as much as possible upon Soforenko's property, distributing the proceeds among a few favored persons, and having Soforenko go through bankruptcy to escape his other debts. The mortgage in question was given in pursuance of this plan, and was therefore an incumbrance, made by the bankrupt with the intent and purpose of hindering and defrauding his creditors, and as such is void against creditors, unless taken in good faith and for a present fair consideration. Bankruptcy Act, § 67e (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]).

That a "present fair consideration" was given by Seligman is not denied; his mortgage was not a preference. The referee has found:

"That Seligman, at the time of making the loan, knew or had reasonable cause to believe that Soforenko was insolvent; that the creditor (Seligman) knew or had reason to believe that the money he loaned was to be used in preferential payments to sundry creditors of Soforenko; and that the creditor Seligman was therefore party to Soforenko's intended fraud upon Soforenko's general creditors."

That Seligman had reasonable cause to believe that Soforenko was insolvent and was attempting to prefer certain creditors is not, it seems to me, enough to make Seligman "a party to Soforenko's intended fraud upon Soforenko's general creditors." If Seligman acted in actual good faith, though stupidly, his mortgage ought not to be set aside. *Peabody v. Knapp*, 153 Mass. 243, 26 N. E. 696. Even if Seligman knew that his loan was to be used in preferential payments, such knowledge would not invalidate his claim, unless he also knew that Soforenko, having preferred certain creditors, intended to go into bankruptcy to defeat his other creditors.

[2] Preferential payments made by an insolvent in the hope and for the purpose of thereby continuing his business are not really fraudulent, though they are under certain circumstances voidable by the trustee. A loan made with knowledge that it was to be so used would not be invalid. On the other hand, preferential payments made by an insolvent who does not expect to continue in business, who sees bankruptcy ahead, and who is endeavoring to provide for certain creditors at the expense of his general creditors, are fraudulent in any sense of the word, and a loan knowingly made to provide funds for such payments would be invalid. *Tiffany v. Boatman's Sav. Institution*, 18 Wall. 375, 21 L. Ed. 868; *Coder, Trustee, v. Arts*, 213 U. S. 244, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008.

The question upon which the case turns is whether Seligman knew of the fraudulent scheme in which Soforenko and Levis were engaged, and made the loan and took the mortgage in order to assist them.

"Actual fraud in which the recipient of the lien or security participates is indispensable to the avoidance of a transaction of this nature." *Sanborn, J.*, in *Powell v. Gate City Bank*, 178 Fed. 609, 102 C. C. A. 55; *Coder, trustee*,

v. Arts, 213 U. S. 240, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; Re Pease, 129 Fed. 446; Tiffany v. Boatman's Sav. Institution, *ubi supra*; Collier on Bankruptcy (9th Ed.) pp. 956, 959.

"What we hold is that, to constitute a conveyance voidable under section 67e, actual fraud must be shown." Day, J., in *Coder, Trustee, v. Arts, supra*.

I am aware that there is high authority for the view taken by the referee (*Dokken v. Page*, 147 Fed. 438, 77 C. C. A. 674), but it seems to me that upon principle and upon weight of authority the law is otherwise.

Under the view of the law which I have taken, the referee's findings are not sufficient for the proper disposition of the case, because Seligman, though having reason to believe that the mortgage was for preferential purposes, may, upon these findings, have acted in good faith, or without knowledge that, besides preferences, bankruptcy was intended.

It may be that upon the facts in this case, from reason to believe that the mortgage was for a fraudulent purpose, to actual knowledge and co-operation, is a short step; that Seligman was neither stupid nor inexperienced, was likely to put two and two together, and, having done so, was not likely to have proceeded with the transaction unless he was an assisting party to the plan on foot; that, knowing Soforenko was realizing as quickly as possible as much as possible on everything he owned, Seligman saw through Soforenko's plan, and understood that bankruptcy was to be resorted to to get rid of the other creditors. *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489. Some of the testimony suggests that he may have suspected what was afoot and purposely shut his eyes to the facts. Such collusive and intentional ignorance is the full equivalent of actual knowledge and notice. *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807; *Nudd v. Hamblin*, 8 Allen (Mass.) 130.

On the other hand, it may be that Seligman was stupid and ignorant, and was an innocent dupe of Soforenko and Levis. These are important questions of fact which depend so largely upon the appearance and credibility of the witnesses that, although the evidence upon them is reported, they ought in the first instance at least to be passed upon by the referee before whom the matter was heard.

This case is recommitted to the referee to add to his findings of fact such further findings as are necessary for a decision in accordance with this memorandum.

CASE v. MOUNTAIN TIMBER CO.

(District Court, W. D. Washington, S. D. February 2, 1914.)

No. 1131.

1. JUDGMENT (§ 828*)—RES JUDICATA.

A judgment entered in a suit between the same parties and involving the same controversy, in a state court having jurisdiction of the parties and subject-matter, is res judicata of a similar suit in a federal court, though the suit in the state court was instituted subsequent to the action in the federal court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.*]

2. APPEARANCE (§ 24*)—GENERAL APPEARANCE—EFFECT OF SERVICE.

Where defendant, summoned by publication, appeared generally and moved the court to require plaintiff to make the complaint more definite and certain, such appearance waived any objection to the service.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118-143; Dec. Dig. § 24.*]

At Law. Action by Willard Case against the Mountain Timber Company. Judgment for defendant.

Miller, Crass & Wilkinson, of Vancouver, Wash., and Fletcher & Evans, of Tacoma, Wash., for plaintiff.

The following authorities are relied upon by plaintiff: Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399; Prout v. Starr, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584; Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897; So. Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Buck v. Calbath, 3 Wall. 334, 18 L. Ed. 257; Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287; Ex parte Crouch, 112 U. S. 178, 5 Sup. Ct. 96, 28 L. Ed. 690.

E. C. Strode, of Lincoln, Neb., Imus & Gore, of Kalama, Wash., and Coy Burnett, of Portland, Or., for defendant.

The following authorities are relied upon by defendant: Merritt v. American Steel-Barge Co., 79 Fed. 228, 234, 24 C. C. A. 530; Powers v. Blue Grass, etc. (C. C.) 86 Fed. 708; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Stanton v. Embry, 93 U. S. 548, 23 L. Ed. 983; Sperry & Hutchinson Co. v. Tacoma (C. C.) 190 Fed. 682; Id. (D. C.) 199 Fed. 853; Ball v. Tompkins (C. C.) 41 Fed. 486, 490; Rodgers v. Pitt (C. C.) 96 Fed. 675; Fountain v. 624 Pieces of Timber (D. C.) 140 Fed. 381; No. Carolina, etc., v. Westfeldt (C. C.) 151 Fed. 294; Guardian Trust Co. v. K. C. So. Ry. Co., 146 Fed. 340, 76 C. C. A. 615; Louisville, etc., v. Knott, 130 Fed. 826, 65 C. C. A. 158; Guaranty, etc., v. No. Chicago St. Ry. Co., 130 Fed. 807, 65 C. C. A. 65; Baltimore & O. R. Co. v. Wabash Ry., 119 Fed. 680, 57 C. C. A. 322; Hubinger v. Central Trust Co., 94 Fed. 790, 36 C. C. A. 494; Ahlhauser v. Butler (C. C.) 50 Fed. 708; Heidritter v. Elizabeth

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Oilcloth Co., 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729; *Spencer v. Wolfe*, 49 Neb. 8, 67 N. W. 858; *Merchants' Sav. Bk. v. Noll*, 50 Neb. 615, 70 N. W. 247; *State ex rel. v. Smith*, 57 Neb. 41, 77 N. W. 384; *M. P. R. R. Co. v. Fox*, 56 Neb. 746, 77 N. W. 130; *Ragan v. Morrill*, 43 Neb. 361, 61 N. W. 590; *Omaha Loan & Trust Co. v. Knight*, 50 Neb. 342, 69 N. W. 933; *Stelling v. Peddicord*, 78 Neb. 779, 111 N. W. 793; *Shiabata v. Johnston*, 53 Neb. 12, 73 N. W. 278; *Texas & Pac. R. R. v. Saunders*, 151 U. S. 105, 14 Sup. Ct. 257, 38 L. Ed. 90; *St. Louis & San F. R. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332; *Edgell et al. v. Felder*, 84 Fed. 69, 28 C. C. A. 382; *Hupfeld v. Automaton, etc.* (C. C.) 66 Fed. 788; *Lowry v. Tile, etc.* (C. C.) 98 Fed. 817; *Briggs v. Stroud* (C. C.) 58 Fed. 717; *President, etc., v. Merritt* (C. C.) 59 Fed. 6; *Mills v. Duryee*, 7 Cranch, 481, 3 L. Ed. 411.

CUSHMAN, District Judge. This matter was, so far as the issues made by defendant in its separate answer and the reply and answer of the plaintiff thereto are concerned, tried to the court upon written stipulation, without a jury.

[1] The defense set up is that of *res adjudicata*; that plaintiff is barred and estopped from further urging his cause of action, as set out in his complaint, because he was heard thereon in the district court of Douglas county, Neb., in a cause in which both the plaintiff and defendant here were parties, which cause was entitled "*Robert J. Tate and Robert Y. Appleby, Plaintiffs, v. Mountain Timber Co., a Corporation, Robert Z. Drake, Harry D. Miller, and Willard Case, Defendants*"; and that said cause was therein determined by the court, adversely to the plaintiff here.

Under the evidence introduced, this defense must prevail. Although the suit in this court was begun before that in the district court of Douglas county, yet, as in this court only a money judgment was asked and the exercise of jurisdiction over any *res* in such controversy was not sought, the nature of the relief sought being such as to make it appear that it would probably not be necessary to exercise exclusive jurisdiction over any *res*, it is clear that, decree and judgment having been first rendered by the district court of Douglas county, a court of general jurisdiction, in a cause involving the same issues, such decree is binding here and must be accorded full credit and effect, providing that court had jurisdiction of the person of the defendant and the subject-matter of the suit. *Sperry-Hutchinson Co. v. City of Tacoma* (C. C.) 190 Fed. 682; *Id.* (D. C.) 199 Fed. 853; *Powers v. Blue Grass B. & L. Ass'n* (C. C.) 86 Fed. 705, 708.

[2] No question is made but that the district court of Douglas county had jurisdiction of the subject-matter, but it is contended that it was without jurisdiction of the person of Willard Case, defendant there, plaintiff here. After publication of summons in the district court of Douglas county (which would not have conferred jurisdiction to determine the controversy arising in this court), the defendant there (Willard Case) appeared and moved the court that the complaint against

him be made more definite and certain. The appearance made by him for that purpose was general, and by this course, in invoking the court's power and jurisdiction, he must be held to have submitted himself to the jurisdiction of that court and to have waived any objection thereto, and that objection by him, thereafter made to the jurisdiction, came too late, and the court's decree, thereafter rendered, concludes him, unless such decree is set aside upon appeal or other regular proceeding in courts established for its review.

In re PRINTOGRAPH SALES CO.

(District Court, E. D. Pennsylvania. February 7, 1914.)

No. 1,159.

1. BANKRUPTCY (§ 217*)—COURTS—ANCILLARY JURISDICTION.

A federal District Court has ancillary jurisdiction over a petition by a bankrupt's trustee, appointed and qualified in another district, to restrain the prosecution of distress proceedings by a landlord against property of the bankrupt within the district.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 323, 330, 340; Dec. Dig. § 217.*]

2. BANKRUPTCY (§ 215*)—DISTRAINT—RIGHT TO PROCEED—BANKRUPTCY PROCEEDINGS—INTERVENTION.

Where distress proceedings by a landlord against a bankrupt were not instituted until after adjudication in bankruptcy in the court of primary jurisdiction, the landlord's right was barred, since, under Bankruptcy Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), the title of the bankrupt's property passes to the trustee on his appointment as of the date of adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 324-326; Dec. Dig. § 215.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Printograph Sales Company. On petition of the trustee to restrain a sale of the bankrupt's assets under a landlord's warrant of distress. Restraining order made permanent.

Mark W. Collet and John F. McEvoy, both of Philadelphia, Pa., for petition.

Isaac C. Sutton, of Philadelphia, Pa., opposed.

THOMPSON, District Judge. The Printograph Sales Company was adjudged a bankrupt in the United States District Court for the Western District of Wisconsin on October 29, 1913, and the petitioner was elected trustee in bankruptcy on November 11, 1913. The bankrupt company was tenant under a lease from the Library Bureau Company of Philadelphia of an office on the third floor of the building numbered 910-912 Chestnut street, Philadelphia, at a rental of \$70 per month payable monthly. The term of the lease is five years expiring June 1, 1916. On November 5, 1913, the Library Bureau Company caused distraint to be made for the \$70 installment of rent due No-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vember 1, 1913, and also for all rent up to the end of the term of the lease. The landlord claims that the entire rental for the balance of the term is due, having become accelerated by reason of breach of the following covenants of the lease:

"If the said lessee or any one acting on behalf of lessee, or connected with lessee in any manner, shall at any time during the continuance of this lease, attempt to remove or manifest what in the judgment of the lessor constitutes an intention to remove the goods and effects out of or off from said demised premises without having paid and satisfied the said lessor in full for all rent which shall become due during the term of this lease, or any renewal thereof, then and in such case, such removal or attempt to remove, or manifestation of intention to remove, shall be considered fraudulent, and the whole rent for the whole term of this lease, or any renewal thereof, shall be taken to be due and payable; and the said lessor may proceed by landlord's warrant or other process to distrain and collect the whole in the same manner as if by the conditions of this lease the whole rent were payable in advance."

"If the said lessee shall become embarrassed, make an assignment for the benefit of creditors, or if a petition in bankruptcy shall be filed by or against the lessee, or a bill in equity or other proceeding for the appointment of a receiver for the lessee, or if the personal property of the lessee shall be sold by sheriff's or marshal's sale, then the rent for the said term or for whatever portion thereof the lessor may desire, shall at once become due and payable as if by the terms of this lease it were all payable in advance, and shall be first paid out of the proceeds of such assignment, bankrupt estate, or sale, any law, usage or custom to the contrary notwithstanding."

By virtue of a landlord's warrant, distraint has been made by a constable, the personal property of the bankrupt upon the premises seized, and advertisement of sale made. On December 19, 1913, upon the petition of the bankrupt, a restraining order for a period of ten days was issued and a rule granted upon the Library Bureau Company, landlord, and William J. Slemmer, constable, to show cause why they should not be further restrained from proceeding with the distraint against the property of the bankrupt. An answer of the Printograph Sales Company was filed December 23, 1913, praying for proof of the adjudication in bankruptcy and the appointment of the trustee and claiming a right to distrain under the paragraphs of the lease above recited. On December 30th Harry C. Fair, the trustee in bankruptcy, filed a petition praying that the distraint and levy be permanently stayed. At the hearing on the petitions and answer, a certified copy of the order of adjudication in bankruptcy on October 29, 1913, and the appointment of Harry C. Fair, as trustee, on the 11th of November, 1913, and the approval of his bond in the District Court for the Western District of Wisconsin, was presented and filed.

[1] It cannot be questioned that, upon the petition of a trustee appointed and qualified in bankruptcy proceedings pending in another district, this court has ancillary jurisdiction over the matter in controversy; the respondents and the property both being within this district. Bankruptcy Act, § 2, subd. 20, added by the amendment of June 25, 1910 (chapter 412, 36 Stat. 839 [U. S. Comp. St. Supp. 1911, p. 1491]); *Babbitt v. Dutcher*, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; *Re Elkus*, 216 U. S. 115, 30 Sup. Ct. 377, 54 L. Ed. 407; *Acme Harvester Co. v. Beckman Lumber Co.*, 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208.

[2] The question for determination is not the nature and extent of the landlord's claim to priority under the lease, but whether he is entitled to enforce its terms by distress. Before the distraint was made, the District Court of primary jurisdiction had adjudicated the Printo-graph Sales Company a bankrupt, and when the constable levied for the rent the property was already in custodia legis. *Keegan v. King* (D. C.) 96 Fed. 758; *In re Frazin & Oppenheim* (D. C.) 174 Fed. 713.

Upon the appointment and qualification of the trustee, he is, by section 70a, vested with the title of the bankrupt as of the date of adjudication. The property therefore having passed into the custody of the law prior to the levy under the landlord's warrant, the landlord can take nothing by virtue of the seizure. The right to distraint for rent in arrear must be exercised prior to adjudication to be of avail. *In re Duble* (D. C.) 117 Fed. 794; *In re West Side Paper Co.*, 162 Fed. 110, 89 C. C. A. 110, 15 Ann. Cas. 384; *Henderson v. Mayer*, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233.

The restraining order heretofore made will therefore be made permanent in accordance with the prayer of the petition,

In re KNOX AUTOMOBILE CO.

(District Court, D. Massachusetts. November 12, 1913.)

No. 19,064.

1. BANKRUPTCY (§ 228*)—ADMINISTRATION OF ESTATE—PRIVATE SALE OF ASSETS.

The discretionary power of the referee to direct a private sale of a bankrupt's estate will not be disturbed unless it appears to have been improvidently exercised, especially where the referee reports that he has entire confidence in the ability and impartiality of the trustee, and believes it to be for the best interests of the estate that he be hampered as little as possible in disposing of the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

2. BANKRUPTCY (§ 262*)—ADMINISTRATION OF ESTATES—SALE OF ASSETS—"SPECIFIED PORTION."

Bankr. Act July 1, 1898, c. 541, § 47, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), provides that trustees shall collect and reduce to money the property of the estates for which they are trustees, under direction of the court, and close such estates as expeditiously as is compatible with the best interests of the parties in interest. General Order XVIII, subd. 2,† declares that on application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of a bankrupt's estate at private sale. *Held*, that the words "any specified portion" should be construed to mean such portion of the estate as was specified in the petition and order for sale, and hence did not prevent the referee from authorizing the trustee to sell all the bankrupt's property at private sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 363-365; Dec. Dig. § 262.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
† 89 Fed. viii, 32 C. C. A. xx.

In Bankruptcy. In the matter of bankruptcy proceedings of the Knox Automobile Company. On petition to review an order authorizing the trustee to sell all the property of the bankrupt at private sale, without notice to creditors or prior approval of the court. Affirmed.

Tyler, Corneau & Eames, of Boston, Mass., for objecting creditors.
Charles G. Gardner, of Springfield, Mass., pro se.

MORTON, District Judge. This is a petition to review an order of the referee authorizing the trustee in bankruptcy to sell all the property of the bankrupt at private sale without notice to the creditors or prior approval of the court. The order also authorizes the trustee to sell at public auction, but to that part of it no objection is made. The property has been appraised at \$1,682,000. The total indebtedness is about \$1,265,000.

The order is objected to upon the grounds: (1) That it leaves too much to the discretion of the trustee, and (2) that it authorizes the sale of all the property and estate of the bankrupt, which it is said cannot be done under General Order XVIII.

[1] As to (1):

"The discretionary power of the referee directing a private sale of a bankrupt estate ought not to be disturbed unless it clearly appears to have been imprudently exercised." *Re Hawkins* (D. C.) 125 Fed. 633.

The referee reports that he has entire confidence in the ability and impartiality of the trustee and believes it to be for the best interests of the estate that the trustee should be hampered as little as possible in disposing of the property. I see no reason to disagree with this conclusion. Some fear was expressed lest the trustee should sell the property without giving certain creditors and stockholders sufficient opportunity to buy. The trustee expressly disclaimed any such thought or intention. I have no doubt that he intends to use every reasonable effort to get the highest possible price for the property, and I agree with the referee that he will be in a better position if not hampered by formal orders as to what he shall do.

[2] As to (2): Section 47 of the Bankruptcy Act, relating to the duties of trustees, provides:

"That trustees shall respectively * * * (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest."

General Order XVIII (89 Fed. viii, 32 C. C. A. xx) provides:

"(1) All sales shall be by public auction unless otherwise ordered by the court.

"(2) Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale. * * *

"(3) Upon petition by a bankrupt, creditor, receiver, or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be a loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court."

In the official form of petition for private sale, the words "a certain portion of said estate, to wit," are used. This is also true of form 42, relating to auction sales of real estate. In the notice of proposed sale, form 177, the language is, "To consider a proposed sale of the following described property."

It has been the practice in this district, ever since the Bankruptcy Act went into effect, to make orders authorizing the sale of all the property of a bankrupt in substantially the same form as that made by the referee in this case. So far as I am aware, no question has ever been raised as to the legality of such orders prior to the present proceedings. The sale of all the assets is frequently the most convenient and advantageous way to liquidate a bankrupt estate, especially when a going business is disposed of. The words in General Order XVIII, "any specified portion of the bankrupt's estate," have been taken to mean such portion thereof as was specified in the petition and order for sale. This accepted construction, which has been acted on by this court in many cases and for many years, is entitled to great weight. It is certainly a reasonable interpretation of the order in question, and it is plainly my duty to adhere to it.

Order of the referee affirmed.

ADZENOSKA et al. v. ERIE R. CO.

(District Court, M. D. Pennsylvania. February 6, 1914.)

No. 535.

COURTS (§ 274*)—UNITED STATES COURTS—DISTRICT IN WHICH SUIT MUST BE BROUGHT.

Under Judiciary Act March 3, 1911, c. 231, § 51, 36 Stat. 1087 (U. S. Comp. St. Supp. 1911, p. 150), providing that, except as provided in the following sections, no civil suit shall be brought in any district against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but that, where the jurisdiction is founded on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant, aliens cannot sue a New York corporation in one of the districts of Pennsylvania though such corporation is carrying on its railroad business in Pennsylvania, since a corporation's domicile, habitat, and citizenship is in the state by which it was incorporated, and an alien is assumed not to reside in any state, and must therefore resort to the domicile of the defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. § 274.*]

Action by Joseph Adzenoska and another against the Erie Railroad Company. On rule to show cause why the suit should not be dismissed. Rule to dismiss made absolute.

C. B. Little, of Scranton, Pa., for plaintiffs.

Warren, Knapp, O'Malley & Hill, of Scranton, Pa., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WITMER, District Judge. Plaintiffs' right to sue the defendant within this jurisdiction is challenged on rule to dismiss. Plaintiffs are aliens and subjects of the Czar of Russia. The defendant, the Erie Railroad Company, is a corporation of the state of New York. Though defendant, through its agents, is carrying on its business in Pennsylvania and elsewhere, it is well settled that its domicile, habitat, and citizenship is in the state by which it was incorporated. The matter presented raises the question whether alien plaintiffs may maintain their action in a jurisdiction other than the residence or habitat of the defendant.

The jurisdiction of the United States District court is fixed by the Judiciary Act of March 3, 1911, c. 231, § 51, U. S. Stat. at Large, vol. 36, p. 1087 (U. S. Comp. St. Supp. 1911, p. 150); Federal Statutes Annotated, Supplement 1912, vol. 1, p. 153, wherein it is provided:

"Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a District Court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

It is evident from the language employed that a person, whether he be natural person or a corporation, can be sued only in the court of the district whereof he is an inhabitant, unless the sole ground of jurisdiction is founded on diversity of citizenship of states, in which event the plaintiff may elect to bring his action either in his own district or that of the defendant. The last clause is by way of proviso to the next preceding clause, which restricts the jurisdiction to the defendant's resident district, and it (the proviso) extends the right of the plaintiff to sue under certain circumstances in the district of his own residence when both of the parties plaintiff and defendant are citizens of different states. The purpose of this proviso is to afford the plaintiff the same advantage of litigation in his own district that the defendant has, if he can there obtain service of process. An alien, however, is assumed not to reside in any of the states, hence not within the proviso, and must therefore resort to the domicile of the defendant, as generally provided.

The case, *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211, cited by plaintiffs' counsel as bearing upon the point at issue, merely holds that, under the proviso of the Act of Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 308), 4 Fed. Stat. Anno. 265, 386, very similar to section 5, cited, a citizen of a state might sue an alien or foreign corporation in any district where service could be obtained.

By distinguishing this case in *Galveston, etc., Railway Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248, Mr. Justice Brown said:

"In the *Hohorst Case* it was held that the clause in question, that no civil suit should be brought against any person in any other district than that whereof he was an inhabitant, was manifestly inapplicable to a suit brought

by a citizen of one of the United States against an alien, and that the words of the provision evidently looked to those persons, and those persons only, who were inhabitants of some district within the United States," and "to prevent a manifest failure of justice, in the inability to sue any foreign corporation whatever, it was held that, where an alien corporation was defendant, it might be sued in any district wherein it might be found."

In further commending he said:

"It was not meant or intimated * * * that the clause in question had no application to cases where an alien was plaintiff, but only where he was defendant."

Inasmuch as the plaintiffs are not citizens of any of the states, the defendant may only be sued in the District Court of its residence, as was also held in *McAulay v. Moody* (C. C.) 185 Fed. 144, citing to the effect *Campbell v. Duluth, etc., Ry. Co.* (C. C.) 50 Fed. 241.

The rule to dismiss is therefore made absolute, and an exception is noted for the plaintiffs.

KANTOR et al. v. MURCHIE, U. S. Marshal.

(District Court, D. Massachusetts. November 14, 1913.)

No. 795.

COURTS (§ 499*)—CONFLICTING JURISDICTION—PROPERTY IN CUSTODY OF MARSHAL.

Property taken by a United States marshal from a person arrested by him was held by him as marshal; it was his duty to return it upon proper demand, and he could not be interfered with in the performance of this duty by process from any other court; and hence a trustee attachment against him individually, issued by a state court, and a writ of injunction from a state court forbidding him to return the property, did not justify him in withholding it from the person legally entitled thereto.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1336, 1337; Dec. Dig. § 499.*]

Application by Sol. B. Kantor and another for an order directing Guy Murchie, United States Marshal, to deliver to them certain property. Marshal ordered to return the property to the person legally entitled thereto, without regard to certain process from the state courts.

William Charak, of Boston, Mass., for plaintiff.

Friedman & Atherton, of Boston, Mass., for trustee in bankruptcy.

Guy Murchie, of Boston, Mass., pro se.

MORTON, District Judge. This is a summary proceeding instituted by Kantor and Hinton by their petition for an order directing the United States marshal to return certain property which is now in his possession, and which was taken from the petitioner Kantor under the circumstances hereinafter set forth. All parties interested, namely, Guy Murchie, Esq., United States marshal for this district, Percy A. Atherton, trustee, Sol. B. Kantor, and John Hinton appeared before the court, and such evidence was taken as any party desired to offer.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexer

I find the material facts to be as follows:

On October 31, 1913, the petitioner Kantor was arrested by a deputy United States marshal upon a warrant issued by a United States commissioner. Upon being searched, as is customary in the case of all prisoners, a package containing about \$20,000 worth of uncut diamonds was found on Kantor's person. This package was taken from him by the deputy marshal, who searched him, and was sealed up and put in the safe in the United States marshal's office. The diamonds appear to have been lawfully in Kantor's possession, and to be entirely unconnected with the matter on account of which he was arrested. Guy Murchie, Esq., the United States marshal for this district, has, in his individual capacity, been summoned as trustee in an action brought in the superior court of Massachusetts by Atherton, Trustee, v. Kantor, and has also been served with a writ of injunction issued by the Supreme Judicial Court of Massachusetts, forbidding him from giving up these diamonds. Kantor and Hinton (the latter claiming to be the real owner of the diamonds) demanded the return of them, and upon the marshal's refusal to deliver them because of uncertainty as to his duty in the premises, brought this petition. The marshal also desires the instruction of the court as to the proper course for him to pursue.

Without going into all the evidence I am clearly of opinion, and I find, that Mr. Murchie does not hold the diamonds in his individual capacity, but as United States marshal for this district, as property rightfully taken from a prisoner under arrest.

It is the marshal's duty to return this property upon proper demand therefor. He cannot be interfered with in the performance of his duty by process from any other court. It seems to me that neither the trustee attachment nor the writ of injunction affords any ground for withholding from the petitioners, if otherwise entitled to them, the diamonds in question in this case. *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *In re Neagle*, Petitioner, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55. Even under the state law this property could not, I think, have been reached by trustee process. *Mass. Rev. Laws*, ch. 189, § 31; *Robinson v. Howard*, 7 Cush. (Mass.) 257; *Morris v. Peniman*, 14 Gray (Mass.) 220, 74 Am. Dec. 675.

I have conferred with the Justice of the Supreme Judicial Court of Massachusetts by whom the injunction referred to was issued; it is his opinion, as well as mine, that property in the possession of the United States marshal cannot be reached by process from the state courts. The injunction in question was only issued to cover the possibility that Mr. Murchie might be holding property, not in his official capacity, but as a private individual.

The marshal ought to return the property at once to the person legally entitled thereto, without regarding either process issued by the state courts.

So ordered.

THE TRANSIT.

WALKER v. STOCKWELL.

(District Court, E. D. Pennsylvania. January 8, 1914.)

Nos. 84, 86.

ADMIRALTY (§ 58*)—CROSS-LIBEL PLEADING COUNTERCLAIM—SECURITY—LIBEL BY RECEIVER IN BANKRUPTCY.

Under Admiralty Rule 53 (29 Sup. Ct. xlv), requiring the respondent in a cross-libel on a counterclaim to give security to respond in damages, "unless the court on cause shown shall otherwise direct," where the libelant is a receiver in bankruptcy, he will not be required to give such security since, under Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), any recovery on the counterclaim must be set off against any recovery by libelant, and if in excess thereof, the balance is provable only against the estate.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 334; Dec. Dig. § 58.*]

In Admiralty. Libel by Henry F. Stockwell, receiver of John H. Dialogue & Son, bankrupts, against the tug Transit, and cross-libel by Charles I. Walker, managing owner of the Transit, against said Stockwell, receiver. On petition by libelant to vacate order requiring filing of security on cross-libel. Order vacated.

Wilson & Carr, of Camden, N. J., and Willard M. Harris, of Philadelphia, Pa., for Stockwell.

J. Frank Staley and Lewis, Adler & Laws, all of Philadelphia, Pa., for the Transit.

THOMPSON, District Judge. Admiralty rule 53 (29 Sup. Ct. xlv) provides:

"Whenever a cross-libel is filed upon any counterclaim, arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given."

As was said by Judge Brown in the District Court for the Southern District of New York in the case of *Empresa Maritima a Vapor v. North & South American Steam Navigation Co.*, 16 Fed. at page 504:

"The granting of the order, it is true, is to some extent discretionary, since 'upon cause shown' the court 'may otherwise direct.' From this it is clear that it was the intent of the rule that security should be given unless the respondents affirmatively show, the burden of proof being upon them, circumstances which would make the application of the rule unjust."

See, also, *Franklin Sugar-Refining Co. v. Funch et al.* (D. C.) 66 Fed. 342, affirmed in 73 Fed. 844, 20 C. C. A. 61.

Judge Butler's refusal to order security in the case in 66 Federal Reporter was based in part upon the ground that the original libel was in personam, and consequently no security was required of the re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

spondent in the original cause. The general practice is to require security to be given under rule 53, where the proceeding is in rem and the vessel has been released upon stipulation in order that the parties may stand upon an equality. In the present case, however, I think a practical ground exists for not requiring security to be entered by the respondent in the cross-libel. The counterclaim upon which the cross-libel is based comes within the provisions of section 68 of the Bankruptcy Act, which provides:

"(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

"(b) A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which is not provable against the estate."

If judgment is rendered in favor of the cross-libelant not in excess of judgment in favor of the libelant, a bond in the present case would be superfluous. If he recovers judgment for an excess, he can receive upon that judgment only such amount as is awarded him upon proving his claim in the court of bankruptcy. It must be presumed that the receiver has given bond under the Bankruptcy Act for all assets in his hands, and if in this proceeding he should be succeeded by a trustee, the cross-libelant will be protected by the trustee's bond, and, whether the claim should be determined to entitle the cross-libelant to a priority or to a dividend with other creditors, recourse can only be had to the funds of the bankrupt estate, or to the bond of the receiver or trustee.

In my opinion, there is no just cause shown for requiring a bond in this case, and it is therefore directed that the order to enter security be vacated.

HEROLD, Collector of Internal Revenue, v. PARK VIEW BUILDING & LOAN ASS'N.

(Circuit Court of Appeals, Third Circuit. January 23, 1914.)

No. 1,801.

1. INTERNAL REVENUE (§ 9*)—SPECIAL EXCISE TAX ON CORPORATIONS—CONSTRUCTION OF STATUTE—BUILDING ASSOCIATIONS.

Tariff Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), imposing a special excise tax on corporations, contains the following proviso in paragraph 1: "Provided, however, that nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual." *Held*, that the final clause, "no part of the income of which," etc., applies only to the fourth group of corporations named, i. e., religious, etc., corporations, and has no application to building associations which are organized for the express purpose of benefiting their stockholders, but that all such associations, if they come within the terms of the proviso as to organization and operation, are exempted.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

2. INTERNAL REVENUE (§ 9*)—SPECIAL EXCISE TAX ON CORPORATIONS—CONSTRUCTION OF STATUTE—BUILDING ASSOCIATIONS.

A building association is not excluded from the right to such exemption as not one "organized and operated exclusively for the mutual benefit of its members" because it issues both prepaid and installment stock; the prepaid stock being entitled to a fixed dividend, payable however only out of earnings of the association.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

In Error to the District Court of the United States for the District of New Jersey; Charles P. Orr, Judge.

Action by the Parkview Building & Loan Association against Herman C. H. Herold, Collector of Internal Revenue. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 203 Fed. 876.

J. Warren Davis, U. S. Atty., of Camden, N. J., and Walter H. Bacon, Asst. U. S. Atty., of Bridgeton, N. J., for plaintiff in error.

Spaulding Frazer and Riker & Riker, all of Newark, N. J., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. The Park View Building & Loan Association was taxed under section 38 of the Act of August 5, 1909, c. 6, 36 Stat. 112 (Supplement of 1911 to Revised Statutes, p.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—37

946), and was compelled to pay \$71.04, tax and penalty, for the year 1909. This suit, which seeks to recover that sum from the collector, was removed from a state court of New Jersey to the District Court, where the parties agreed upon a statement of facts. The court entered judgment for the association (203 Fed. 876, Judge Orr presiding specially) and we refer to his opinion with general approval. On two or three branches of the subject, something more may perhaps be said without extending the discussion unduly.

We do not think it necessary to rely on the rule that words imposing a tax should be clear; doubtful language being construed in favor of the citizen. There is force in the government's contention that the words in question do not impose a tax at all; that the tax is not laid by the proviso, but by the first clause of the section, which includes "every corporation," etc.; and therefore that the court is asked to construe, not language that lays a tax, but language that exempts. The government insists that a different rule should be applied in such a situation, and that a doubt must be resolved against a claim of exemption. We lay the subject aside, however, for we do not think the questions presented are doubtful enough to require the aid of either rule.

[1] Let us consider first the question Judge Orr did not decide, namely: What effect should be given to the words hereafter italicized in the proviso to the first paragraph of section 38? After imposing a special excise tax upon "every corporation, joint-stock company, or association, organized for profit and having a capital stock represented by shares," etc., the paragraph proceeds to state certain exceptions to the generality of this clause:

"Provided, however, that nothing in this section contained shall apply to labor, agricultural, or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, *no part of the net income of which inures to the benefit of any private stockholder or individual.*"

The government's argument on this branch of the case is based upon the contention that the words in italics qualify the whole proviso, and apply to every organization or association named therein, including a building association like the plaintiff that issues what is known as prepaid stock. (This is not preferred stock, as will appear in a few moments.) We do not agree with this position. As we construe the proviso, it excepts four groups of corporations:

"Labor, agricultural, or horticultural organizations.

"Fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members.

"Domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members.

"Any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, *no part of the net income of which inures to the benefit of any private stockholder or individual.*"

The character of the first three groups is well known. In none of them (as normally conducted) does the net income inure to the benefit of private stockholders or individuals, and it would have been superfluous to add that feature to the description. But there is a large and a more indeterminate class—"religious, charitable, and educational" corporations or associations—and this class contains some members whose precise character may not be altogether easy to define. For example, a church is no doubt organized and operated exclusively for religious purposes; but is this true of a camp-meeting association also? Such an association sometimes has net income that inures at least in part to the benefit of private stockholders or individuals. A hospital is usually organized and operated exclusively for charitable purposes; but there are private hospitals operated by associations, whose net income goes to the benefit of individuals. The exclusive purpose of a school is educational; but the income of many schools operated by associations is devoted to private profit. Indeed, every one acquainted with the problems of state taxation knows how often the courts have been called on to determine the scope and application of statutes exempting charitable and educational institutions from taxation; and we see no reason to doubt that Congress intended to avoid such disputes as far as possible by establishing both a positive and a negative test for the restricted membership in the fourth group. Positively (although the use of the word "exclusively" makes this test partly negative also), the test is that the corporations and associations must be organized and operated exclusively for religious, charitable, and educational purposes; and, negatively, the test is that none of such corporations and associations shall devote its net income, in whole or in part, to the benefit of any private stockholder or individual.

As pointed out in the association's brief, section 2 of the Income Tax provisions of the Act of October 3, 1913, lends force to the construction that confines the italicized clause to the fourth group. Section 2 in clause S of the Act of 1913 repeals section 38 of the Act of 1909, the reason being that an earlier clause (G) is in effect a substitute for section 38, and that Congress did not intend to impose two taxes of the same nature at the same time, one by the Act of 1913, and the other by the Act of 1909. Being a substitute, therefore, clause G also contains an excepting proviso, and this as follows:

"Provided, however, that nothing in this section shall apply to labor, agricultural, or horticultural organizations, or to mutual savings banks not having a capital stock represented by shares, or to fraternal beneficiary societies, orders, or associations operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations and dependents of such members, nor to domestic building and loan associations, nor to cemetery companies, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual, nor to business leagues, nor to chambers of commerce or boards of trade, not organized for profit or no part of the net income of which inures to the benefit of the private stockholder or individual; nor to any civic

league or organization not organized for profit, but operated exclusively for the promotion of social welfare." Act Oct. 3, 1913, c. 16, 38 Stat. 172.

We think it is clear that the repeated use here made by Congress of the negative clause—"no part of the net income of which inures to the benefit of any private stockholder or individual"—throws light upon the previous use of the same clause in the Act of 1909, and strengthens the construction we have adopted. We agree that the argument is somewhat weakened by the possibility of supposing that Congress was trying to make more clear in the Act of 1913 what may have been thought obscure in the Act of 1909; and we wish to avoid even the appearance of evading this consideration. But certainly both constructions are available, and one seems as likely to be correct as the other. We believe the view we have indicated should be adopted.

But there is another reason for believing that the clause in italics could not have been intended to apply to the group of "domestic building and loan associations organized and operated exclusively for the mutual benefit of their members." And the reason is this: Such application leads to a conclusion that may fairly be described as absurd. Every building association is organized and operated for the mutual benefit of its members; this benefit is attained by profits; and profit is gained by the use of its funds—whether derived from installments, premiums, interest, or fines—supplemented by forfeitures, and by such dealing in real estate as it may be permitted or obliged to undertake. In every year of its normal operations it expects to have a net income, and of course this net income belongs, or inures, to its members. Now, while the members can hardly be described accurately as "private" stockholders (the word seems to be contrasted with some other relation to a particular association), they are certainly "individuals"; and therefore, if the right of a building association to be exempted by the proviso is to be tested by the fact that no private stockholder or individual receives any benefit from its net income, the inevitable result will follow that the proviso has no effect upon building and loan associations at all, and that no such association can be exempted. We have said that in our opinion this conclusion comes near to absurdity, and we think that result is too plain to require further discussion.

[2] But the chief contention of the government is that the association is not organized and operated exclusively for the mutual benefit of its members, and the sole support of the argument is found in the fact that the association issues prepaid stock. We repeat that this is not preferred stock. The New Jersey statute forbids the issue of such stock—namely, stock whose holders enjoy advantages greater than the holders of the common stock—while the issue of common stock that is prepaid is expressly authorized:

"No such association shall issue preferred or other than common stock, and all shareholders shall occupy the same relative status as to debts and losses of the association; but nothing herein shall forbid agreements with shareholders who pay full par or maturity value of shares in advance, whereby they may waive participation in the general profits of the association in consideration of a fixed annual profit." Act April 8, 1903 (P. L. p. 476, § 53).

The holders of the stock in question have waived their right to share with installment stock in the general profits of the association,

and they have agreed to accept in lieu thereof (but only "out of the profits of the association") 5 per cent. yearly on the amount prepaid. This is the only difference between the prepaid stock and the installment stock. The parties have stipulated:

"* * * That the rights of the two classes of stockholders are in all respects identical except as to the participation in the profits of the association as above set forth; that the profits of the Park View Building & Loan Association during the year 1909 and subsequent thereto have been in excess of 5 per cent. per annum."

We think therefore the question may be properly stated in this form: Is the foregoing arrangement for the mutual benefit of the parties? In our opinion the answer should be in the affirmative.

The subject of prepaid stock has been much discussed. Several courts have declared against it, and a few Legislatures have forbidden it, but the decided weight of authority, judicial and legislative, is in its favor. The course of the discussion is partially indicated in 4 Am. & Eng. Ency. (2d Ed.) 1030 (text and notes), and in 6 Cyc. 127 (text and notes); but a much better reference than either of these is *Folk v. State Capitol, etc., Association*, 214 Pa. 529, 63 Atl. 1013. In *Folk's Case*, Judge Endlich, of the common pleas court of Berks county, discussed the subject elaborately and came to the conclusion (214 Pa. 535, 63 Atl. 1015) that there is authority of a very high and persuasive order for holding:

"* * * That the acceptance of prepayment of stock and the issuance thereupon of full-paid dividend-bearing stock is in no proper sense a borrowing of money; * * * that, remembering that a building association cannot successfully perform its intended functions without members who are simply investors and not borrowers, its power to aid the latter class of members, and thus the main purpose of its creation, will be promoted by attracting investing members capable of putting larger sums at the society's disposal than can be speedily gathered by means of periodical payments alone; that the allowance of a fixed dividend upon such paid-up stock out of the profits of the corporate business is a reasonable incident to its issuance, just to both classes of shareholders and not calculated to give either an undue advantage over the other; that, on the contrary, the practical effect of the concurrent issuance of both installment and full-paid stock is likely to prove beneficial to both classes of shareholders; that no essential characteristic of the building association scheme can be regarded as forbidding, and no essential purpose of it as defeated by, this device; that it is contrary to no accepted rule of policy applicable to or involved in the nature of building associations; and that (in Pennsylvania) it is not excluded by statutory provisions in terms authorizing and regulating operations on the footing of installment stock, but not clearly confining associations thereto or expressly prohibiting any other. And it is to be noted that with this view every adjudicated case involving the point under discussion appears to be in harmony, except perhaps the one above referred to decided in North Carolina."

And the Supreme Court of Pennsylvania, in the brief opinion approving and adopting Judge Endlich's opinion, has this to say upon the subject (214 Pa. 543, 63 Atl. 1019):

"The general purpose of building associations is the accumulation of funds to be loaned to their members and to be repaid in small periodical payments. The accumulation from the payment of installments on stock is so slow as often to hamper their practical operations, and different methods have been adopted to provide funds to meet the demands of borrowing members promptly

and thus to promote the general purpose. Building associations are authorized by the Act of June 25, 1895, P. L. 303, to borrow money for temporary use when applications for loans exceed the accumulations in the treasury, and when a series of stock has matured. The issuing by these associations of full-paid stock to serve the same purpose as borrowing is an enlargement of their scope of operations not inconsistent with their original design, if properly restricted. While it has not been expressly authorized by the Legislature, there is a distinct recognition of the practice by the Act of June 22, 1897, P. L. 178, which subjects such stock to taxation. We find nothing unlawful in the issuing of full-paid stock, the dividends of which are not guaranteed but are limited in amount and payable only out of the profits, and the holders of which are entitled to no preference and have no advantage over other stockholders upon distribution in case of loss or insolvency; provided that the issue is incidental to the main business of the association and is intended to provide a fund from which loans may be made to the holders of installment stock. To this extent and for this purpose its issue is within the implied powers of such associations."

Judge Endlich is the author of a standard treatise on building associations, and in sections 461-464 of the second edition he has again considered the subject and has stated the results of the prevailing principles to be as follows:

"464. The result of the principles declared and applied in these decisions would seem to be, in the absence of any statutory provision expressly authorizing or prohibiting it: (1) That building associations may always permit prepayments of stock subscriptions to be received, with or without rebate or interest allowance in consideration of such prepayment; (2) that, in pursuance of charter provisions, such associations may issue paid-up stock with the incident of priority in distribution over installment stock; (3) that, under a like power and the right to pay dividends, they may issue paid-up stock-bearing income at any given reasonable rate per annum payable in cash out of and to the extent of the earnings of the association; an arrangement on the part of any corporation to pay interest or dividends to its shareholders, without reference to the ability of the company to pay them out of its earnings, being wholly illegal and void."

We agree with these conclusions and with the reasoning that supports them, and we see no occasion to prolong the discussion. In our opinion, the members of the Park View Building & Loan Association are mutually benefited by the issue of the prepaid stock in question, and as a consequence the association is organized and operated exclusively for such benefit. It is certain that the association regards the arrangement as mutually beneficial, for it has availed itself of the statutory permission to adopt it; and we may be sure that the keen sense of self-interest possessed by the members of such associations would scarcely tolerate an arrangement—even if the statute did not expressly forbid it—that would constitute a small class of privileged stockholders with rights superior to their fellows.

Looking at the subject from as many points of view as possible, we are persuaded that Congress intended the word "mutual" to mean "substantially equal," and that a building association is organized and operated for the mutual benefit of its members when they share in the profits on substantially the same footing. Exact equality is probably not possible, where part of the stock is prepaid, and part is installment; but an approximate equality, sufficiently close for all purposes, is certainly not beyond the reach of calculation. We have no doubt

that such a calculation is always made before the terms are adopted upon which prepaid stock is allowed to share in profits.

In brief, the Park View Building & Loan Association was "organized" exclusively for the mutual benefit of its members; the New Jersey Legislature required such benefit to be its object, and (as a means of attaining it) expressly permitted the use of prepaid stock. And the association is in fact "operated" for their mutual benefit, if we may trust the abundant and well-reasoned authority that approves of prepaid stock, and if we may rely also on the strong antecedent probability that the members would not agree to any arrangement that would disturb their substantially equal footing.

The judgment is affirmed.

BERNARD v. LEA.

In re AMERICAN FOUNDRY & SUPPLY CO.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1913.)

No. 1,171.

1. COURTS (§ 405*)—CIRCUIT COURT OF APPEALS—ASSIGNMENT OF ERRORS—TIME FOR FILING.

The failure to file an assignment of errors before the allowance of an appeal, as required by rule 11 of the Circuit Court of Appeals (193 Fed. vii, 112 C. C. A. vii), does not deprive the appellate court of jurisdiction, and the appeal will not be dismissed because the assignment of errors was not filed until later, where there was a valid reason therefor.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101, 1103; Dec. Dig. § 405.*]

2. BANKRUPTCY (§ 455*)—APPELLATE PROCEEDINGS—MODE OF REVIEW.

An order of a District Court allowing a claim against a bankrupt estate and establishing a portion of it as a lien on property of the bankrupt is reviewable by appeal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 916; Dec. Dig. § 455.*]

3. BANKRUPTCY (§ 467*)—APPEALS—MATTERS REVIEWABLE.

On an appeal under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), the Circuit Court of Appeals proceeds "as in equity cases" and may review findings of fact made by a referee or the District Court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 467.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

4. BANKRUPTCY (§ 188*)—VENDOR'S LIEN—LAW OF NORTH CAROLINA.

Notes executed by a corporation for the purchase price of land conveyed to it at the same time, by a deed duly probated and recorded, although they described the consideration for which they were given, and there was a clause written below the signatures stating that they covered a vendor's lien on the land, did not create such a lien under the law of North Carolina, which will be enforced in equity as against the unsecured creditors of the corporation in bankruptcy, especially where there is no clear proof that there was any agreement to give a lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

5. BANKRUPTCY (§ 172*)—LIENS—CORPORATION.

A deed of trust executed in the name of a bankrupt corporation by its officers to secure notes given to its president, neither notes nor deed of trust having been authorized or ratified by any action of the directors or stockholders, the intention being that the notes should be negotiated for the benefit of the corporation, which was never done, *held* not to create a valid lien against the property in favor of the president for an indebtedness which was owing to him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 220; Dec. Dig. § 172.*]

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville; James E. Boyd, Judge.

In the matter of the American Foundry & Supply Company, bankrupt. Appeal by S. G. Bernard, trustee, from a decree establishing a lien in favor of H. G. Lea. Reversed.

T. J. Harkins, of Asheville, N. C. (Harkins & Van Winkle, of Asheville, N. C., on the brief), for appellant.

James H. Merrimon, of Asheville, N. C., for appellee.

Before PRITCHARD, Circuit Judge, and WADDILL and CONNOR, District Judges.

CONNOR, District Judge. [1] Upon a motion lodged by appellee to dismiss or affirm the judgment, the record discloses that the judge filed his decree on January 25, 1913. Immediately following his signature are the words:

"The trustee excepts to the foregoing decree and, in open court, gives notice of his intention to appeal this matter to the United States Circuit Court of Appeals for the Fourth Circuit. Exceptions and appeal allowed, dated January 25, 1913." Signed by the judge.

No assignment of error was filed at that time. On January 29, 1913, the trustee presented to the judge a formal petition for appeal. In compliance with Rule 14, § 7 (193 Fed. ix, 112 C. C. A. ix), it was properly omitted from the printed transcript. A memorandum, "Petition for appeal, filed January 29, 1913. Citation dated Feby. 3, 1913. Service accepted Feby. 10, 1913," is in the transcript as required by the rule. At the time of presenting the "petition for appeal," the trustee filed his "assignments of error." Appellee insists that the appeal was taken and allowed, on January 25, 1913. He invokes Rule 11 (193 Fed. vii, 112 C. C. A. vii), which requires that the plaintiff in error or appellant shall file, with his petition, an assignment of errors.

"That no writ of error or appeal shall be allowed until such assignment of error shall have been filed. * * * When this rule is not complied with, counsel will not be heard except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned." Rules, 193 Fed. v, vii, 112 C. C. A. v, vii.

Appellee further insists that the appeal having been prayed for and allowed, on January 25, 1913, the judge of the District Court was without jurisdiction or power to make orders, or do any act, in the cause. The learned counsel for appellee strongly stressed this position and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cited authorities for its support. It is unquestionably true, as contended by him, that when an appeal has been taken, that is prayed for and allowed, the court is without jurisdiction to make further orders affecting the rights of the parties. *Edmondson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91. It follows therefore that if the entry made by the judge, at the end of the decree of January 25, 1913, had the effect claimed by appellee, the action taken by the parties, and the judge, on January 29, 1913, was ineffectual for any purpose. The motion to dismiss, or to affirm, is based upon the assumption that filing the assignment of error, as required by rule 11 of this court, is jurisdictional and essential to taking an appeal. It must be conceded that cases may be found—some of them are cited by the learned and industrious counsel—which appear to, if they do not in fact, so hold. In *Lockman v. Lang*, 128 Fed. 279, 62 C. C. A. 550 (C. C. A. 8th Cir.), Judge Sanborn says that, when an appeal is prayed and allowed in open court, “the prayer for reversal and the citation may be waived, but the assignment of errors is indispensable to the perfection of the appeal.” He bases this conclusion upon section 997, Rev. Stat. (4 Fed. Stat. Anno. p. 605 [U. S. Comp. St. 1901, p. 712]), and Rule 11 (C. C. A.); *Lloyd v. Chapman*, 93 Fed. 599, 35 C. C. A. 474. It will be observed that the language of rule 11 of the Circuit Court of Appeals is the same as Rule 35 of the Supreme Court (32 Sup. Ct. xiii). Section 997, Rev. Stat. requires that:

“There shall be annexed to and returned with any writ of error for the removal of a cause * * * an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party.”

This statute, it will be observed, does not prescribe the method of praying, the time for allowing, or making up the record upon a writ of error, and, as will be noticed later, makes no reference to appeals. They appear to be brought within its provisions by section 1012, R. S. (U. S. Comp. St. 1901, p. 716). It is found in the Judiciary Act of Sept. 24, 1789, c. 20, 1 Stat. 73. These matters were evidently left to be dealt with by the Supreme Court under its power to make rules of practice. In prosecuting and making up the record in writs of error, the provisions of section 997 should be complied with, but the order of procedure allowing the writ, or appeal, is not “essential to the perfection of an appeal.” The question involved in the motion of appellee was considered by Judge Sanborn in *Simpson v. First National Bank*, 129 Fed. 257, 63 C. C. A. 371. After quoting the words of the statute (section 997), with the language of section 1012 (4 Fed. Stat. Anno. p. 624) “appeals” from the Circuit Courts and the District Courts “* * * shall be subject to the same rules, regulations and restrictions as are, or may be, prescribed in law in cases of writs of error,” he says:

“The acts of Congress did not require the filing of an assignment of errors before the allowance of a writ of error or an appeal. This requirement rests upon Rule 11 of this court, which is the same, in terms and in effect, as Rule 34 (35) of the Supreme Court of the United States.”

The learned judge proceeds to state the reason why the assignments of error should accompany the petition for a writ of error—they are

manifestly correct and, upon slight reflection, will so impress the mind of a lawyer. He proceeds to say:

"It is not so in case of an appeal. The right to appeal is an absolute right granted to the defeated party by the acts of Congress. No court or judge has any jurisdiction or power to condition the allowance of an appeal upon his consideration or determination of the question whether or not the applicant presents alleged errors which form reasonable grounds for the review of the decision below. That question is reserved for the consideration of the appellate court exclusively. The petitioner has the same right to the allowance of his appeal, in the absence of error, or of the appearance of it, as when he presents the most conclusive reasons for the belief that the decision against him was erroneous. * * * The result is that the assignment of error is not required to be filed before an allowance of appeal, for the benefit or information of the court to whom the application for the allowance is made."

He says that the only reason for requiring it to be filed at that time is that it may be made a part of the record for the information of opposing counsel and of the appellate court, "and that object, is as well attained by filing it at any time before the security is approved and accepted as by filing it before the order is made, etc." In that case, on June 23, 1902, both parties prayed, in open court, for an appeal. Defendants, on August 15, 1902, filed their assignments of error. As both parties appealed, the plaintiffs, on August 20, 1902, filed their assignments of error. The question presented here, therefore, was fairly raised and decided in that case. The court refused to dismiss, or affirm, and decided the case on its merits. *Brown v. McConnell*, 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495. We call attention, without undertaking to reconcile the two decisions, to the disposition made of *Lockman v. Lang*, *supra*, which was an appeal. The court said:

"The assignments of errors in this case were not filed until the seventh day after the appeal was allowed, and under Rule 11 and the uniform decisions of this court the appeal must be dismissed."

In that case the bankrupt also filed a petition for a writ of error, with assignments of error, and a bond. The petition was allowed by the judge; the Circuit Court of Appeals dismissed it, saying:

"A proceeding in bankruptcy is a proceeding in equity, and cannot be reviewed by a writ of error."

The failure to note the distinction made by Judge Sanborn in *Simpson v. Bank*, *supra*, has caused some, either real or apparent, conflict in the decided cases. Eliminating *pro hac vice* the act of Congress (section 697, R. S.), the question, both in respect to appeals and writs of error, involves a construction of Rule 11 of the Circuit Court of Appeals. It is apparent, upon an analysis of the language of the rule, that a failure to file assignment of error in cases in which a writ of error is the prescribed statutory method of securing a review of the judgment below, or in an appeal, does not invalidate the writ, or appeal, or prevent the court, into which it is returnable, from acquiring jurisdiction. After prescribing the time at, and manner in, which error shall be assigned in "an appeal or writ of error," the rule provides that:

"When this is not done counsel will not be heard except at the request of the court; and errors not assigned according to this rule will be disregarded,

but the court, at its option, may notice an obvious error." Sup. Court Rule 35; Circuit Court Appeals Rule 11.

If the requirement that the assignment of error shall be filed before the writ of error is allowed is jurisdictional, by what authority does the court request counsel to argue any question presented by the record, or obtain "the option to notice a plain error not assigned"? In *School Dist. v. Hall*, 106 U. S. 428, 1 Sup. Ct. 417, 27 L. Ed. 237, the court refused to grant a motion to dismiss a writ of error because the assignment of errors was not annexed to, or returned with, the writ, as required by section 997, R. S., holding that the provisions of the statute were not jurisdictional. In *Farrar v. Churchill*, 135 U. S. 609, 614, 10 Sup. Ct. 771, 773 (34 L. Ed. 246), after quoting the Stat. § 997, Mr. Chief Justice Fuller said:

"There is no assignment of errors annexed to the transcript of the record in this case, nor does the brief of counsel contain any specification of errors, such as is required by our rule. We shall not in this instance decline to consider what we suppose to be the errors relied on, but we call attention to this statute and the rule, in the hope that nothing more is needed to prevent its recurrence hereafter."

In *Rowe v. Phelps*, 152 U. S. 87, 14 Sup. Ct. 622, 38 L. Ed. 365, Mr. Justice Brown said that there was no assignment of errors, as required by the Stat. § 997, nor specification of errors in the brief, as required by the rule (21), and there is no such plain error, not assigned or specified, "as calls upon the court to exercise its option to review the questions involved." The writ of error was dismissed.

In *United States v. Pena*, 175 U. S. 500, 20 Sup. Ct. 165, 44 L. Ed. 251, Mr. Justice Brewer says:

"A third proposition is that no assignment of errors is annexed to the transcript, as required by sections 997 and 1012 of the Revised Statutes. But this is not sufficient to compel a dismissal of the appeal. * * * The court may, at its option, notice a plain error."

The case was considered upon its merits. In *Old Nick Williams Co. v. U. S.*, 215 U. S. 541, 30 Sup. Ct. 221, 54 L. Ed. 318, affirming the judgment of this court, 152 Fed. 925, 82 C. C. A. 73, Mr. Chief Justice Fuller said:

"The assignment of error is not a jurisdictional requirement, and, although by the rule errors not assigned would be disregarded, the court might at its option notice a plain error not assigned or specified."

In that case this court, by an interesting and well-considered opinion, by Judge Morris, dismissed the writ because "not sued out six months from the entry of the judgment." He was careful, however, to say that the failure to assign error was not fatal to the writ of error. *World's Columbia Exposition Co. v. Republic France*, 91 Fed. 64, 33 C. C. A. 333.

The rule requiring assignments of error to be filed is a very wise one, vindicated by the experience of all appellate courts; but its enforcement is sometimes "pushed to an extreme," resulting in a denial of justice. With the limitation placed upon it, in Rule 11, the court retains the power to prevent this result. It makes the rule its servant and not its master. It is doubtful whether some confusion has not arisen by rea-

son of the failure to keep in mind the distinction between writs of error, always sued out in actions at law, and suits in equity which are always removed into the appellate court by appeal; in these cases the court examines the evidence, passes upon the facts, and makes such decree as in good conscience and the doctrines of equity the parties are entitled to. *Babbitt v. Clark*, 103 U. S. 606, 26 L. Ed. 507.

Without pursuing the question further, we are of the opinion that the appeal was "prayed and allowed" on January 25, 1913; that the assignments of error, filed on January 29, 1913, if necessary, are properly in the record. We are further of the opinion that, in no aspect of the case, should a motion to dismiss be allowed. We do not wish to be understood as putting a premium upon, or encouraging, a failure to comply with a very salutary rule. It should be observed. There are indications in this record that the judge was at another place than Asheville when he signed the decree, and, supposing that the trustee would desire to appeal, he, *ex gratia speciali, certa scientia et mero motu*, made the entry at the foot of his decree. This is not unusual. It would be to impose "hard lines" upon the appellant to permit the gracious act of the judge to deprive him of the right to present his contentions and have them passed upon by this court. In matters of practice, courts should look to substance rather than form and remember the maxim, *qui hæret in litera hæret in cortice*. Upon appellee's motion to affirm, it is our duty to examine the decree and the record to ascertain whether there is prejudicial error.

[2] Appellee insists, next, that the procedure adopted by the trustee, in bringing the case to this court does not conform to the provisions of the bankrupt law, as interpreted by the Supreme Court. The record shows that appellee filed his "claim and petition" before the referee, in which he set out the facts upon which he relies to establish an indebtedness of \$5,330.14, with interest, against the bankrupt, and demanded that said amount be adjudged a lien on the proceeds of the sale of the property of the bankrupt in the hands of the trustee, etc. The trustee filed his answer and objections to the allowance of the lien. The referee heard the evidence and made his conclusions of fact and of law disallowing the claim. Appellee filed his petition for review, whereupon the referee certified the evidence, together with his conclusions, to the judge of the district, who reversed the referee in respect to the claim of \$3,400, due on account of purchase money of certain real estate sold by claimant to bankrupt. In respect to the remainder of the debt, he affirmed the referee. From this decree, as we have seen, the trustee appeals to this court. The procedure is in strict accordance with that adopted and approved by the Supreme Court, in *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, and *In Matter of Loving*, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725. Whatever doubt may have existed, and variant decision rendered, upon this question of procedure, prior thereto, must give way to these decisions which "blaze the way" so clearly that the profession and courts should have no further difficulty in respect to it. This conclusion is not in conflict with the decision of this court in *Thompson v. Mauzy*, 174 Fed. 611, 98 C. C. A. 457.

[3] We are thus brought to an examination of the merits of the controversy. The referee's findings of fact, so far as relevant to the view which we think disposes of the case, are:

"On July 22, 1911, H. G. Lea sold to the bankrupt real estate, situate in Buncombe county, N. C., for the price of \$3,500, executing a deed therefor, bearing that date. To secure the payment of the purchase money, the bankrupt, on the same day, executed its notes payable to Lea, due and payable at different dates." Each note sets out, upon its face, the recital that it was "given as part consideration of the purchase price of the following described land" (giving a description thereof). Following the signature of the officers of the corporation are the following words: "This note covers a vendor's lien." Each note is indorsed "H. G. Lea." The deed was admitted to probate in Buncombe county October 2, 1911, and recorded on same day in the office of the register of deeds for said county.

"On September 20, 1911, O. R. S. Pool, secretary and treasurer of the bankrupt company, assuming to act for said company, executed in its name two notes, each for \$10,000, payable respectively 8 and 12 months after date to the petitioner Lea, and, at the same time, a deed in trust was executed in the name of the bankrupt company, by W. F. Post, its vice president, and its execution was attested by said Pool, its secretary. This deed in trust was made to J. G. Merrimon, and, after describing the two \$10,000 notes just referred to, states that 'it was given to secure their payment.' On September 20, 1911, claimant H. G. Lea was the president of the bankrupt company.

"The purpose of said Lea, Pool, and Post, in the execution of the notes and deed of September 20, 1911, was that they should be used by Lea to raise money for the bankrupt company, and it was agreed, between them, that if Lea did raise the money on said notes and deed in trust, he should be paid \$5,000 out of the money so raised, the same to be in payment of the notes for \$3,500, referred to in finding of fact No. 1, and the balance of \$5,000 to be a payment on other indebtedness claimed by the petitioner Lea to be owing to him by the bankrupt company.

"Lea did not raise any money on the said notes and deed of trust, and the purpose for which the same were executed was not accomplished, and there was a failure of the consideration upon which said notes and deed of trust were executed.

"None of the directors nor any of the officers of the bankrupt company, other than the said Lea, Pool, and Post, had anything to do with the said notes or deed in trust, or had any knowledge of the same having been executed, until some time after the execution thereof.

"The execution of said notes and deed in trust has not been ratified by the bankrupt corporation, nor has it derived any benefit from the execution thereof."

All of the property of the bankrupt corporation, including the land conveyed by Lea, was sold by the trustee, free from liens and incumbrances; such liens as are found to be valid being transferred to the fund.

The referee found, upon the foregoing facts, as a conclusion of law, that:

"The petitioner Lea is not entitled to any security for any indebtedness due him by the bankrupt company by said deed in trust of September 20, 1911."

Appellee, in the specifications, set out in his petition for review, averred that the referee was in error in his findings of fact, and further that he failed to find additional facts which, he insisted, were essential to a correct conclusion in respect to the law. The trustee filed a statement averring that he was content that the case be submitted upon the findings of fact made by the referee, but that there

were several issues, material to the rights of the parties, raised by the petition and answer, and supported by the evidence, upon which the referee made no findings of fact or conclusion of law. He suggests that, if in the opinion of the court such findings were necessary, the matter be referred, etc. The District Judge did not make any ruling upon the claimant's exceptions to findings of fact, nor did he specifically affirm, or otherwise refer to, the findings made by the referee. The language of the decree, in so far as it is relevant to the question involved, is:

"This cause coming on to be heard, upon the petition or application of H. G. Lea to review the order of the referee in bankruptcy, * * * and being heard, it is ordered and decreed that the order of the said referee be, and the same is, so far reversed, as to allow the said Lea a lien upon the said assets or moneys in the hands of the said trustee, to the extent of \$3,500, the amount of the purchase money of the lands mentioned and described in the petition of said Lea, and interest on said sum from the 20th day of September, 1911, until the date of the trustee's sale, and that said lien be a first lien to be paid and discharged in full, in preference to the claims of unsecured creditors."

While not essential to the decision of this appeal, it is proper to note that Mr. Covington, of Summit, Miss., intervened in the bankrupt court, claiming that he was the owner, by assignment from Mr. Lea, of the notes for \$3,500 in controversy. To meet this claim, which was controverted by Mr. Lea, the judge directed that the amount, adjudged to Mr. Lea, be paid to his attorney, and held by him until the claim of the intervenor was decided. In the absence of any reference, by the judge, to the findings of fact, we assume that he affirmed them and that his judgment expresses his dissent from the conclusion of law. In the argument before us, counsel strongly urged their conflicting views of the facts which they claimed should be found, as the basis of our judgment. In exercising the jurisdiction conferred upon this court by section 24b, "to superintend and revise," we are confined to matters of law; whereas in appeals we are to hear and determine them, "as in equity cases." Section 25, Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. Supp. 1911, p. 3432]); Judicial Code, § 130 (Act March 3, 1911, c. 231, 36 Stat. 1134 [U. S. Comp. St. Supp. 1911, p. 194]). This language conferred upon the court the power, with the consequent duty, to treat the "whole case as open," as in appeals in equity cases, except as to facts determined by a jury. *Elliott v. Toepfner*, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200. In *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 291, 25 Sup. Ct. 693, 697 (49 L. Ed. 1051), it is said:

"But this was an appeal and not a petition for revision, and hence it was that the Circuit Court of Appeals reviewed the questions of fact and declined to accept the findings of the referee and the District Court. In the exercise of supervisory power, it would have been confined to matter of law." *Collier, Bankruptcy* (9th Ed.) 535.

The evidence is sent up and printed in the transcript. In the view which we take of the case, the vital points are within a much smaller compass than counsel seemed to think. No question in regard to a voidable preference is involved, hence it becomes unnecessary to inquire

whether the corporation was insolvent on September 20, 1911. For the purpose of adjudication, that question passed into the judgment—this also eliminates the question whether the notes for \$10,000 each, of September 20th, were given for a present consideration, or pre-existing debts. Proceeding, therefore, to the aspects of the case upon which the decision must rest, two questions are presented:

[4] 1. Has the claimant any equitable lien upon the real estate conveyed to the bankrupt company, independent of the notes and deed in trust of September 20, 1911? The claim of priority, in this respect, is dependent upon section 64b, "debts owing to any person who, by the laws of the states or United States, are entitled to priority." The question, therefore, is whether, under the laws of the state, the claimant had any equitable right to have the notes, executed for the purchase money, paid out of the proceeds of the land, in preference to the general creditors of the bankrupt. The referee finds that the title to the land vested, on July 22, 1911, the day upon which the deed and notes bear date. The claimant controverts this finding and insists, in his eighth specification, that he should have found that, on said day, claimant "contracted to sell, and the corporation to buy, the real estate at the price of \$3,500, but that the said agreement was not fully executed until the execution by the bankrupt of the deed of trust in question to J. G. Merrimon, * * * and that it was a part of the contract of sale and purchase of said real estate that your petitioner should have a lien upon said real estate to secure the purchase price of the same." The record shows that, at a meeting of the directors of the company, held on April 19, 1911, a resolution was adopted accepting "the offer of H. G. Lea to sell the land for site upon which to erect the buildings." The terms of the sale, respecting the amount and due date of the notes for the deferred payment, are set out in the resolution; no reference is made to any security therefor. The deed bears date July 22d, and the notes were executed and delivered on that day. Mrs. Lea resided in Mississippi, and the deed was signed by her, and probated there. It was admitted to probate in Buncombe county and recorded there October 2, 1911. It also appears that Mr. Lea, who had resided in Mississippi, was under the impression that he held a vendor's lien for the purchase money. This is shown by the form of the notes and his testimony. The weight of the evidence contradicts the contention of claimant that, at the time of the contract to purchase, there was any agreement that a mortgage was to be executed to secure the payment of the purchase money. Several of the directors say that there was no such agreement, and some of them say that it was understood that Mr. Lea was to take stock for the purchase money, that the notes were only given to be used temporarily for the purpose of enabling him to raise money to pay for the land.

The learned counsel for claimant concedes that the "vendor's lien" does not exist in this state. *Johnson v. Cawthorn*, 21 N. C. 32, 27 Am. Dec. 250; *Womble v. Battle*, 38 N. C. 182; *Lumber Co. v. Lumber Co.*, 150 N. C. 282, 63 S. E. 1045, 21 L. R. A. (N. S.) 843. If it be conceded that there was an agreement to give Lea a mortgage on the land, we do not perceive how that could affect the rights of the trustee

in bankruptcy. Conceding further that the title did not vest in the corporation until the deed was admitted to probate and registration, at which date it was delivered—that is “duly executed”—it follows that, at that date, as between the parties, and as against all persons having prior liens, the title was perfected in the company and passed to the trustee upon its adjudication July 20, 1912. We are unable to perceive any view in which the claimant Lea had any equity or equitable title in, or in regard to, the land after the delivery and registration of the deed. There is no statute, nor any line of decisions, conferring or recognizing any such right or equity. The registration is in lieu of livery of seisin and perfects the title. Rev. § 979. It does not appear when the deed was delivered. The date of probate will be adopted.

[5] 2. Has the claimant any liens upon, or right of priority in respect to, the proceeds of the sale of the land under, or by virtue of, the deed in trust executed to Mr. Merrimon to secure the two notes of \$10,000 each, dated September 20, 1911?

The claimant is met at the threshold of this contention by the fatal fact that the notes and mortgage were never, either in their inception, or by ratification, the act and deed of the corporation. The evidence, in this respect, is uncontradicted. Mr. Lea was, on September 20, 1911, the president of the corporation. He says:

“No meeting was held for the purpose of authorizing this \$20,000 mortgage and notes. No specific meeting was ever called to authorize the mortgage, and I do not know of any meeting of directors or stockholders being called or held to sanction the mortgage.”

Mr. Post, the vice president, says:

“There was no meeting of the directors called to execute that mortgage. * * * I don't think there was any meeting called after the execution of the mortgage, or any meeting held at which the execution of the mortgage was ratified. There was no meeting called to ratify the mortgage either before or after it was executed. I don't think the mortgage was ever considered at any meeting, either before or after it was executed.”

Mr. Pool, secretary and treasurer, a witness for claimant, says:

“No regular meeting was held or called to ratify this mortgage.”

Mr. English, a director, says:

“The first I ever heard of the mortgage for \$20,000, executed by the company to H. G. Lea on September 20, 1911, was along in December.”

Mr. J. G. Merrimon, who was named as trustee, says that he has no recollection of the deed. The referee's finding, in respect to the execution of the mortgage, was clearly correct.

“The power of directors belongs to them collectively and not individually. The fact that a person is a director gives him no authority to act for the corporation, except when acting as a member of the board, in the absence of a by-law conferring special authority upon him.” 21 Am. & Eng. Enc., 864.

“Directors of a corporation can act as such, so as to bind the corporation, only as a board; the acts of directors individually, though such individuals may constitute a majority of the board, cannot affect the corporation.” Id. 865.

This has been uniformly so held, as law, in North Carolina, Duke v. Markham, 105 N. C. 131, 10 S. E. 1017, 18 Am. St. Rep. 889, in

which a mortgage on the corporate property, although a majority of the directors individually assented to its execution, was held void. *Benbow v. Cook*, 115 N. C. 325, 20 S. E. 453, 44 Am. St. Rep. 454.

In *Hill v. Railroad*, 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606, it was said:

"It is therefore essential to the validity of their acts that they (directors) should be assembled in their representative capacity, as they are not permitted to discharge any of their duties unless thus organized into a deliberative meeting, though they may all have personally and individually given their assent to any proposed corporate action."

Cook on Corporations (6th Ed.) 2254, says:

"Directors are elected to meet and confer, and to act after an opportunity for an interchange of ideas. They cannot vote or act in any other manner."

It is manifest, therefore, that, independent of the purpose for which the notes were given, the attempted execution of the deed in trust to Mr. Merrimon was ineffectual to vest the title in him or to create any valid lien upon the land. The learned counsel says that, conceding this to be true, the parties are in a court of equity, and that upon "broad principles of equity" the lien should be declared and given priority for the purchase money. As we have seen, the claimant has no "vendor's lien." To the suggestion that it was the intention of the parties to secure the payment of the purchase money, and that a court of equity will disregard form and effectuate the intention of the parties, it is manifest that there is a very decided conflict in the evidence as to what was the intention of the parties in the execution of the notes and mortgages. Mr. Lea says:

"I was under the impression that a man could retain title for the deferred payments until they were made, but I found out that that could not be done."

Mr. Sternberg was present, when the contract was made, to buy the land. He says:

"There was nothing said at that time about any mortgage or security to be given for these notes. He wanted the notes to pay Mr. Weaver."

W. F. Post, a director, was also present. He says:

"I cannot say whether at that time anything was said about a mortgage to secure these notes. * * * I think these \$3,500 notes were vendor's lien notes, and, if I could see them, I could tell you more about them."

Mr. Litchenfels, another director, was present, and says that the directors were talking about buying another piece of land, when Mr. Lea said that he had something better.

"He said that he had a piece of property that he would sell the company for \$3,500 and take stock for it. Notes were to be given him for three months in order to enable him to pay Mr. Weaver and Mr. English was to buy another part of the property. They were to give him notes, and when the notes became due he was to take stock for them, * * * that he would have the money at the expiration of the notes, etc."

Mr. Pool says:

"Mr. Lea has never been paid for this land. He agreed to sell us the land and give us three years to pay for it, and he was to be secured by a mortgage

on the land. * * * Mr. Lea never agreed to take stock from the company for his land; I cannot be mistaken about that."

Mr. Lea was president of the bankrupt company from July 20, 1911, until it was adjudicated bankrupt. He denies that he was to take stock for the land.

It would be very difficult for a chancellor, in a suit between the parties to the transaction, upon this evidence, to find that there was any agreement on the part of the company to execute a mortgage on the land to secure the purchase money. The resolution, authorizing the purchase, spread on the minutes, while very explicit as to the terms of the purchase, fails to make any reference to security. Does the circumstance under which the mortgage of September 20, 1911, was executed, afford any basis for equitable relief? It clearly does not come within the equitable principles by which courts of equity aid the defective execution of powers. The evidence, in respect to the agreement upon which the \$10,000 notes and deed in trust were executed, is somewhat confused. Mr. Lea says:

"They gave me two notes for \$10,000 each, and, if possible, I was to negotiate that mortgage and take up the Sternberg mortgage (for \$15,000), \$5,000 represented the amount I had advanced, and I had an open account with them. It was agreed that, if I could make that loan, they would pay me \$5,000. That was how they came to execute the \$20,000 mortgage. * * * I failed to negotiate the paper."

On cross-examination, he is asked the question:

"Now, Mr. Lea, tell us about this mortgage of yours for \$20,000, securing two notes, \$10,000 notes?"

He answers:

"The company was indebted to me around \$11,000, \$700 of which I had just let them have, thinking temporarily, so I said to Mr. Pool and Mr. Post that I believe I can get you—the buildings were practically completed—a first mortgage on this property, a \$20,000 loan, at least \$10,000 of which, if I can put it through, I will turn over to the company. They can apply it to Mr. Sternberg's indorsement, the notes that he had indorsed, and if I succeeded in getting that, I can arrange the other \$5,000, and we will cancel the mortgage altogether, leaving this \$20,000 first mortgage on the property.' In the \$20,000 was included the \$10,000 that the company owed me, \$10,000 I was to get for them if I could. I failed to negotiate that paper. I was not successful about handling it, that is, on a satisfactory basis, and that is the history briefly stated."

He says:

"I did not include those \$3,500 notes in the proof of claims I filed."

Mr. Post says:

"I suppose it (the mortgage) was to be null and void if he could not carry out the purpose."

Mr. Pool says:

"We agreed with Mr. Lea to give him \$10,000 if he could negotiate all the notes. He said he did not expect to hold us up, and that he would take \$5,000."

Mr. Sternberg says:

"After the petition in bankruptcy was filed Mr. Lea told me 'that the mortgage was only a scheme mortgage, Mr. Pool told me so. He told me he wanted to raise the money, to take up my mortgage and that, if he could not raise the money, the mortgage was null and void.'"

Upon this testimony, it is by no means clear what was in the minds of Mr. Lea, the vice president, who executed, and the secretary who attested his signature to the mortgage. No other director had any knowledge of the execution of the notes and mortgage. There are many other facts and circumstances found in the record, surrounding Mr. Lea's dealings with the property of this company, which would cause a court of equity to pause before decreeing to him a first lien on the land, to the detriment of creditors. Certainly there is no such weight of evidence as would induce a court of equity to conjecture just what their purpose was, and to enforce it. Equity seeks to effectuate the intention of parties to contracts, and will, to that end, aid their defective execution; but this is done upon well-settled rules and principles, found by experience to be wise and safe. The chancellor may not proceed when the evidence is unsatisfactory or the rights of innocent creditors are involved. After a careful and anxious examination of the evidence, we are brought to the conclusion that the judgment of the referee, either upon the facts found by him or, as we find them, was correct. The judgment of the District Court must be reversed. It will be so certified to the end that further proceedings may be had in the bankrupt court in accordance with this opinion.

Reversed.

UNITED STATES v. MARSHALL et al.

(Circuit Court of Appeals, Eighth Circuit. January 22, 1914.)

No. 3920.

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1009*)—DECREE IN EQUITY—PRESUMPTION.

Upon appeals in equity cases the decision of the trial court is presumptively correct and will not be revised save where there has intervened an obvious error of law or a serious mistake of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

2. APPEAL AND ERROR (§ 934*)—DECREE IN EQUITY—PRESUMPTION.

This presumption exists not only where the testimony was taken in open court and where the trial judge thus saw and heard the witnesses, but also where the submission was entirely upon deposition. It is, however, less strong in the latter instance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.*]

3. INDIANS (§ 14*)—ALLOTMENT PATENTS—CANCELLATION—FRAUD—EVIDENCE.

Indulging this presumption in favor of the decree below, in a suit by the United States to cancel homestead and allotment patents issued by the officers of the Choctaw and Chickasaw Nations to a deceased Indian under the provisions of "An act to ratify and confirm an agreement with

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Choctaw and Chickasaw Tribes of Indians and for other purposes," approved July 1, 1902, c. 1362, 32 Stat. 641, it is *held* that the evidence was sufficient to sustain a decree dismissing the bill as against one claiming the status of a bona fide purchaser for value without notice and quieting the title of such purchaser.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 2, 31-36, 46; Dec. Dig. § 14.*]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Proceeding by the United States against J. Horace Marshall, administrator, etc., and others, to cancel a patent alleged to have been obtained by fraud. From the decree, the United States appeals. Affirmed.

C. C. Herndon, of Muskogee, Okl. (D. H. Linebaugh, of Atoka, Okl., and John B. Meserve, of Muskogee, Okl., on the brief), for appellant.

A. H. Ferguson, of Durant, Okl. (C. C. Hatchett, of Durant, Okl., on the brief), for appellees.

Before SANBORN and SMITH, Circuit Judges, and POPE, District Judge.

POPE, District Judge. This is a proceeding by the government to cancel a patent alleged to have been obtained by fraud. The patent ran to one Cornelius Barnes, a deceased Choctaw Indian, and covered a selection of land made by his administrator, Marshall, upon a showing by the administrator that Cornelius Barnes had died subsequent to September 25, 1902. The relevancy of this date arises from the fact that heirs were by the Act of July 1, 1902, c. 1362, 32 Stat. 641, allowed participation in the allotment of the common lands of the tribes where the Indian, from whom the inheritance came, had been living at the date of the ratification by the tribes of the agreement with the government embodied in the statute just mentioned, which ratification was voted on September 25, 1902, the date above mentioned. The administrator and Robert Barnes, the brother and sole heir at law of Cornelius Barnes, were made parties defendant. Two alleged grantees from Robert Barnes were also made parties: First, W. L. Bates holding under a deed duly recorded, dated August 20, 1904; and, second, V. Bronaugh whose deed from Robert Barnes was dated August 22, 1908. The fraud alleged in procuring the patent was that the application for it was supported by two affidavits, one made by Robert Barnes, showing Cornelius Barnes to have died after September 25, 1902, when as a matter of fact, known both to the administrator and to Robert Barnes, he died during the September preceding. It is also alleged that the deeds to Bates and Bronaugh were invalid because made at a time when there was no power of alienation in Robert Barnes. This last contention, however, was abandoned upon the trial in view of *Mullen v. U. S.*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834. The defendants, except Bates and Bronaugh, suffered default. These latter answered separately, setting up their respective deeds and claiming the status of bona fide purchasers for value. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

District Court held that Cornelius Barnes died before September 25, 1902, and that as against his administrator and his heir at law, Robert Barnes, the proceeding must prevail. It decided, however, that Bates was a bona fide purchaser for value without notice of the fraud and dismissed the bill as to him, quieting the title in him upon his prayer for cross relief. There was a decision against Bronaugh upon the ground that, the title being held to be in Bates under a deed made and duly recorded in 1904, there was nothing left in Barnes for Bronaugh to take under his deed given four years later. Bronaugh has not appealed, so that the case here is between the government and Bates. On this appeal the controversy is purely one of fact. The questions raised are: First, was the court below wrong in holding that the deed from Barnes to Bates was genuine? And, second, was it wrong in holding that Bates was a bona fide purchaser for value?

[1, 2] To secure a reversal upon such a basis as that just mentioned the appellant must convince us not only that the trial court may have been wrong, but that it was manifestly wrong. There must, under the holdings of this court, have been an "obvious error" of law or a "serious mistake" in dealing with the facts. *Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447; *Mastin v. Noble*, 157 Fed. 506, 85 C. C. A. 98; *State of Iowa v. Carr*, 191 Fed. 257, 112 C. C. A. 477; *Harper v. Taylor*, 193 Fed. 944, 113 C. C. A. 572; *De Laval Co. v. Iowa Co.*, 194 Fed. 423, 114 C. C. A. 385. The error must be "clear and palpable." *Babcock v. De Mott*, 160 Fed. 882, 88 C. C. A. 64. The conclusion of the trial court is "presumptively right." *State of Iowa v. Carr*, *supra*. Some distinction relieving from this rule is claimed in the present case because the testimony was not taken before the judge but before an examiner, and it is said that under such circumstances this court is in as favorable a situation to deal with the matter as was the court below. *United States v. Booth Kelly Lumber Co.*, 203 Fed. 423, 121 C. C. A. 533, from the Ninth Circuit, is cited to this point. But the question is not so much one of situation to decide as of where the law places the primary determination of questions of fact. While no doubt the circumstance that the district judge personally heard the witnesses tends to strengthen the presumption in favor of his conclusion—a consideration mentioned by this court in *Coder v. McPherson*, 152 Fed. 951, 953, 82 C. C. A. 99, also in *Harper v. Taylor*, 193 Fed. 944, 113 C. C. A. 572, by the Circuit Court of Appeals for the Sixth Circuit in *Mt. Vernon Co. v. Wolf Co.*, 188 Fed. 164, 110 C. C. A. 200, and by the Circuit Court of Appeals for the Ninth Circuit in *The Santa Rita*, 176 Fed. 890, 100 C. C. A. 360, 30 L. R. A. (N. S.) 1210—the fact that he did not hear such witnesses, but that the proofs before him were entirely by deposition or upon examiner's report, does not destroy the presumption. Such still exists in favor of his conclusion. To hold otherwise would in effect be to make this the court of first instance. The District Court is not in such matters a mere conduit. It, not this court, is the trial court. Our functions are simply to guard against manifest error on its part, and this is true whether such arises upon hearing witnesses or upon reading a record.

[3] Starting with this presumption in favor of the decision of fact

below, is there apparent error in the court's determination of either of the matters mentioned? We believe not. If the genuineness of the deed from Barnes to Bates was indeed an issue under the pleadings—a matter we do not find it necessary to decide—we have no fault to find with the conclusion below that the deed was made by Barnes. The deed was by mark. There were two witnesses to it and an acknowledgment before a notary. One of these witnesses, Robertson by name, testified that Barnes in his presence made his mark to the signature and thereupon acknowledged the deed. Barnes testifying through an interpreter denied this. But Barnes was the heir whose false affidavit as to the date of his brother's death had induced the fraudulent patent. Upon the elimination of the Bates deed depended the payment to him of some \$500 yet due upon the subsequent Bronaugh transaction. The court below was certainly not bound to award unreserved credence to an interested witness, thus discredited by a previous perjury. The notary public, Silas Cole, also denied the acknowledgment. But complying with a request on cross-examination this witness wrote his name for purposes of comparison with that upon the deed. This signature seems to have been a very peculiar one. The court below had both of these signatures before it, and we learn from its opinion that this comparison proved very convincing that Cole was telling an untruth. We cannot say that the trial judge was wrong in this.

The other issue was as to whether Bates was a bona fide purchaser. Bates was a member by marriage of the Chickasaw Nation. wishing to secure the land involved, he made his wants known to Johnson, a real estate agent, paying him \$50, either as compensation for securing the tract or as a forfeit to the owner to insure the trade, should one be arranged. About this time Robertson, the witness above mentioned, communicated to Johnson that he had a party, who later proved to be Robert Barnes, who was willing to sell this land after securing it upon the basis of the tribal rights of his deceased brother Cornelius. The proof shows that Robertson by an arrangement with Barnes was to retain from the latter for his service all he could get out of the matter over \$1,050. Robertson and Barnes furnished the proofs showing the date of the death of Cornelius. Armed with this, the defendant Marshall, who seems to have acted in the matter purely as an accommodation to all concerned, qualified as administrator and filed upon the land, whereupon patent issued inuring to Robert Barnes. Upon the closing of the trade Bates turned over \$1,450, the full balance of the agreed purchase price of \$1,500, to Johnson to be by him paid over upon the delivery of the deed. When this latter was delivered by Robertson and Barnes, the money was paid to the former as the representative of Barnes, and there the transaction closed so far as Bates was concerned. Bates had no notice of any misrepresentation or fraud in the procurement of the patent. Some point seems to be made just here that Robertson has paid over only a small part of the money to Barnes. But that did not concern Bates. Robertson was not his agent, but the agent of Barnes. Some argument is also made that Johnson was the agent of Bates and knew, or at least

by diligence might have known, that Cornelius Barnes died before 1902. But the proofs are clear that Johnson knew nothing of this. Nor was he called upon to know. The latter duty rested, not upon him, but upon those who were applying for the patent. The duty of furnishing a title to the land was upon the seller, not upon the purchaser or the purchaser's agent. It is said, however, that Marshall, the administrator, at least should have known whether the affidavits as to the death of Cornelius were true and that his failure to verify their accuracy was legal fraud imputable to Bates. Marshall, however, did not represent Bates. True, he consented to serve as administrator upon a request from Bates and Bates was one of his bondsmen. But these circumstances did not make him the agent of Bates. As administrator his agency was as an officer of the law and for certain purposes as a representative of the beneficiary of the estate. We are of opinion that any penalty for what he may have failed to ascertain, or for what Barnes and his agent Robertson may have known but failed truthfully to present, must be visited upon these and not upon one who has purchased in good faith and for full value. Such the trial court found Bates to be, and we find no fault with that conclusion.

The decree will accordingly be affirmed.

EBNER GOLD MINING CO. v. ALASKA-JUNEAU GOLD MINING CO.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1914.)

No. 2155.

1. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS OF FACT.

Findings made by a trial court that no discovery had been made on a lode mining claim, and that the required assessment work had not been done thereon, will not be reversed by an appellate court, where the evidence was conflicting and there was substantial testimony to support such findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

2. MINES AND MINERALS (§ 23*)—MINING CLAIMS—ASSESSMENT WORK.

Where the locator of a mining claim in Alaska has failed to do the annual assessment work required by Act March 2, 1907, c. 2559, 34 Stat. 1243 (U. S. Comp. St. Supp. 1911, p. 609), he cannot save his rights by a resumption of work before the intervention of other parties.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 51-59, 114; Dec. Dig. § 23.*]

3. PLEADING (§ 236*)—AMENDMENT—DISCRETION OF COURT.

Under Code Civ. Proc. Alaska, § 92, it is within the discretion of a trial court to permit the amendment of an answer after the testimony has been concluded by setting up additional defenses to meet the evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

4. COSTS (§ 32*)—ACTION TO RECOVER REAL PROPERTY—ALASKA STATUTE.

Under Comp. Laws Alaska 1913, § 1342, which allows a plaintiff costs as of course on a judgment in his favor in an action to recover possession

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of real property, he is entitled to costs although he does not recover all the land sued for.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 108-132; Dec. Dig. § 32.*]

In Error to the District Court of the United States for the District of Alaska; Edward E. Cushman, Judge.

Action at law by the Ebner Gold Mining Company against the Alaska-Juneau Gold Mining Company. From a judgment in part in its favor and in part against it, plaintiff brings error. Modified.

The Ebner Gold Mining Company, plaintiff below and plaintiff in error here, brought an action in ejectment in the District Court, Division No. 1, of the District of Alaska, against the Alaska-Juneau Gold Mining Company, defendant in error, charging that some time in August, 1910, the Alaska-Juneau Company wrongfully entered upon part of the Lotta and Parish No. 2 lode claims which were owned and possessed by the Ebner Gold Mining Company, and ejected the said Ebner Company therefrom and built a dam and flume over the said claims.

The Alaska-Juneau Company denied all the material allegations set forth in the complaint and claimed that it owned and was entitled to possess what is conceded to be practically the same ground as had been described as Parish No. 2 and Lotta claims by virtue of certain mining locations known as the Oregon and the Canyon mining claims, respectively; that the dam referred to in the complaint is within the boundaries of the Oregon and Canyon mining claims; and that the flume is within the boundaries of the said two claims and another claim owned by the defendant in error.

Defendant further set up that, if the Ebner Gold Mining Company ever had had any interest in the claims described, it had failed to do the necessary work and labor for the use and benefit of the Parish No. 2; that it owned many mining claims and was building tramways and utilizing water which it had appropriated for mining and other purposes; that the waters it had appropriated were necessary in the operation of its mills; and that the dams constructed by it were necessary; that the pretended Parish No. 2, the Oregon, and the Canyon claims were all unpatented mining claims; that for many years the miners of the Harris Mining District, Alaska, in which the properties in litigation are situated, were accustomed to certain rights by which riparian owners had no rights to the water flowing within the stream, but could only enjoy the use of water by diversion, appropriation, and application to beneficial usage.

Replication to the answer was filed, plaintiff denying the assertions of claims of ownership made in the answer. Trial before the court without a jury resulted in findings to the effect that the Ebner Company, plaintiff, owned and possessed the Lotta claim; but that it had never owner or possessed the ground claimed as Parish No. 2 claim; that the said Parish No. 2 "was located solely for purposes of convenience; that no discovery of mineral-bearing rock in place, of any value, was ever made by the plaintiff or its grantors, nor any indication or evidence of such as could or would warrant or justify one in spending time, work, or money in its development or in the expectation of finding ore; * * * that no assessment work required by law to the extent of \$100 each year has been performed or caused to be performed in labor and improvements of any kind or for the benefit and use of said Parish No. 2 claim prior to the year 1909; and that the plaintiff and its grantors failed and neglected to sufficiently represent said claim during the years prior to 1909, after its attempted location in 1899; * * * that the Oregon mining claim was located solely for purposes of convenience; and that no discovery of any mineral-bearing rock in place of any value was ever made by defendant or its grantors."

As conclusions of law the court found that the plaintiff was entitled to the possession of the Lotta claim and to a decree ousting the defendant there-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from; that the location known as the Parish No. 2 and the locations known as the Oregon and the Canyon mining claims were void and of no effect; and that neither of the parties was entitled to recover costs. Judgment was entered that plaintiff take nothing further by its complaint, and except as to the Lotta mining claim the action was dismissed. From this judgment the writ of error is prosecuted.

John R. Winn and N. L. Burton, both of Juneau, Alaska, for plaintiff in error.

Curtis H. Lindley, of San Francisco, Cal., and Hellenthal & Hellenthal, of Juneau, Alaska, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] The decision of the case turns upon the validity of the location of the Parish No. 2 and the Oregon lode claims. Involved in this question is the necessity for determining whether or not there was any substantial evidence introduced upon which the court was justified in predicating its view of lack of discovery on the Parish No. 2. The contention of the Ebner Company is that the record discloses that upon the trial, "by a great preponderance of the evidence, if not by the undisputed proof, plaintiff in error or its grantors had, prior to any intervening rights, made a good and sufficient discovery, location, staking, and marking of the boundaries and posting and recording of the location notice of the Parish No. 2 lode claim," and that since discovery the necessary annual assessment work had been done upon said claim.

Examination of the testimony of the witness Ebner, who was the original locator of the Parish No. 2 claim, discloses these questions and answers:

"Q. How did you happen to locate the Parish Lode? That is, did you take a man with you the day you located it? A. Do you want to know the history of it?

"Q. I will ask you now—the Parish No. 2 lode, was anybody with you the day you made that discovery? A. When I made my discovery I think I had two men with me.

"Q. How did you happen to take these two men with you? A. In the first place, I always take a man with me when I go out in rough places; I had them for cutting brush. The brush was very high and a great deal of it. * * *

"Q. Parish let the lodes lapse? A. Yes, sir.

"Q. So you went out there some time—was it August, 1899? A. It was during the latter part of the summer. I prospected around some time before we started to locate them.

"Q. And your location notice described your discovery point? A. Yes, sir; within a few feet or a short distance.

"Q. I wish you would describe to the court the appearance of that discovery. A. Why the discovery on the Parish No. 2, Mr. Shackelford, is just north of a pit, an old pit that was there.

"Q. The Borean pit? A. The Borean pit and the bedrock stuck out in one place there and showed quartz; that was the discovery for the Parish No. 2.

"Q. Is that bedrock there now? A. I think that that is blasted out. I think that is where the open cut was made.

"Q. Is it blasted out? A. Yes, sir."

This testimony very clearly fixes the discovery point on the Parish No. 2 as in the Borean pit. Counsel say, however, that there were so

many other discoveries made by Ebner, "which are practically undenied by the defendant in error and are to a great extent corroborated by the witnesses of the opposing party, that we do not care to take the time to dwell any further on the question as to whether the discovery made at or near the Borean pit is or is not rock in place." But when we turn to the testimony introduced by the defendant in error, we find that its agent and general superintendent was asked particularly with reference to the portion of the Parish No. 2 lying between the banks of Gold creek and the southerly end line of the claim, and whether there was any rock in place anywhere near the surface. We quote from the record:

"A. The southerly end line?

"Q. Yes, I mean along where the Borean pit is. A. That is entirely covered by rock slide in the southeastern portion, all the way; it is made up of two slides, one in the vicinity of Miller's gulch and the other coming from a point on the north side of Snowslide gulch.

"Q. How about the Borean pit? Any rock in place anywhere in that vicinity? A. In the Borean pit itself?

"Q. Yes. A. No, there is not.

"Q. Do you know where that open cut is—the Borean pit? A. I do.

"Q. Is there any rock in place in the neighborhood of that open cut? A. I didn't see any.

"Q. Did you examine it? A. I did.

"Q. Answer the question whether there is or not. A. I don't think there is any bedrock within at least 30 or 40 feet, if not more, of the bottom of the Borean pit itself."

Counsel who represented the plaintiff in error in the court below moved to strike out the last part of the witness' answer, but the court denied the motion. The examination continued:

"Q. I now hand you this photograph marked '10,' and call your attention to a rock shown on the right-hand side of the picture, and ask you if you are familiar with that piece of rock there? A. I am. I looked at that very carefully.

"Q. Is that a boulder or rock in place? A. That is a piece of slide from the cliff above and is part of the general slide.

"Q. Part of the general slide? A. Yes, part of the general slide.

"Q. Is that in place or not? A. It is not in place.

"Q. Is there, Mr. Kinzie, any rock in place in the Borean pit, at the Borean pit or within a radius of 50 or 100 feet on each side of the pit? A. No, there is not. You mean to be seen?

"Q. Yes. A. No, there is not.

"Q. How deep, in your opinion, is the slide rock there? A. The slide rock, starting at a point—starting at Miller's gulch and following along Gold creek until you come to a point almost in front of the two Alaska-Juneau tunnels, and then going straight south to the side line of the Colorado or very likely a little southeast from that point—the country above is entirely covered by slide rock.

"Q. To what depth? A. It is varying from a few feet, practically nothing at that point, to, I should judge, 50 or 80 feet."

Afterwards, in explanation of his opinion as to the depth of the slide on Parish No. 2 lode claim at its southeasterly end, the witness said that he had known of the slide in a general way for a long time, that he had examined it just before the trial of the case, and that he found two slides on the claim up the hill to the southeasterly end line of the Parish No. 2. Another witness called by the plaintiff below tes-

tified that the rock in the Borean pit and within 75 feet of the open cut in the Borean pit was slide rock and not in place, that the slide was between 30 and 40 feet deep from the bottom of the open cut to the rim; that he dug an open cut toward the southerly side of the boulder toward a cut that he had made; that he then sunk a shaft about 3 feet wide and 4 feet long; that everything above the boulder was a solid mass of rock and everything beneath it loose gravel and boulders of granite differing in character from the boulder itself; and that, when he reached the open cut underneath, the entire mass gave evidence of breaking away and had to be timbered. Another witness, who was a surveyor, said that the open diggings in the Borean pit disclosed what appeared to be a large placer wash with boulders piled up in the wall, that the surface was slide rock of a depth of 20 feet or more, and that the character of the bedrock in Snowslide gulch, which was just southerly of the Parish No. 2 claim, and on the creek, differed from the pieces of rock that protruded from the surface in the neighborhood of the Borean pit.

After hearing the testimony, the judge of the court below, by consent of counsel, examined the ground; and it was agreed by counsel that the fact of his visit should be referred to in the record of the case. The judge was accompanied by experts representing the views entertained by the respective sides. The court thereafter reached the conclusion that under the evidence there was a failure to prove a discovery in the Parish No. 2 location; that it was located for convenience only; that no assessment work as required by law had been done upon it prior to 1909; that the Oregon claim was also located for convenience; and that no discovery of any mineral-bearing rock in place of any value had ever been made upon that claim by defendant in the case below, or its grantors. The record has much testimony which conflicts with the evidence which we have heretofore quoted; nor is it to be disputed that witnesses of repute testified to the existence of facts which might have warranted the court in concluding that there was a discovery upon the Parish No. 2 location. But this puts the case among those where a substantial conflict calls for an application of the rule which prevents this court from reversing the findings of fact made by the judge. Moreover, it must have been of considerable advantage to the judge to examine the ground itself and to observe carefully those particular conditions to which the experts for the respective sides called his attention. Under such circumstances the findings, being supported by substantial evidence, are not to be disturbed. *McIntosh v. Price*, 121 Fed. 716, 58 C. C. A. 136; *Moore v. Moore*, 121 Fed. 737, 58 C. C. A. 19; *Hemphill v. Raymond*, 144 Fed. 796, 75 C. C. A. 526.

The plaintiff in error urges that, inasmuch as both of the parties to the action were claiming the ground in dispute as being mineral, the least amount of proof of a discovery was sufficient, and that the effect of the trial judge's findings is to work a forfeiture of the ground embraced in the Parish No. 2 lode mining claim. The argument is that the government, not being a party to the suit, is not seeking to declare the Parish No. 2 ground public domain; hence that the court ought

not to consider the possible interests of the United States by declaring the ground public domain. An answer lies in this: Inasmuch as the power of the court to make the finding, to which the argument just referred to is addressed, exists, if the evidence sustains the finding, we cannot set it aside merely because we might not have made such a finding ourselves.

[2] The determination by the court that there was no discovery and no valid location of the Parish No. 2, whether or not the annual labor required by law to be done was performed became immaterial. The issue was tried before the court below, but the trial of it only became necessary because neither of the parties could foresee that the court would hold that the Parish No. 2 location was wholly invalid. We may say, however, that under the rule laid down in *Thatcher v. Brown*, 190 Fed. 708, wherein the acts of Congress concerning failure to perform assessment work during any given year upon mining claims in Alaska are discussed, there can be no saving of a locator's rights by resumption of work prior to the intervention of other parties.

Plaintiff in error says that a *possessio pedis* gave it a right to possession and to maintain ejectment. The finding of the court, however, is that the plaintiff below was not and never had been seised, possessed, or entitled to the possession of the Parish No. 2 lode mining claim, and that at the time of the location of the dam and flume and the diversion and appropriation of the water the property described as the Parish No. 2 lode mining claim was a part of the unoccupied public domain of the United States. These findings, being sustained by substantial evidence, cannot be disturbed.

Again, in view of the finding of the court with respect to the Parish No. 2 location, the question of the validity and effect of any custom which may have prevailed in the Harris Mining District by which an entry upon unpatented mining claims was permitted to one seeking to appropriate water flowing through such unpatented mining claims became immaterial.

[3] It is assigned as error that the court permitted the defendant below to amend its answer after trial of the case but before the court took the matter under advisement. The amendment was a plea of noncompliance of plaintiff with the laws requiring annual assessment work upon the Parish No. 2 lode mining claim, and of a failure on the part of plaintiff to represent the claim or to resume work thereon until long after the water and mining locations of the defendant had been made, and of the failure to record the affidavit of annual labor and improvement required by statute. While under the view we take this became immaterial, still the action of the court in allowing such an amendment was clearly within the exercise of sound discretion. *Carter's Alaska Code*, pt. 4, § 92.

[4] We are asked to hold that the court below should have awarded costs to plaintiff in error because it obtained judgment for restitution of the Lotta claim. The judgment of the court awarded possession of the Lotta claim to the plaintiff below and ordered that plaintiff take nothing further by its complaint, and that, except as to the Lotta claim, the case should be dismissed without cost to either side. The effect of

the judgment, therefore, was in part favorable to the plaintiff below and in part against it. But as section 1342, Compiled Laws of Alaska, allows a plaintiff costs as of course upon a judgment in his favor in an action for the recovery of the possession of real property or where a claim of title or interest in real property or right to the possession thereof arises, the court erred in not regarding the case as within the statute. The fact that plaintiff below did not recover judgment as to all the land in controversy does not change the fact that it had a judgment in its favor. *Sierra Union, etc., Co. v. Wolf*, 144 Cal. 430, 77 Pac. 1038; *Phipps v. Taylor*, 15 Or. 484, 16 Pac. 171; *Grant v. Oregon Navigation Co.*, 49 Or. 324, 90 Pac. 178, 1099.

The order is that the judgment of the court below is reversed, and the court below is directed to amend the judgment heretofore made by it by striking out the words "without cost to either side," and substituting therefor words which will award costs to the plaintiff, and as thus amended the judgment shall stand affirmed.

COMMERCIAL UNION ASSUR. CO., Limited, v. DALZELL.

LONDON & LANCASHIRE FIRE INS. CO. v. SAME.

(Circuit Court of Appeals, Third Circuit. January 29, 1914.)

Nos. 1,792, 1,793.

1. INSURANCE (§ 612*)—FIRE POLICY—CONSTRUCTION—TIME TO SUE.

Where a fire policy provided that in the event of disagreement as to the amount of the loss the same should be fixed by appraisal, and that the award should "determine the amount of such loss," and that the company should pay the same within 60 days after due notice, ascertainment, estimate, and satisfactory proof of loss, no suit could be lawfully brought on the policy until the amount to be sued for had been so determined.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1520-1528; Dec. Dig. § 612.*]

Conditions in policy as to time for bringing suit, see notes to *Steel v. Phoenix Ins. Co.*, 2 C. C. A. 473; *Rogers v. Home Ins. Co.*, 35 C. C. A. 404.]

2. INSURANCE (§ 574*)—FIRE POLICY—LOSS—AMOUNT—DETERMINATION BY ARBITRATION—CONCLUSIVENESS.

Where a fire policy provided that in the event of a disagreement as to the amount of the loss the same should be ascertained by two competent and disinterested appraisers, one to be selected by the insurance company and the other by the insured, and the two to select an umpire and together should appraise the loss, and the award in writing of any two should determine the amount of such loss, the award of the appraisers was conclusive on both parties and fixed the amount of the insured's liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Actions by John Dalzell against the Commercial Union Assurance Company, Limited, and against the London & Lancashire Fire Insur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ance Company. Judgment for plaintiff in each case, and defendants bring error. Reversed.

Jennings & Jennings and S. S. & C. B. Mehard, all of Pittsburgh, Pa., for plaintiffs in error.

Richard H. Hawkins, of Pittsburgh, Pa. (Dalzell, Fisher & Hawkins, of Pittsburgh, Pa., of counsel), for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. These two cases were tried together in the District Court, and do not need separate attention here. They arise under the following circumstances:

In June, 1907, the plaintiff, who owned a large building in Wilkesburg, Pa., insured it for \$45,000 in several companies; each of the defendants writing a policy of \$2,500. In March, 1908, a fire occurred, and much damage was done. A dispute arose immediately about the amount of the loss; the plaintiff asserting the damage to be nearly \$35,000, and the defendants contending for a much lower sum. In such a situation, if we turn to the contract—as we must—in order to ascertain the rights of the respective parties, we find the following provisions:

The sum covered by the policy is not to exceed \$2,500, and the company is not to be liable—

“beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality.”

And, as disputes arise continually between insurer and insured concerning the amount of a loss, the policy goes on to provide:

“Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers as hereinafter provided.”

[1] The subsequent provisions thus referred to are as follows:

“In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage; and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expense of the appraisal and umpire.”

It will be observed that this award is to “determine the amount of such loss,” and obviously no suit can be brought until the amount to be sued for shall be thus determined. And, indeed, the suit cannot be brought immediately, even after an award has been made; for in two places the policy expressly provides as follows:

“* * * And, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable in 60 days after due notice, ascertainment, estimate, and satisfactory

proof of the loss, have been received by this company in accordance with the terms of this policy. * * *

"An the loss shall not become payable until 60 days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required, have been received by this company, including an award by appraisers when appraisal has been required."

[2] It will thus be seen that the office of the award is to determine the amount of the loss; for reasons not connected with the award, the company may not be liable at all, but if liable it must pay the amount thus determined. And this amount is binding upon both parties; they so agree, and of course they are bound by their contract.

Other preliminary conditions must also be complied with by the insured, before he can acquire a right to sue. Especially, he must give immediate notice of the loss—this is not in dispute, and need not be considered—and he must also—

"within 60 days after the fire, unless such time is extended in writing by this company, render a statement to this company, signed and sworn to by such insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof, and the amount of loss thereon, etc." (specifying what is usually required in proofs of loss).

As all these preliminary conditions are for the company's benefit, the company may waive them, and this possibility is expressly recognized in other clauses of the policy. One clause guards against the contingency that the mere fact of agreeing to an appraisal may be construed as a waiver:

"This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for."

And another clause attempts to ordain a particular method by which waiver is to be proved:

"* * * No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto."

After a right to sue has been acquired by the performance of the stipulated conditions precedent, the insured is required to sue within a specified time:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

Each policy was accepted subject to these stipulations and conditions; it is the voluntary contract of the parties by which they have chosen to be bound. Courts have differed concerning the effect of the condition concerning appraisal. The Supreme Court of Pennsylvania holds it to be revocable. Its position will appear by the following ex-

tract from the opinion in *Commercial, etc., Co. v. Hocking*, 115 Pa. 414, 8 Atl. 591, 2 Am. St. Rep. 562.

"It is undoubtedly true, when the parties to an executory contract agree that all questions of difference or dispute which may arise between them in reference thereto, or that the amount of any claim arising therefrom, shall be first submitted to the arbitrament of a single individual, or tribunal named, they are bound by their contract, and cannot seek redress elsewhere, until the arbiter agreed upon has been discharged, either by the rendition of an award, or otherwise. *Monongahela Nav. Co. v. Fenlon*, 4 Watts & S. (Pa.) 205; *Connor v. Simpson*, 104 Pa. 440; *Hostetter v. City of Pittsburgh*, 107 Pa. 419. But it is equally true that where the agreement in question does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be mutually chosen by the parties, it is revocable by either party; and such a provision is not adequate to oust the jurisdiction of the courts having cognizance of the subject-matter of the dispute. *Gray v. Wilson*, 4 Watts (Pa.) 41; *Mentz v. Armenia Fire Ins. Co.*, 79 Pa. 480 [21 Am. Rep. 80]; *Hostetter v. City of Pittsburgh*, *supra*."

See, also, *Needy v. Insurance Co.*, 197 Pa. 460, 47 Atl. 739.

But the Supreme Court of the United States takes a different view. In *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419, the court said, in considering a policy, not essentially different from those now in question:

"The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action.

"Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country. *Scott v. Avery*, 5 H. L. Cas. 811; *Viney v. Bignold*, 20 Q. B. D. 172; *Delaware & Hudson Canal v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Heed v. Washington Ins. Co.*, 138 Mass. 572; *Wolff v. Liverpool & London & Globe Ins. Co.*, 50 N. J. Law, 453 [14 Atl. 561]; *Hall v. Norwalk Ins. Co.*, 57 Conn. 105, 114 [17 Atl. 356]. The case comes within the general rule long ago laid down by this court: 'Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so.' *United States v. Robeson*, 9 Pet. 319, 327 [9 L. Ed. 142]. See, also, *Martinsburg & Potomac Railroad v. March*, 114 U. S. 549 [5 Sup. Ct. 1035, 29 L. Ed. 255]."

Numerous cases to the same effect are collected in 4 Cooley, *Insurance Briefs*, 3597.

It thus appears that in the federal courts the insured is bound by the appraisal clause, and must do all that he can to carry it into effect. If an award is made, both parties are bound by it.

Having thus ascertained the rights of the parties under the policies in suit, let us see what was done. The fire occurred on March 10th, and the plaintiff gave notice thereof. A dispute arose at once about the amount of the loss, and on March 27th appraisers and an umpire were duly chosen. The appraisal agreement is in writing; it follows the policy strictly; provides that the appraisers shall ascertain, pursu-

ant to the terms and conditions of the policy, the sound actual cash value on March 10th and the actual loss or damage directly caused by the fire; declares that the award of any two "shall determine the amount of such loss"; lays down rules for ascertaining the loss; and provides that the appraisal—

"* * * does not in any respect waive any of the provisions or conditions of said policies of insurance or any forfeiture thereof, or the proof of such loss and damages required by the policies of insurance thereon."

The award was not made until June 13th, when the umpire and one appraiser determined "the actual damage * * * to be \$27,524." Each company's share of this loss would be \$1,720.25, while its share under the plaintiff's estimate would be \$2,150.37. The difference is not large, but apparently it could not be adjusted. No proofs of loss had yet been filed, although more than 60 days had elapsed since the fire; but in this matter no fault appears on the part either of the plaintiff or of the company, and the company very properly did not set up the lapse of time as a bar to the plaintiff's claim. On the contrary, it was willing to accept proofs of loss in spite of the 60 days' provision; but it refused to accept them unless they conformed to the award on the subject of amount. The company's position was that the award was binding upon both parties as to amount, while the plaintiff took the opposite position and declined to be bound thereby. Accordingly, on June 25th he sent proofs to the company in which he ignored the award altogether, itemized the loss at \$34,405.87, and claimed \$2,150.27 from each of the defendants. The company insisted—and, as we think, correctly insisted—that the award must be complied with, and on July 3d (after acknowledging the receipt of the proofs) went on to say:

"The company declines to accept these as proofs, as they do not accord with the award of the appraisers, which is binding on both of us. Under this award the pro rata proportion due you from this company is \$1,720.23, which we are ready and willing to pay you, and not \$2,150.57 as claimed by you.

"If it shall be alleged or claimed by you that said award of appraisers for any reason is not binding upon you, than this company objects to the papers purporting to be proofs of loss, and declines to accept them for the reason that they were not served upon this company within 60 days after the fire as required by the terms and conditions of the said policy.

"The papers are returned herewith."

It is clear therefore that the only point in dispute between the parties was the effect of the appraisal, and, as we have already intimated, we think the company's construction of the contract was correct. There is no evidence, and indeed there is no contention, that the company ever waived this position. It was certainly entitled to insist that proofs of loss should be furnished. In strictness such proofs should have been offered within 60 days after the fire, but there was evidently good reason why this strict requirement should not—and perhaps it could not—be insisted upon. But in any event it is clear that the company did not insist upon it; on the contrary, it expressly agreed to accept proofs although the 60 days had passed, but it did stand by the position that these proofs must conform to the appraisal, since both parties had agreed to be bound thereby. Neither then nor thereafter was it obliged to accept proofs that paid no attention to the appraisal

and insisted upon a different estimate of the damage, made up outside of the contract and in disregard of its provisions. There was no misunderstanding between the parties on this subject; the plaintiff was in no way misled or injured by anything that was done or said. He knew that proofs would be accepted, and that the loss would be paid, if he would agree to the amount awarded; but this he declined—as of course he had a right to do, but at his own risk—and in December of the same year he brought suit in the state court, still claiming \$2,150.27 from each defendant. (Four years later, he amended his claim by leave of the District Court, but, for reasons that will presently appear, we do not go into matters connected with the amendment.)

The trial judge submitted to the jury as "the sole question" on which the verdict must turn:

"Whether or not, it appearing that proofs of loss were not furnished by the plaintiff to the defendant companies within 60 days of the date of the fire, which was March 10, 1908, the defendant companies have waived that provision."

In our opinion there was no evidence of waiver to be submitted, and, to speak precisely, the real point is not a question of waiver at all. The question is one of law, arising upon a written instrument, and is not a question of fact. As we regard the case, it turns upon this: Did the policy require the plaintiff to conform to the appraisal in his proofs of loss? If the proofs he did file had conformed to the award and had otherwise complied with the policy, and if the company had insisted that these proper proofs were not offered in time, then of course it would be important to decide whether the company had waived the 60 days' limit. But we repeat, the company was objecting only to a particular aspect or item of the proofs themselves, and did not object to the lapse of time. It agreed to accept the proofs if they were changed in one specified particular; this had been the dispute from the beginning, and both parties knew all about it. The plaintiff's attitude was not altered in the least in consequence of anything that was done by the company. He merely continued to maintain his original attitude, and refused to make the only change that was pointed out as necessary. He never supposed that the company was waiving its position about the effect of the appraisal, and he never changed his own. The case of *Astrich v. Insurance Co.*, 65 C. C. A. 251, 131 Fed. 20, is not in point, for the doctrine of estoppel does not apply, unless a plaintiff's position has been changed to his hurt. Even now it is not contended that the company ever relinquished the position that the appraisal was binding upon both parties, and therefore it seems unnecessary to prolong the discussion. The question submitted to the jury was not the point of the case, and upon the record before us the defendants were entitled to binding instructions in their favor.

We do not depreciate the importance of the other questions that are raised by the companies; but, as the matter we have discussed is fundamental, we do not even state them. We feel impelled, however, to express the hope that the parties may still settle this controversy on an equitable basis. The companies have already conceded—and have properly conceded—their liability in a certain amount, and the sub-

sequent dispute (no matter what its final result has been) should not be an impassible obstacle to an adjustment on fair and reasonable terms.

In each case the judgment is reversed, but without prejudice to the right of the plaintiff below to bring such other suit as he may be entitled to prosecute in whatever forum may have jurisdiction thereof.

MONONGAHELA RIVER CONSOL. COAL & COKE CO. v. RIVER & RAIL STORAGE CO.

(Circuit Court of Appeals, Sixth Circuit. January 6, 1914.)

No. 2,389.

WHARVES (§ 22*)—INJURY TO WHARF BY COAL FLEET—NEGLIGENT NAVIGATION—QUESTION FOR JURY.

Defendant operated a fleet of heavily loaded coal barges down the Mississippi river. There were 28 of them made up in the form of a raft, 775 feet long and 210 feet wide, with a steamer behind. When 6 miles above Memphis in the early morning, the fleet was met by a tug to assist in guiding the front end while passing the city and bridge. As it passed the bend in the river immediately above the city, it passed into heavy fog and smoke so thick that practically nothing could be seen. The current was running at a speed of 7 or 8 miles, and the fleet could not then be stopped, and in attempting to navigate past the city it ran into and injured plaintiff's wharf and wharf boat. There were places above, one within a mile or so, where the fleet could have been tied up and held or separated, and taken past the city in sections. The towing vessels could not hold the fleet, but could guide it in clear weather. The condition of fog and smoke on the city front was not unusual at that season. *Held*, that it could not be said as matter of law that defendant exercised reasonable care and prudence in navigating its unwieldy tow, and that the case was properly submitted to the jury.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. § 7; Dec. Dig. § 22.*]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action at law by the River & Rail Storage Company against the Monongahela River Consolidated Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The River & Rail Storage Company owned a wharf structure and wharf boat upon the river front, in Memphis. The coal and coke company (hereinafter called "defendant") was engaged in transporting coal down the river, past the city. About 6 in the morning, on February 14, 1911, the stern wheel steamer Pittsburgh, belonging to the coal and coke company, and bringing down the river a fleet of coal barges, had reached a point about six miles above the city. There were 28 of these barges, deep laden, lashed together and making a rectangular raft 775 feet long and 210 feet wide. It was being handled in the customary river manner, viz., the bow of the steamer was fast to the stern of the raft, so that reversing the steamer's wheel would tend to hold the barges against the current, and so that the course of the raft in the current could be somewhat, although imperfectly, directed. Whenever such a fleet was to go under a bridge or through a place where the steamer at the stern could not sufficiently control the course, it was customary to take on a small steamer or tug at the bow of the raft. This tug would lie crosswise of the current, and, by going ahead or astern, would swing the nose of the raft toward one

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or the other bank. According to this custom, such a tug, the Jones, at about 4:30 in the morning, went up the river and met the coal fleet at the point stated. The captain of the Pittsburgh inquired from the captain of the Jones regarding weather conditions at Memphis, and was told that they were all right; as they had been when the tug left the city. Accordingly, the tug made fast, in the usual way, and they proceeded down the river. The city of Memphis lies upon the outer side of, and just below, a great bend in the river, and that part of the river immediately in front of the city and called the Memphis Harbor is not visible from upstream until the descending boat rounds the curve and is practically in the harbor. When the Pittsburgh and its coal fleet had passed the "Jim Lee Light," which is about a mile above where the river swings into the harbor, it was noticed that there were fog and smoke ahead, and, on rounding the last point, these became so thick that the captains could see practically nothing. This was about 8 o'clock.

The current was running seven or eight miles an hour. There was no system of anchors in use, or perhaps possible, that would hold this coal fleet against that current. The reversed wheel of the Pittsburgh could only slightly retard its progress. It was impossible to tie up to the bank, unless a special landing place had been provided and equipped. The proofs indicated that such a landing did exist at one or more places between the six-mile point where the tug met the fleet and the "Jim Lee Light"; but below the Jim Lee Light there was no such landing. Accordingly, after the fog bank was entered, there was nothing for the Pittsburgh and its fleet to do, except to come on blindly, avoiding obstacles as best they could. The channel naturally lies upon the outer side of the course, up against the city bank. The fleet was carried along this channel, swept into the Memphis bank, and collided with and injured a wharf structure 2,000 feet up the river from the River & Rail Storage Company wharf. Using their best efforts, both the Pittsburgh and the Jones were unable to get the fleet away from the bank, and it came on down and struck and damaged the River & Rail Company's wharf boat and structure. For such damage, that company brought this action, alleging common law negligence, and recovered the judgment to reverse which this writ of error is brought.

It is to be taken as a further conceded fact, from defendant's standpoint, that the power accompanying the raft was sufficient, in clear weather, to control and guide it safely past the city and under the bridge, just below, but was insufficient to hold its speed down to that slow rate which, in a fog, would be essential to safety.

C. L. Marsilliot and Walter C. Chandler, both of Memphis, Tenn., for plaintiff in error.

C. H. Trimble, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). In reciting these facts, we have put the defendant's construction upon every substantial matter of dispute, because defendant's main contention is that there was no evidence of its negligence sufficient to go to the jury, and because we think that the undisputed facts, as thus recited and as thus colored in defendant's favor, make a case clearly tending to show a right of action.

There is no dispute between counsel as to the applicable rule of law. All agree that defendant was bound to use reasonable care to navigate its coal fleet past the city without injury to the shipping lying there, or to wharves or structures along the bank, and all agree that such care and caution as were reasonably prudent, under all the existing circumstances, form the ultimate measure of liability.

We think it obvious, beyond the necessity for elaboration, that to

permit this great raft, aptly described by counsel as "3½ acres of coal," to tumble through the harbor, wholly out of control, so that only good luck could preserve the shipping and wharves from destruction—that this would be actionable negligence, unless the reasonable necessities of prudent navigation at this point in the river justified the conduct which brought about this result, or (another form of saying the same thing) unless the result followed from conditions which could not have been reasonably anticipated and guarded against.

If the fog and smoke which had settled down this morning had been an extraordinary and unprecedented condition, we would have a different question; for it cannot be required of navigators that they should guard against all possible abnormal and unusual conditions. The proof tended to show that there was a great amount of smoke from the city factories; and that, with the wind from a certain direction and with the atmosphere in a certain foggy condition, the high bluffs on which the city is situated would cause the smoke and fog to drop down in the harbor, as in a pocket, and that it was not unprecedented—indeed, not uncommon—to encounter, at about this point, banks of fog and smoke, nearly, if not quite, as bad as this. It is not to be implied that such a coal fleet should always be able to tie up when about to enter a fog bank, or even that it should always have means to stop when finding such a fog bank at a place where one may be anticipated. In many parts of the river, the danger from proceeding somewhat blindly would be small; but it is not too much to say that it may be negligence for a coal fleet, under very imperfect control, to proceed into such a fog bank just above a city like Memphis, where the conditions are such as have been described, and where the danger of great damage is imminent. That such conduct is, as matter of law, not negligent, cannot be said, unless there was no known and reasonable precaution which might have been adopted and which would have avoided or tended to avoid the damage. Three such precautions are suggested by this record. The first is that additional steamboat power should have been held in reserve for such emergency, subject to be summoned and available for instant use. It is not entirely clear that this remedy was feasible or would have been efficient, and it does not need further consideration. The second precaution which it is said might have been taken, is the providing of a suitable tying up station on the Arkansas bank, immediately above the city, instead of some distance above. The third is that the coal fleet might have been "double tripped" past the city and the bridge; that is, that one half of the barges might have been left at an upper landing station while the steamer and the tug brought down the other half and then returned for the remainder. The last seems to have been the familiar and common expedient used at all points where it was thought that the full-sized fleet would be dangerously unmanageable. It was not employed on this occasion only because, when the fog came on, the fleet had passed the last existing station where it could be done; and defendant asks us to say, in substance, that it can avoid liability by so locating its landing stations that a disaster like this becomes unavoidable. We cannot approve that doctrine. The peculiar and well-known physical river and harbor conditions at this point,

coupled with the known fact that the harbor might be shut in by a fog bank which could not be seen until the descending boat was almost upon it, amply justified submitting to the jury the question of defendant's negligence upon either of two theories: That it should have established and maintained an additional landing place comparatively close above the city where a fleet could stop after harbor conditions could be seen, or, at least, close enough so that the fleet could receive recent and accurate information before it was too late to stop; or that, lacking such further landing place, the fleet should have tied up at the lowest existing one and "double tripped" past the city or obtained knowledge of conditions at that time, instead of proceeding on the strength of a report three hours old.

We are cited to several cases (note ¹) in which it has been held that it was not negligent to navigate on the Ohio or Mississippi in a fog. It is not necessary to review these cases. Each depends on its own facts and is vitally dissimilar to the instant case in what we have considered the controlling facts.

We find no prejudicial error in the assignments relating to the admission or rejection of evidence.

The defendant presented a special request which required the jury to find a verdict for defendant, if it found certain recited conditions tending to show due care. This request was faulty because it undertook to make a verdict for defendant follow from a recital of only a part of the existing situation; it would have excluded from the jury each of the considerations which we have just stated as furnishing support for a verdict for plaintiff. It was not error to refuse the request.

The judgment is affirmed, with costs.

LADERBURG v. MILLER.

(Circuit Court of Appeals, Fourth Circuit. December 12, 1913.)

No. 1185.

1. CONSTITUTIONAL LAW (§ 12*)—RULES OF CONSTRUCTION.

A construction of a constitutional or statutory provision which would make it self-destructive or of no practical value will be rejected, when there is a reasonable construction which would result in carrying out its manifest purpose.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. § 12.*]

2. BANKRUPTCY (§ 396*)—HOMESTEAD EXEMPTION IN PERSONAL PROPERTY—CONSTITUTIONAL PROVISION—"SHIFTING STOCK OF MERCHANDISE."

Under Const. Va. 1902, §§ 190, 191, which give a debtor the right to a homestead exemption in personal property to the value of \$2,000, but provide that it shall not be claimed in a "shifting stock of merchandise," which means a stock of merchandise subject to change from time to time, in the course of trade by purchases, sales, or other transactions, a bankrupt cannot hold as exempt goods which he removed from the shelves in

¹ Bray v. Monongahela Co. (C. C. A. 3) 161 Fed. 277, 88 C. C. A. 323; Kenova Co. v. Monongahela Co., 56 W. Va. 70, 48 S. E. 844; The Porter, Fed. Cas. No. 11,285; The Joseph W. Gould (D. C.) 19 Fed. 785.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his store and boxed up in contemplation of bankruptcy, and for the express purpose of making such claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668; Dec. Dig. § 396.*]

Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Judge.

In the matter of William Laderburg, bankrupt. Petition by bankrupt to revise an order denying his claim to exemption, on objection of F. C. Miller, trustee. Affirmed.

S. M. Brandt, of Norfolk, Va., for petitioner.

Edward R. Baird, Jr., of Norfolk, Va. (Baird, Swink & Moreland, of Norfolk, Va., on the brief), for respondent.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. William Laderburg, a merchant conducting a general retail store in Portsmouth, Va., was adjudged a bankrupt on the 10th day of June, 1913. Two days before the adjudication, in contemplation of bankruptcy, he separated from his stock numerous articles of merchandise valued at \$867.90, and placed them together with his store fixtures, valued at \$145, and his household goods, valued at \$113.25, in boxes numbered from 1 to 18. The purpose of thus separating and boxing the goods was to enable the bankrupt to set up the claim that they had ceased to be a part of a shifting stock of merchandise, and could be claimed as exempt from his debts under the Constitution and statutes of Virginia which provide for a homestead exemption, but do not allow it to be claimed in a "shifting stock of merchandise." Having taken this preliminary step, the bankrupt after the adjudication filed his petition with the referee, asking that the property, including the goods in the boxes, be set apart as his homestead exemption. Attached to the petition was a paper called a homestead deed, in which the property was scheduled, and in which the petitioner declared that he claimed, selected, and set apart the property so scheduled as his homestead. The referee refused to allow the claim as to the merchandise taken from the stock of goods, and his action was confirmed by the District Court. The bankrupt then filed his petition, asking this court, in the exercise of its power of superintendence, and revision, to reverse the judgment and adjudge that he was entitled to the exemption claimed. There was a motion to dismiss the petition, a demurrer and an answer, but questions of pleading were not pressed at the hearing, and we go at once to a decision on the merits.

The Virginia Constitution of 1902, § 190, provides:

"Every householder or head of a family shall be entitled, in addition to the articles now exempt from levy or distress for rent, to hold exempt from levy, seizure, garnishment, or sale under any execution, order, or other process issued on any demand for a debt hereafter contracted, his real and personal property, or either, including money and debts due him, to the value of not exceeding two thousand dollars, to be selected by him. * * *"

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The limitation of this right of homestead which is here involved is set out in section 191:

"The said exemption shall not be claimed or held in a shifting stock of merchandise, or in any property, the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration."

These provisions must be read in the light of the constitutional injunction that they shall be liberally construed. The Virginia Code, § 3639, thus indicates the method of setting apart a homestead in personal property:

"Such personal estate shall be selected by the householder and set apart in a writing signed by him. He shall, in the writing, designate and describe with reasonable certainty, the estate so selected and set apart and each parcel or article, affixing to each his cash valuation thereof; and the said writing shall be admitted to record, to be recorded as deeds are recorded, in the county or corporation wherein such householder resides."

The meaning of the term "shifting stock of merchandise" is too obvious for difference of opinion. It means a stock of merchandise subject to change from time to time in the course of trade, by purchases, sales, or other transactions. The bankrupt's stock of merchandise was admittedly shifting as long as he kept his store open for trade. Counsel for petitioner earnestly contends, however, that when the debtor took the goods off sale and boxed them, they ceased to be a part of a shifting stock, and became fixed property which the debtor could select as his homestead. It is true that the same articles may be at one time part of a shifting stock and afterwards cease to be so. This change occurs as soon as the articles are purchased by a customer in the usual course of trade, and even when they are taken by the debtor to his home in good faith for customary and reasonable domestic purposes. By changes like these constantly taking place in the ordinary course of business, goods falling without the homestead exemption to-day may fall within it to-morrow. Not only is this the reasonable construction of the Constitution, but any other would lead to results clearly absurd. But the plain limit to the rule that goods may change from being a part of a shifting stock not subject to exemption into property falling within the exemption is that the change must take place in good faith in the ordinary course of affairs, and not in pursuance of a design to defeat the constitutional provision. The Constitution safeguards and fixes the limits of the rights of the creditor as well as those of the debtor, and the debtor is as powerless to defeat the rights of the creditor to subject to his debts property not exempt as the creditor is to defeat the rights of the debtor to his homestead exemption in other property.

[1] It follows that the debtor cannot, by his act of closing his store or separating a part of his shifting stock of merchandise with the view of defeating the rights of the creditor, have a homestead in such property. To hold that the Constitution contemplates that such a result could be secured by such a method would be to make of no effect the constitutional provision that a shifting stock of goods shall not be exempt. The principle is elementary that a construction which would result in making a legislative enactment self-destructive or of no practical value will be rejected when there is a reasonable construction which

would result in carrying out the manifest design of the statute; and, in applying this rule, that which is necessarily implied, as well as that which is expressed, must be regarded a part of the enactment. *United States v. Tappan*, 24 U. S. (11 Wheat.) 419, 6 L. Ed. 509; *Lau Ow Bew v. United States*, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; *Beley v. Naphtaly*, 169 U. S. 353, 18 Sup. Ct. 354, 42 L. Ed. 775; *Low Wah Suey v. Backus*, 225 U. S. 461, 32 Sup. Ct. 734, 56 L. Ed. 1165; *Singer Mfg. Co. v. McCollock* (C. C.) 24 Fed. 667; *Norfolk Traction Co. v. Ellington*, 108 Va. 245, 61 S. E. 779, 17 L. R. A. (N. S.) 117; *Potter's Dwarris on Statutes*, 145. Under this rule the Constitution of Virginia cannot be construed to contemplate the annulment of one of its own provisions by allowing a failing debtor to transmute a shifting stock of merchandise not exempt into exempt property by withdrawing it from sale for the purpose of claiming it as an exemption.

[2] But even if we lay aside these general principles of construction and look at the strict verbal significance of the language of the Constitution and the statute, the same result is reached. The petitioner was involved in debt, and set about claiming and selecting property he wished to have exempt from process under the authority of the law. This taking of the goods from the stock and boxing them was a part of the assertion of his claim of exemption and selection. When he thus asserted the claim and undertook to make the selection, the property here involved was a part of a shifting stock of merchandise, and under the Constitution was not property out of which the homestead could be claimed. The claim and selection was for this reason without authority of law, and the property therefore came into the hands of the trustee in bankruptcy free from any homestead claim.

For these reasons the judgment of the District Court is affirmed.

N. JIM QUAN v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 13, 1914.)

No. 2,357.

ALIENS (§ 32*)—DEPORTATION OF CHINESE—SUFFICIENCY OF EVIDENCE.

An order for the deportation of a Chinese person who held a certificate of residence as a merchant, admittedly genuine and issued to him in 1894, held not sustained by the contradicted testimony of a single witness that he saw defendant with other Chinese persons in Juarez, Mexico, and the absence of any evidence of his re-entry, where the witness admitted that he had never seen defendant before and defendant proved his residence at the time in the United States and testified that he had never been in Mexico.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*

What Chinese persons are excluded from the United States, see note to *Wong You v. United States*, 104 C. C. A. 538.]

Appeal from the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

Proceeding by the United States against N. Jim Quan. Order of deportation, and defendant appeals. Reversed, and appellant discharged.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

W. P. McLean, of Ft. Worth, Tex., for appellant.
Charles A. Boynton, U. S. Atty., of Waco, Tex., and Robt. T. Neill,
Asst. U. S. Atty., of El Paso, Tex.

Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

SHELBY, Circuit Judge. The appellant, a Chinaman, was arrested August 6, 1911, in El Paso, Tex., charged with being in the United States in violation of the acts of Congress, and was tried before a United States commissioner on August 22, 1911, who ordered him to be deported to the Empire of China, and this order was affirmed by the District Court.

The case is brought here by the accused on appeal.

On the hearing before the commissioner, the appellant produced a certificate of residence, which is copied in the margin.¹ No question was made as to the genuineness of the certificate, nor of the fact that the appellant was the person named in the certificate. The order of deportation is based on evidence that satisfied the commissioner and the lower court that the appellant was in Juarez, Mexico, on August 2, 1911, and the burden was on him to show that he re-entered the United States in accordance with the provisions of the act of Congress. Act of September 13, 1888, 25 Stat. 476. No return certificate was produced in evidence.

The case depends on the question of fact as to whether or not the appellant was in Mexico on August 2, 1911, as claimed by the government. Only one witness was examined to prove that fact, and on direct examination he testified as follows:

"Q. What is your name?

"A. F. H. Crockett.

¹ "No. 106085.

Original.

"United States of America.

"Certificate of Residence.

"Issued to Chinese person other than laborer, under the provisions of the act of May 5, 1892.

"This is to certify that N. Jim Quan, a Chinese person other than laborer, now residing at Ennis, Tex., has made application No. 85 to me for a certificate of residence, under the provisions of the act of Congress approved May 5, 1892, and I certify that it appears from the affidavits of witnesses submitted with said application that said N. Jim Quan was within the limits of the United States at the time of the passage of said act, and was then residing at Dallas, Texas, and that he was at that time lawfully entitled to remain in the United States, and that the following is a descriptive list of said Chinese person other than laborer, viz.: Name: N. Jim Quan. Age: 25 years. Local Residence: Ennis, Tex. Occupation: Merchant. Height: 5 ft. 4¼ inches. Color of Eyes: Brown. Complexion: Yellow. Physical Marks or Peculiarities for Identification: Scar left of left eye and scar on right cheek.

"And as a further means of identification, I have affixed hereto a photographic likeness of said N. Jim Quan.

"Given under my hand and seal this 16th day of February, 1894, at Dallas, state of Texas.

"J. L. Doggett,
"Collector of Internal Revenue,
"4th District of Texas."

"Q. Mr. Crockett, you are in the immigration service?

"A. Yes, sir.

"Q. And you know this defendant, this Chinese—the one with the scar on his face?

"A. Yes, sir.

"Q. When did you first see him?

"A. August 2d, in Juarez.

"Q. In Juarez, Mexico?

"A. Yes, sir.

"Q. Did he get off the train there?

"A. Yes, sir.

"Q. At what time?

"A. At 5 o'clock or thereabouts.

"Q. Have you any doubt as to the identity of the man?

"A. No, sir.

"Q. Why do you identify him?

"A. When he with six or seven Chinese got off the train, I looked to see if I could see any I knew, and to know them if I saw them on this side. I noticed this man on account of the scar, his size; he stood a little stooped and had red around the pupils of his eyes.

"Q. Come over here, Mr. Crockett. How close were you to him?

"A. As close as that man.

"Q. Say five feet?

"A. Yes, five or six feet from him.

"Q. Have you any doubt as to this man being the man you saw in Juarez?

"A. I have not."

On cross-examination, he testified that he had only been in the government service since July 26, 1911; that he never saw appellant till August 2d; that he saw five or six Chinamen get off a train in Juarez; that appellant was one of them; that his only opportunity to see him was as he walked by the witness; that this occurred about 5 o'clock in the evening; that he identifies appellant "by the scar on his face, the size of the man, his eyes, and the way he stands up." The witness admitted that he would be unable to identify any one of the other five or six Chinamen that he saw on that occasion. The next time the witness saw appellant was in El Paso. He did not arrest him. "I wanted to get an older man who knew more about it." He knew, however, that he was arrested on August 6th.

The appellant was examined as a witness, identified his certificate, and said he had lived in the United States since he was a small boy, naming the towns in which he had lived and the work in which he was engaged in each town; that he had lived in El Paso for only five or six months, and named his place of residence in El Paso. He called witnesses to corroborate him as to his residence in El Paso. The appellant swore positively that he was not in Juarez, Mexico, on August 2, 1911, and that in fact he had "never in his life been in Mexico." It will be observed that the certificate produced by the appellant described him as having a "scar left of left eye and scar on right cheek"; that is, that he had on his face two scars, and the location of each is given. The government witness describes the Chinaman he saw in Juarez as having a "scar on his face." There is no other effort to identify him with the careful description in the certificate, and yet it is not denied that the certificate is genuine and that it was issued to the appellant. Evidence of the identity of persons is often very uncertain

and unsatisfactory even when careful effort is made to make it satisfactory and certain.

To comment on this evidence further would be useless. We can only say that, on careful consideration of it, after giving full weight to the fact that the commissioner and the court below came to a different conclusion, we are constrained to believe that the appellant was not satisfactorily proved to have been in Mexico on August 2, 1911, and that, on the evidence in the record, he should not have been ordered to be deported.

The order is reversed, and the appellant is discharged.

Reversed.

In re MARTIN.

HEADLEY v. WARREN.

(Circuit Court of Appeals, Third Circuit. January 17, 1914.)

No. 1804.

BANKRUPTCY (§ 224*)—MORTGAGED PROPERTY—SALE—HEARING—JURISDICTION OF REFEREE.

Where a petition to sell certain mortgaged property of a bankrupt free from the lien of the mortgage and transfer the lien to the proceeds did not ask for an adjudication as to the validity of the mortgage, and the notice to creditors contained nothing concerning an attack on the mortgage, and the mortgagee could have had no notice that such an attack would be made, the referee had no jurisdiction to determine the validity thereof and to adjudge it void.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 383; Dec. Dig. § 224.*]

Petition for Revision of Proceedings of the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

In the matter of bankruptcy proceedings of John N. Martin. Petition by James R. Headley, trustee, to revise an order requiring him to pay over to George H. Warren, mortgagee, certain money, part of the proceeds of a sale of the mortgaged property under an order to sell the same free from liens and transfer the mortgage lien to the proceeds. Affirmed.

Martin W. Lane, of Millville, N. J. (Louis H. Miller, of Millville, N. J., of counsel), for petitioner.

Wilson & Carr, of Camden, N. J. (Walter R. Carroll, of Camden, N. J., of counsel), for respondent.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. On January 11, 1909, when Martin was adjudged bankrupt, nearly all his personal property was covered by the lien of a chattel mortgage in favor of George H. Warren. The mortgage bore the date of April 9, 1908, but was not recorded until April 28th. Nevertheless it was prima facie a valid incumbrance, and could not be ignored. On January 29, 1909, James R.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Headley was appointed trustee, and on February 20th he petitioned the referee to order a sale of the property free and clear of liens. The petition did not attack the mortgage, but was based wholly on the trustee's desire to sell the property to the best advantage, and upon his belief that a better price would be obtained by transferring the mortgage lien to the fund derived from the sale. The referee notified the creditors that a meeting would be held "to pass upon the foregoing petition," and on March 5th he made the order of sale prayed for. But, for some reason that does not fully appear, he went much further, and made the following order also:

"It appearing to the court that the chattel mortgage made and executed by the bankrupt on the 9th day of April, A. D. 1908, to one George H. Warren, covering stock in the store of bankrupt in the city of Millville, was recorded on the 28th day of April, A. D. 1908, and that due diligence had not been exercised by the mortgagee in the recording of the same as required by the statutes of the state of New Jersey, it is, in open meeting of creditors, of which meeting 10 days' notice has been given to all creditors, for an order to sell the stock of the bankrupt, free and clear of liens, and, no adverse interest appearing, it is, on this 5th day of March, A. D. 1909,

"Ordered that said chattel mortgage be void as against other creditors of the bankrupt."

But the referee had no authority, real or apparent, to make this order, and his lack of power appears on the face of the proceedings. The petition did not ask for it, the notice to creditors said nothing about an attack on the mortgage, and the mortgagee could have had no notice that such an attack would be made. The orders show that he was neither present nor represented, and it seems clear that the referee acted upon a misconception of his power.

These matters, however, are not before us on this petition; we are only concerned with the validity of an order made by Judge Rellstab on May 5, 1913, in which, after reciting certain facts, he orders the trustee to pay a certain sum of money to Warren:

"And it appearing from the proofs and papers on file in the cause that the trustee aforesaid realized the sum of \$2,403.02 by selling and disposing of the goods and chattels of the said bankrupt which were subject to the lien and operation of the chattel mortgage of petitioner, and that out of the said sum only \$1,125.14 has been paid petitioner on this chattel mortgage, leaving the sum of \$1,277.88 applicable to the payment of his said mortgage, and it further appearing that out of said last-mentioned sum there should be allowed the sum of \$150 for moneys paid to the receiver and his counsel by previous order of the court, and that the sum of \$330.55 has been properly paid out for administration expenses, leaving the sum of \$797.33 applicable to petitioner's mortgage debt.

"It is thereupon, on this 5th day of May, 1913, ordered, adjudged, and decreed that James R. Headley, the trustee, do pay to the said George H. Warren, within 30 days after service upon him of a certified copy of this order, the said sum of \$797.33."

The present proceeding is a petition to revise the order just quoted, and we are therefore confined to matters of law. But we have examined the whole record, and are satisfied that the district court has correctly disposed of all the matters that were presented. The questions that the trustee attempts to raise now are all based upon the erroneous assumption that the referee's order of March 5, 1909, is valid because it has never been formally reversed. It is true that no formal order of

reversal has been entered, but (even if this were important in a case where the lack of power appears on the face of the proceedings), it is also true that on December 20, 1909, the referee, upon a subsequent hearing, found the mortgage to be valid. Indeed the order of March 5th has been disregarded by all parties, and is only relied upon now because no other ground of objection in matter of law is even plausible.

But we do not wish to be led into a discussion of the facts, and we shall not go into details of the numerous proceedings shown by this record. As we have said, the trustee has no case, unless he can claim the protection of the invalid order of March 5, 1909. It is enough for us to say that the order of May 5, 1913, has not been shown to be erroneous in any matter of law, and disputed questions of fact are not before us. These questions must have been disposed of by the district court, before the order of May 5th could have been made.

The order is affirmed.

THE BAINBRIDGE.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1914. Rehearing Denied March 10, 1914.)

No. 2,196.

MARITIME LIENS (§ 65*)—EQUIPMENT OF VESSEL—WASHINGTON STATUTE.

Under Rem. & Bal. Code Wash. § 1182, which makes all vessels liable for all work done or materials furnished for their construction, repair, or equipment at the request of their owners, where one furnished prior to June 23, 1910, a valuable engine for the equipment of a motor boat on request of the owner, but slight evidence should be required to establish the fact that it was furnished on the credit of the vessel.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 103; Dec. Dig. § 65.*]

Maritime liens for supplies and services, presumption as to credit to vessel, see note to *The George Dumois*, 15 C. C. A. 679.]

In Admiralty. Suit by T. J. King and A. Winge, copartners doing business as King & Winge, against the gas boat Bainbridge (the Inland Navigation Company, claimant), for repairs prior to June 23, 1910, in which the Astoria Iron Works intervened. From a decree denying it a lien, intervener appeals. Reversed.

C. C. Dalton and Herbert W. Meyers, both of Seattle, Wash., for appellant.

Ira Bronson and J. S. Robinson, both of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellant was an intervener in a suit in which the firm of King & Winge had libeled the gas boat Bainbridge for balance due for work done and material furnished in repairing the vessel at her home port in Seattle, Wash. The court below held that the libellant had a lien on the vessel for the balance due, basing that conclusion upon the owner's remark to the libellant:

"You need not be afraid about the money. The boat is good for the work."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The intervener, at the request of the owners, furnished gas engines and other fixtures, which were installed in the boat, of the reasonable value of \$3,550, and other material and labor, of the value of \$189, on which \$1,000 was paid, leaving a balance due of \$2,739. The court below found that no agreement had been made between the intervener and the owners under the terms of which the engines, fixtures, and labor were to be furnished or performed upon the faith and credit of the vessel, and held that under the rule established by this court in *Alaska & P. S. S. Co. v. C. W. Chamberlain & Co.*, 116 Fed. 600, 54 C. C. A. 56, the appellant was not entitled to a lien. A decree was entered dismissing the intervening libel, and from that decree the present appeal is taken.

In the case so referred to, and relied upon by the court below, a lien was claimed for supplies furnished a vessel at her home port at the instance of her charterer. There was no evidence even tending to show that the supplies were furnished on the faith and credit of the vessel. The evidence, so far as it went, was to the contrary. The bills which were made out and presented for the supplies were made against the charterer, and the failure of the libellant to produce its books on the trial was taken as indicating that the supplies had not been charged against the vessel. In the present case the facts are materially different. The intervening libel is brought to enforce a lien for machinery and repairs which went into the vessel and enhanced her value. The only testimony on the subject of the understanding between the parties is that of the president of the appellant, who testified as follows:

"Q. State whether or not, in the furnishing of the material that you have testified, and the work performed on the vessel in placing the engine equipment in the vessel, whether or not you depended upon the credit of the vessel for payment? A. Any time we furnished anything for any vessel, we always hold the vessel; that is, we bill to the vessel, and hold the vessel for the repairs. Q. Well, at the time that you agreed to furnish the machinery and perform these services as you testified to, did you have any understanding of any kind with the Sound Motor Company as to holding the vessel for the payment of the amount in case it was not paid? A. No; I did not have any understanding to hold the vessel; it was not mentioned. I did not mention it; but it was understood that we were to hold the engine until the final payment was made, but there was nothing said about holding the vessel, as I remember."

We think there is enough in this testimony and the circumstances to show that the work was done, and the material was furnished, upon the faith and credit of the vessel. There was an understanding that the appellant was to hold the engine until the final payment was made. The engine, representing almost the entire outlay of the appellant, having gone into the vessel, there was no way by which the appellant could hold the engine, otherwise than by holding the vessel. The owner must have understood that the vessel was liable for the material and machinery so furnished, for at the time, while this work was being done, King & Winge, who were making other repairs, were told by the owner:

"The boat is good for the work."

The statute of Washington (section 1182) makes all vessels, their tackle, apparel, and furniture, liable for work done or material furnished in that state for construction, repair, or equipment at the request of their owners, or persons having charge of their construction, alteration, repair, or equipment. In view of the terms of the lien law, and the fact that in the present case the appellant furnished valuable machinery, which became part and parcel of the vessel, slight evidence should be required to establish the fact that the work was done and the material furnished on the faith and credit of the vessel, especially where, as here, there is entire absence of evidence to indicate a contrary intention.

The decree is reversed, and the cause remanded for further proceedings.

HASKELL GOLF BALL CO. v. SPORTING GOODS SALES CO.

(District Court, D. Massachusetts. January 13, 1914.)

No. 366.

PATENTS (§ 328*)—VALIDITY—INFRINGEMENT—GOLF BALL.

The Work and Haskell patent No. 622,834 for a golf ball, comprising a core composed wholly or in part of rubber thread wound under high tension and a gutta-percha inclosing shell, was not anticipated, and discloses patentable invention; also *held* infringed.

In Equity. Suit by the Haskell Golf Ball Company against the Sporting Goods Sales Company. On final hearing. Decree for complainant.

Fish, Richardson, Herrick & Neave, of Boston, Mass., and Charles Neave, of New York City, for complainant.

Redding & Greeley, of New York City, and Charles F. Perkins, of Boston, Mass., for defendant.

DODGE, Circuit Judge. The plaintiff charges the defendant with infringing United States patent No. 622,834, issued April 11, 1899, to Work and Haskell, for an improvement in balls; which patent has belonged to the plaintiff since 1901.

The patentees begin their specification by stating that their improved ball is for use more especially in the game of golf, though it may be used in other games where a ball of similar qualities is desired. No other game requiring a ball of similar qualities has been referred to, the claims of the patent speak only of "a golf ball," and there is no suggestion that the alleged infringing ball is anything but a golf ball. No occasion arises, therefore, for considering the patent in any other aspect.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The claims are as follows. The defendant is charged with infringing both.

"1. A golf ball, comprising a core composed wholly or in part of rubber thread wound under high tension, and a gutta-percha inclosing shell for the core, of such thickness as to give it the required rigidity, substantially as described.

"2. A golf ball, comprising a central core section of relatively nonelastic material, rubber thread wound thereon under tension, and an inclosing shell of gutta-percha, of such thickness as to give it the required rigidity, substantially as described."

1. The defendant, a corporation organized in May, 1912, has sold golf balls in Massachusetts of a kind known as "Zodiac" golf balls. Some of them have been produced, and as to their actual material and construction there is no question requiring discussion. They have a central core section, and I see no reason to doubt that this is of "relatively nonelastic material." Whether it is or not, the core is composed of rubber thread wound upon it, not only "under tension" but, as I find, "under high tension." I must regard the defendant's core as the core of the patent, particularly in view of Haskell Golf Ball Co. v. Perfect Golf Ball Co. (C. C.) 143 Fed. 128, the only reported decision in this country involving this patent.

In the defendant's golf ball the above core is inclosed in a shell or covering. Whether or not this ought to be regarded as differing materially from the "shell" of the patent is in dispute, and is the only question which need be considered upon the issue of infringement, if the patent be valid.

The shell of the patent, according to the claims, is to be of gutta-percha, which term is to include, as the specification expressly states, any of the substitutes of gutta-percha such as balata gum.

Besides being made of this material, the shell is to be, relatively to the core inclosed, "of such thickness as to give it the required rigidity."

The required rigidity is that described in the specification. It is to be a rigidity sufficient to offer comparative resistance to the lighter, but insufficient to prevent yielding under the more violent of the various impacts, greatly differing in force, adaptation to receive which is required in the golf ball by the nature of the game. The shell of the patent is to be "comparatively unyielding" as regards the elastic core it incloses.

The defendant's material is a composition containing 82 per cent. of balata gum and 18 per cent. of para rubber. I find no reason to doubt, on the evidence, that this is a "substitute" of gutta-percha, within the meaning of the patent.

The rigidity of the defendant's shell is claimed to differ widely from the "required rigidity" of the patent. It appears that, in golf balls made under license from the plaintiff, the thickness of the inclosing shell has been not less than one-sixteenth of an inch, and that this has been considered by the makers the least thickness consistent with durability. It appears that in the defendant's alleged infringing golf balls the thickness of the inclosing shell is somewhat less. It is claimed to be, in them, only one thirty-second of an inch. It is also

claimed that the sole object of the defendant's inclosing shell is to protect the core from injury, and that it does not effect any diminution of that elasticity which the core supplies to the ball because rubber wound. The evidence bearing upon these claims, in connection with an examination of the defendant's shell as produced in court, leaves me unable to regard it as serving only to cover and protect the core, and unable also to believe that there is any substantial difference between it and the shell of the patent, either in the nature or composition of the two, or in the effect they produce as component parts of a golf ball.

The shell of the patent is to be a covering "possessing the attributes, comparatively speaking, of inelasticity, toughness, hardness, and lightness." The patent elsewhere refers to it, as has been said, as "comparatively unyielding." In these respects it must differ from such elastic, soft, flexible, or yielding coverings as might serve the mere purpose of protecting the core. Because it is so to differ from any such covering, it is properly described as a "shell." The defendant's shell possesses the same attributes, and must necessarily possess them, because they are inherent in the material of which it is made. It is distinguishable in the same respects from a mere protecting skin or covering. It is as properly to be called a "shell" as the shell described in the patent, and for the same reasons. Whether or not it has the effect of muffling or diminishing the elasticity of the rubber-wound core within it, so as to secure the results which are to be secured, according to the patent, by the "required rigidity" of the shell therein described, is a question upon which the evidence is in conflict. My conclusion is that if the shell of the patent has the muffling effect referred to, the defendant's shell has it also, that the only difference between them in this respect is at most one of degree only, and that there is no difference in degree such as to be material for the purposes of this case. I must therefore hold the defendant's golf ball to be an infringement; the validity of the patent being assumed.

2. Against the validity of the patent the contentions are made that the invention described lacks patentability, and that it was anticipated. The only reported decision in this country upon the patent has already been cited. In it the question of infringement is the only one determined. *Haskell, etc., Co. v. Perfect, etc., Co.*, 143 Fed. 128, decided in the New York Southern District in 1906.

On the question of patentability, besides the presumption arising from the granting of the patent, there are, in favor of its validity, the following facts which appear from the evidence. By the end of 1902, three years after golf balls made under the patent had first entered the market, they had practically superseded the solid gutta-percha ball, generally used in the game in 1899 and previously, and had become the only golf balls in general use. Golf balls made under the patent have been sold in very large numbers since 1899; the number sold increasing rapidly from year to year. Three alleged infringers have, since 1899, submitted to decrees against them, against one there has been a decree by default, still another obtained discontinuance

of the suit against him by ceasing to manufacture the golf balls complained of; and the defendant in the case above cited did not, as has been stated, question the validity of the patent, so that it may fairly be said that acquiescence in the validity of the patent has become general.

Balls composed of rubber thread or strips, wound under tension, either with or without a central core, and either with or without covers of some kind, were old and well known in 1899. This appears without dispute, but it also appears that all such balls were intended for use and used in other games, none of them in the game of golf. At that time the solid gutta-percha ball may be said to have been the only golf ball known in the market.

Balls having covers composed wholly or principally of gutta-percha were also old and well known in 1899. This also appears without dispute. But none of the balls of this description to which the evidence refers appear to have been either used or intended for use in the game of golf. They were, generally speaking, handballs, baseballs, or polo-balls, and there is nothing to show that in any of them a gutta-percha covering was used which had or was expected to have those attributes, relatively to any of the various cores which they were used to inclose, called for, as has above appeared, by the patent in suit.

The defendant says that the patent does no more than combine an old and well-known ball with an old and well-known cover for a ball, and that its combination of these two old and well-known elements produces no new mode of operation and is unpatentable. This is well founded if it be true, as the defendant contends, that nothing more is in fact accomplished by the patented combination than to produce a "livelier" or more resilient (though less durable) ball than any golf ball before known. The defendant contends, with regard to the patented golf ball as with regard to its own, that their relative resiliency is practically the same on all strokes of the game. Whether this is true or not is a question of fact upon which the evidence is conflicting, and both sides have relied upon experiments, some made by dropping balls from equal heights in the presence of the court, and some made out of court by witnesses who have described the experiments and their results. Experts in the manufacture of golf balls and accomplished players of the game have testified on both sides.

In view of all the evidence, I have been unable to accept the defendant's contention, and think the plaintiff has fairly proved that its patented golf ball does differ from any predecessor in that by a stroke moderated with adequate skill the entire structure can be propelled without distorting it enough to evoke any of the elasticity which resides in the rubber-wound core; while the benefit of that elasticity remains nevertheless available when desired, under a stroke of force sufficient to overcome the relative rigidity of the shell. Of the experiments testified to, those in which the distortion or deformation of the shell under strokes of varying force has been compared, by blackening the face of the driver used and observing the extent to which the shell was marked by the stroke, have seemed to me the most convincing.

Their results strongly support the above conclusion. If the facts are as I have above found, there is a class of strokes whereby the patented golf ball can be made to behave as if it had not that elasticity which it is capable of displaying under heavier strokes, and which, when so displayed, is greater (as is not disputed) than that of any previous golf ball. This, upon the evidence, I must regard as a distinct advantage in a golf ball, and one not possessed by any previous ball. The patentees' core and shell in combination, therefore, produce a new mode of operation; nor has this been done merely by inclosing a rubber-wound ball in any gutta-percha cover—the cover must be a "shell" and have those qualities relatively to what it incloses which the patent describes. I am consequently unable to hold the patent void as disclosing no patentable invention.

The patentees took out a British patent for their alleged invention, being No. 17,554, issued to them, as amended, January 29, 1903. The plaintiff brought a suit for infringement of this patent, which was decided against him in the Chancery Division. The decision was affirmed by the Court of Appeals, and afterward before the House of Lords. The British patent was put in evidence by the defendant in this case. The proceedings in the suit upon it are before this court only so far as they appear in the published reports. *Haskell, etc., Co. v. Hutchison*, 22 Rep. Pat. Cases, 478; *Id.*, 23 Rep. Pat. Cases, 301; *Id.*, 25 Rep. Pat. Cases, 194. In the defendant's answer it is alleged that the subject-matter of the British patent was substantially identical with the claims of the patent here sued on, and that all said claims were held invalid for lack of patentable novelty.

It appears from the reports above cited that in the Chancery Division Mr. Justice Buckley found against the plaintiff on the issue of novelty, holding that the construction of the patent had been anticipated, that in the Court of Appeals one of the judges took the same view, the other two holding also that the patent disclosed no patentable novelty, and that in the House of Lords three of the judgments concurred in holding that there was no novelty and no patentable subject-matter, the fourth holding that the cover of the patented ball was old, the interior also old, and that the combination of the two had been anticipated.

The defendant in this case relies considerably upon these decisions. The plaintiff contends that they are not properly before the court, and has not dealt with them in its brief. Not enough is found in the reports regarding the evidence before the English courts to disclose its exact nature and scope, but it does appear, in all the judgments holding the patent invalid, that the evidence was thought not to sustain the claim that the patented ball possessed the contradictory qualities claimed for it by the plaintiff—in other words, that by the combination of the patent no new mode of operation was produced. As has been stated, the evidence before me has led me to the opposite conclusion. I have been unable to find in the reports of the English case relied on anything to prevent that conclusion. The record in the case before me does not afford the means for an accurate comparison of the

issues and proof which were before the English courts and those here presented. But an examination of the British patent, here in evidence, shows it to be by no means identical with the patent here in suit. It has four claims, all for "a ball," etc., instead of "a golf ball," although the improved ball of the patent is said in the specifications to be for use more especially in the game of golf. The two claims most nearly like those of the patent in suit omit the words referring to the shell "of such thickness as to give it the required rigidity," nor are those words found in any of the claims. The two other claims provide as to the shell only that it is to be "of relatively hard, inelastic material," not that it is to be of gutta-percha; in this respect resembling claims included by the patentees in their application for the patent sued on, but stricken out and disallowed by the United States Patent Office, as appears from the file wrapper.

3. Coming to the contention that the patent in suit was anticipated, the alleged anticipations principally relied on are balls said to have been made under United States patent to Castle, No. 281,238, July 17, 1883, for a "baseball." By the terms of Castle's patent, the material of which his ball was to be made was "not a matter of the slightest importance"; the invention which he claims lay in a seamless gutta-percha cover, to be deposited on the ball by dipping it in a liquid solution. There is evidence that Castle made polo balls at his factory in Bridgeport, Conn., between 1883 and 1887, the gutta-percha covers whereof contained balls composed of rubber-wound centers with an inclosing outer layer of woolen yarn. There is also evidence that Warner Bros., of Bridgeport, made rubber-wound baseballs, or rubber-wound balls for boys' use, which they had covered with gutta-percha at his factory; also that balls of the above kinds were sold and used to some extent. In 1891 Warner Bros. sold their business, after which date no manufacture or sale of any of the above balls appears. None of them have been produced, and the evidence about them, given after a lapse of 20 years, lacks the support of such "concrete, visible, contemporaneous proofs which speak for themselves" as are held necessary in this circuit to establish the defense of anticipation under like circumstances. *Emerson, etc., Co. v. Simpson*, 202 Fed. 747, 121 C. C. A. 113; *De Laski, etc., Co. v. Fisk, etc., Co.*, 203 Fed. 986, 122 C. C. A. 286. And even if it be conceded that the rubber-wound centers of the balls referred to were substantially identical in character with the rubber-wound center of the patent in suit, the evidence regarding them fails to show that their gutta-percha covers had the qualities required by the patent in suit in its inclosing shell, "of such thickness as to give it the required rigidity." It is obvious that at the time they are said to have been made and sold there could have been no idea of using or adapting these balls for use in the game of golf. Castle's patent, it may be added, can hardly be said to contemplate anything which could properly be described as a "shell." The covering which it does describe is the kind of covering to be obtained by dipping the ball into a liquid solution, and it recommends that the gutta-percha be allowed to sink into the "interstices" of the ball or core dipped. The

shell of the patent in suit is preferably to be obtained by inclosing the core in sheets of gutta-percha, softened only to "a certain degree of plasticity," and then molding the whole to the exact desired shape.

The defendant has shown that a golf ball consisting of a solid rubber center inclosed in a gutta-percha cover or jacket, was devised by Mr. Sweeney and Dr. Schuyler in 1896 or 1897. Such golf balls, made by or for them, were used experimentally at Albany and at Poland, Me., in 1897 or 1898, and were found to travel farther than solid gutta-percha balls, when driven. Specimens consisting of centers and of fragments of the inclosing covers were produced. Only one was ever sold, and the manufacture was soon abandoned. They do not seem to me to have been enough like the golf ball of the patent to constitute an anticipation, in any event; and the evidence about them establishes only an abandoned experiment.

I must hold the patent valid, not anticipated, and infringed by the defendant. A decree may be entered accordingly.

OUTLOOK ENVELOPE CO. v. SHERMAN ENVELOPE CO.

(District Court, D. Massachusetts. January 19, 1914.)

No. 295.

PATENTS (§ 328*)—INVENTION—ENVELOPE.

The Callahan patent No. 701,839 for an envelope having a display opening in its face with a transparent covering in combination, with a communication sheet therein so folded as to show the name and address of the sendee through the display opening, *held void* for lack of invention in view of the state of the art.

In Equity. Suit by the Outlook Envelope Company against the Sherman Envelope Company. On final hearing. Decree for defendant.

Louis W. Southgate, of Worcester, Mass., for complainant.
Coale & Hayes, of Boston, Mass., for defendant.

DODGE, Circuit Judge. This is a suit for infringement of United States patent No. 701,839, June 10, 1902, to Americus F. Callahan, for an improvement in envelopes. There is only one claim; the only disputed issue is as to its patentability. The claim is as follows:

"In combination with an envelope having a comparatively opaque face and a display-opening therein having transparent covering, of a folded communication sheet therein, said sheet being so folded with regard to the position of the sendee's name and address upon the same side of the sheet with the communication, that only said name and address appear through the display-opening whereby the sendee's name and address as a part of the communication serves also as the envelope address."

"Open slot" envelopes, i. e., envelopes having an uncovered display-opening in a comparatively opaque face, were used before the date of this patent in combination with communication sheets so folded, with

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

regard to the sendee's name and address upon the same side of the sheet with the communication, that only said name and address appeared through the display-opening. In them, when so used, the sendee's name and address as a part of the communication served also as the envelope's address. Such a combination is not covered by any patent, so far as appears. The defendant has made open-slot envelopes capable of such use since 1899, and has used them itself since that date in combination with correspondence sheets as above described. In 1900 and 1901 it sold such envelopes to customers in not inconsiderable quantities. Such envelopes had been made by others before the defendant began to make them in 1899.

The patentee was not the first to contrive a slotted envelope with a transparent cover for the slot. United States patent to J. S. Brown, No. 36,393, September 9, 1862, describes such an envelope and such a cover for its slot. This patent, however, although under it the transparently covered opening may be wherever convenient within the face of the envelope, or may be coextensive with the face of the envelope, says nothing about so locating the opening as to correspond with the location, on a folded communication sheet to be inclosed, of the sendee's name and address. These were to be on a "card of address," to be placed in the envelope along with the inclosure to be transmitted, in such manner as to show them through the transparent cover of the opening; and, of course, the patent in no way contemplates making the address on a communication sheet serve also to address the envelope. This patent has, of course, long since expired, and little or no use appears to have been made of the patented device.

Envelopes to contain merchandise of various kinds with transparently covered slots, through which the contents could be examined without opening the envelope, were also patented in the United States by Kinner (No. 101,275, March 29, 1870) and in England by Ziegen-speck, No. 23,927 (1896), and Boldt, No. 29,956 (1897).

A British patent to Janett & Scholz, No. 4562 (1900) is for an envelope having one side made of transparent material so that the inscription on the letter inserted therein is legible from the outside.

All that has been accomplished by the patent in suit is to provide a transparent cover for the open-slot envelope when used in combination with a communication sheet addressed and folded as above. By this addition of a transparent cover certain obvious disadvantages of the open-slot are avoided. Without it, matter other than the address, if upon the same side of the same fold of the communication sheet, might be read through the open slot. The entire communication sheet might even be removed and replaced through the slot without leaving indications upon the envelope that this had been done. The open slot is liable to catch and tear the envelope. The use of envelopes having the slot transparently covered has, since the plaintiff began their manufacture, become far more general than the use of "open-slot" envelopes without the cover, in combination, as above, with a communication sheet such as described. Since the plaintiff acquired the patent in suit in 1903, it has had great commercial success

in making and selling envelopes of the kind described, which success is, without doubt, largely due to their superiority in the above respects to the open-slot envelope.

But notwithstanding the presumption from the grant of the patent, and notwithstanding the fact that the plaintiff's envelopes have the commercial merit referred to, I am unable to believe that the patentee's addition of the transparent cover to the open slot formerly used amounted to invention, in view of the state of the art at the time. Everything else in his combination was old, and the transparent cover which he added was old except in its relation to the communication sheet folded so as to show the address through the slot without a cover, which was one of the old elements of the combination. To arrange an envelope of the kind described in the Brown patent in such a way that the position of its transparently covered slot should correspond with the position of the name and address on a communication sheet within, so addressed and folded as to show them where the slot would display them if uncovered, was not to make the old elements combined produce any new mode of operation. The patentee could claim no invention so far as his communication sheet is concerned, nor any with regard to the function of at once protecting it and displaying the desired part of it which his envelope performs.

The case does not seem to me one in which the patentee can fairly be said to have taken, in securing a long-sought result, such a "final step" as has been held to constitute invention. If he can properly be said to have made any new use of the transparent covering for the slot, it would be too nearly analogous to the use made of such a covering in the former devices. The proper position, within the face of the envelope, for the slot had been already selected, and adopting the same position for the covered slot seems to me to have required nothing more than mechanical skill.

It may be added that the evidence by no means proves the commercial success of the plaintiff's envelopes to have been secured entirely by inherent superiority to all former devices. To it the plaintiff's commercial skill in pushing their sale and in educating the public to their use appear to have largely contributed.

A decree may be entered dismissing the bill, with costs.

CHICAGO & N. W. RY. CO. v. SMITH et al.

SMITH v. CHICAGO & N. W. RY. CO. et al.

(District Court, D. South Dakota, S. D. January 20, 1914.)

Nos. 519, 554.

1. CARRIERS (§ 12*) — STATE REGULATION OF RATES — REASONABLENESS OF RATES.

The value of the property of the Chicago & Northwestern Railway Company in South Dakota devoted to the intrastate passenger traffic and the gross earnings, and expenses and charges properly assignable

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to such traffic, determined, based on reports of the business for one year, and on the basis of the amount of business done in such year a passenger rate of 2½ cents per mile fixed by order of the State Board of Railroad Commissioners, *held* not confiscatory, but the subsequent act of February 2, 1909 (Acts S. D. 1909, c. 6), fixing such rate at 2 cents per mile, *held* confiscatory and unconstitutional.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

2. CARRIERS (§ 12*) — STATE REGULATION OF RATES — REASONABLENESS OF RATES.

Where it appears from the evidence that the net earnings of a railroad company from intrastate business under a rate fixed by state authority will approximate a sum that would give a fair return on the value of the property devoted to the service, and the evidence consists largely of opinions as to values upon which the witnesses differ considerably, a federal court is not justified in declaring such rate confiscatory.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

In Equity. Suit by the Chicago & Northwestern Railway Company against Daniel H. Smith, William G. Smith, and George Rice; and supplemental bill by Harold C. Smith against the Chicago & Northwestern Railway Company, F. C. Robinson, W. G. Smith, and George Rice, constituting the Board of Railroad Commissioners of the State of South Dakota, Samuel W. Clark, Attorney General of the said state, and Olaf Eidem, William H. Warren, O. S. Hagen, Harlan J. Bushfield, Royal C. Johnson, Len W. Martin, M. J. Russell, Mark W. Sheafe, Jr., C. A. Mead, William J. Jacobs, William S. Issenhuth, L. T. Van Slyke, J. H. Bottum, D. J. Keefe, E. H. Wilson, E. L. Grua, L. L. Fleeger, A. B. Carlson, Charles Stickney, Peter Olson, Joseph Janousek, P. J. Donohue, S. E. Wilson, A. T. Feay, John P. Milek, John Heffron, John W. Raish, and Chauncey L. Wood, State's Attorneys. On final hearing. Decree for defendants on original bill, and for complainant on supplemental bill.

A. K. Gardner, of Huron, S. D., and C. C. Wright, of Chicago, Ill. (E. M. Hyzer, of Chicago, Ill., of counsel), for complainants and for Chicago & N. W. Ry. Co.

R. C. Johnson, Atty. Gen., and P. W. Dougherty, Asst. Atty. Gen., for defendants.

WILLARD, District Judge. The first of these cases relates to the 2½-cent passenger rate over the lines of the Chicago & Northwestern Railway Company in South Dakota, and the second one to the 2-cent passenger rate over the same lines.

On September 20, 1907, the Board of Railroad Commissioners of South Dakota promulgated an order declaring that the maximum passenger rate over certain lines in the state, including the lines of the Chicago & Northwestern Company, should be 2½ cents per mile between points within the state. This order went into force on October 15, 1907.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On or about October 3, 1907, separate bills in equity were filed against the board praying for injunctions against the putting into effect of said order of September 20, 1907, as confiscatory and as denying the equal protection of the law, by the Chicago & Northwestern Railway Company, the Chicago, Milwaukee & St. Paul Railway Company, the Pierre & Fort Pierre Bridge Railway Company, the Pierre, Rapid City & Northwestern Railway Company, the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, the Chicago, Rock Island & Pacific Railway Company, the Chicago, Burlington & Quincy Railroad Company, and the Minneapolis & St. Louis Railroad Company.

Restraining orders were entered, and on or about January 13, 1908, temporary injunctions were issued in said causes, prohibiting the board from putting said order of September 20, 1907, into effect.

In the Chicago, Milwaukee & St. Paul Railway case the present special master was appointed as such on October 8, 1908. Arrangements were made in the other causes to suspend further proceedings until the determination of said cause. The taking of testimony in that case began on December 8, 1908, and was four days thereafter, at the request of the Assistant Attorney General, adjourned to enable the officials of said railway company to furnish detailed information as to the original cost of construction of the company's lines in South Dakota. Before the master had been advised that such information had been furnished, the Legislature of South Dakota on February 2, 1909, enacted chapter 6, which was approved February 2, 1909. That act fixed the maximum rate for passengers at 2 cents per mile, and was applicable to the Chicago & Northwestern Railway Company.

On February 3, 1909, a bill in equity was filed in this court by Harold C. Smith against the Chicago & Northwestern Railway Company, the several members of the board, and sundry state's attorneys, seeking to prevent the enforcement, because confiscatory and as denying the equal protection of the law of the said chapter 6.

On August 16, 1909, John H. Gates, Esq., of Sioux Falls, was appointed special master in chancery in said causes with power and direction "to take the testimony therein and from such testimony to find the facts proven by said testimony, and to report said facts to this court." The taking of testimony began on December 29, 1909, was concluded on July 20, 1910, and the master filed his report September 23, 1911, returning therewith the evidence taken before him. Nothing more was done with the case until after the decision of the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, on June 13, 1913.

The way in which this case now comes before the court and the precise questions at this time to be decided should first be made clear. Exceptions to the master's report were filed by both sides. Equity Rule 66 (33 Sup. Ct. xxxviii) provides:

"The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the equity docket. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in

session, or, if not, at the next sitting held thereafter, by adjournment or otherwise."

Former rule 83, which was in force when the report was filed, contained the same provision. Proceeding apparently under this rule, counsel for the state on July 17, 1913, moved:

"That a day of hearing be appointed for the argument of the exceptions to the master's report filed in the above-entitled causes, and that the report of the master in all things be confirmed."

On July 18, 1913, the court set the said motion for hearing on August 19, 1913. By agreement made on August 1, 1913, the hearing was continued to September 25, 1913. On September 8, 1913, counsel for the state made a motion to dissolve the temporary injunction, and the same was set down for hearing on September 25th. On September 13, 1913, the same counsel made a motion that the bills be dismissed on the merits, "on the ground and for the reason that the complainants in said original and supplemental bills had wholly failed to prove such a state of facts as would entitle them or either of them to the relief demanded in said bills, and for the further reason that there is an entire failure of proof on the part of the complainants to sustain the allegations contained in the original bills and in the supplemental bill." By order of September 15th this motion was set down for hearing on September 25, 1913. On that day the case came on for hearing, was argued orally, and subsequently briefs were filed by both parties.

It is apparent that the motion to dissolve the temporary injunction is improper at this time, or, in any event, superfluous. The case is now for final hearing. The result of this hearing will be either a dismissal of the bills, in which case the injunction necessarily falls; or the granting of some relief to the plaintiffs, in which case the injunction necessarily stands.

The other motion, namely, to dismiss the bills, may have been made on the theory that after the master's report had been confirmed it was still necessary for the state to move for a decision in its favor. That, however, is a mistaken theory, for after such a final hearing the court will proceed to a decree for one party or the other, and no motion to that effect is necessary. However, part one of the state's brief is, with the exception of Hillman's testimony as to the gross earnings theory, taken up entirely with a discussion of the plaintiffs' evidence. It may be therefore that the motion is made on the theory that the court will now examine the plaintiffs' evidence to see if it made out a case, and if it did not will dismiss the bills without considering whether the testimony of the defendants has aided the plaintiffs. It is apparent that such a motion made on that theory now comes too late. The master decided the case on all of the evidence, and has reported what the facts are. It is upon these facts, and others which may appear from all of the evidence, that the court will decide the case. It will not now stop to inquire whether or not the plaintiffs have made out a prima facie case. The only question therefore before the court is whether or not, upon the master's report and all of the evidence in the case, the decree should be for the plaintiffs or for the defendants.

[1] The master reported the value of the company's property devoted to the passenger traffic, the revenue from the passenger traffic, and the expenses of that traffic. After determining in this way the net income from that source, he reported the returns which the company would receive upon its investment in the passenger business at the different rates of 3 cents, $2\frac{1}{2}$ cents, and 2 cents per mile. All of these findings were based upon the business of the company for the year ending June 30, 1908.

Value of the Company's Property in South Dakota.

The evidence of the company showed this value as of June 30, 1908, based upon the cost of reproduction of the railroad, to be \$28,495,617. It allowed nothing for depreciation, claiming that maintenance offset depreciation.

The evidence of the state showed the valuation at that time, upon the basis of cost of reproduction new, to be \$26,311,400. Witness for the state then stated the amount of depreciation, and fixed the value of the property in its then condition at \$22,608,115. The master, with slight modifications, accepted the state's valuation, and fixed the value of the property in its then (June 30, 1908) condition at \$22,598,602.

Although the master in this case made his report after the master's report and the Circuit Court opinion in the Minnesota Rate Cases had been filed, but before the decision of the Supreme Court therein, he did not fall into one error which that decision pointed out. The company in this case claimed an allowance for adaptation and solidification of roadbed. It added therefore to its estimate of the cost of reproduction of the roadbed on the ground of adaptation and solidification, about 2 cents per cubic yard as the price for doing that work, which would be about 7 per cent. of the total estimate of that cost on the lines west of the river, and about $7\frac{1}{2}$ per cent. on that east of the river. The state's witnesses allowed nothing on account of this item. (Witt, pp. 1994, 2254-2284.) The master accepted the state's claims in that respect, and allowed the company nothing for adaptation and solidification, deducted from the cost of reproduction new, namely, \$26,311,400, depreciation, and adopted, as has been said, the sum of \$22,598,602. This amount does not include any sum allowed as an element of value because the railroad was a going concern. (Witt, p. 2263.)

The table of valuation contains 29 items. None of these seems to be now objected to by either party, except item No. 1. That item is as follows, in state's Exhibit C:

			Cost of reproduction new.	Present value.
Lands for rt. of way	16,138.6 acres	\$32 x $2\frac{1}{2}$	1,292,483	
Lands for yards and station grounds	3,365.04	\$256 x $2\frac{1}{2}$	2,153,357	
Other real estate	360.00		12,300	
			<hr/>	
			3,458,140	3,458,140

To this item the company does not object. It is willing to accept as the value of the right of way, station grounds, etc., the amount fixed by the state's witnesses, namely, \$3,458,140. The state, however, does now object, because in reaching that amount its witnesses made use of multipliers, a practice which it says was condemned by the Supreme Court in the Minnesota Rate Cases. This objection was first made at the hearing. The state filed no exception to the finding of the master that the value of the right of way, station grounds, etc., was \$3,458,140. The evidence of both sides showed that at that time it was customary, in making such valuations, to ascertain the market value of contiguous farms by the acre, and multiply that value by 2, or $2\frac{1}{2}$, or 3, in order to ascertain what the cost to the railroad company for the strip of land taken would be. In this case the state used for a multiplier $2\frac{1}{2}$, and the defendant used as a multiplier 3 for farm lands only. This practice had not been condemned by the Supreme Court at the time exceptions were filed. Under these circumstances, I do not think that the lack of an exception should prevent the court from noticing what is claimed by the state to now be a plain error.

In the appraisals of both sides the lands were divided into two classes: (1) Right of way, and (2) stations grounds. The latter class included all of the right of way within the corporate limits of any town, city, or village. Each piece of this property was appraised separately by the state's witnesses at the market value of contiguous property. They attempted to determine what lands in that vicinity were selling for in the market. Having determined this value for each tract in the cities and villages, it was found that the average value per acre for station grounds was \$256. This was first multiplied by 3,365.04, the number of acres, and that result was then multiplied by $2\frac{1}{2}$. The reasons for doing this, as given by Witt, were as follows:

"A multiple was placed upon this property, this value of $2\frac{1}{2}$, as there are very few large terminals or large cities in this state. Nearly all the small towns here have corporate limits which extend beyond the built-up portion of the city, and a great deal of the property that is included in this 3,365.04 acres is outside of the business section. The multiple as stated for the business section would approximate probably two times or over, and it was decided by taking $2\frac{1}{2}$ for both or for all the property of the railroad company, both for land outside of the corporate limits and for yards and station grounds, would be the fair and reasonable basis."

The testimony of the company's witnesses showed that in relation to farm lands the use of the multiple 3 gave the actual cost to the company. There was, however, no evidence that in the case of town lots their experience would justify such action. An examination of the evidence satisfies me that the use of any multiple, so far as station grounds (that is to say, lands within corporate limits) are concerned, was improper. The master himself, as appears from his report, was not satisfied with its use.

This ruling does not, however, require the rejection of the entire valuation, as was done in the Minnesota Rate Cases. There the witness Cooper did not state in his testimony the market value of contiguous lands. It appears that, after determining it, he, without stat-

ing what it was, added an arbitrary sum, and the result thus obtained he called the market value. This latter sum he multiplied by 3. Nowhere in that case did the market value of contiguous lands appear. That does appear in this case, both in the evidence of the state, and in that of the company. The market value, according to the state's witnesses, was \$849,581, and according to the company's witnesses \$860,751, a difference, as is seen, of only about \$10,000. I accept the state's figures and place the valuation of the station grounds at \$849,581. This sum was not arrived at by estimating "what would be the actual cost of acquiring the right of way if the railroad were not there." It was the market value, at the time of the appraisal, of property contiguous to the railroad, on the theory that the railroad was there. It contains no sum allowed for "railway value." It is not "in excess of the market value of contiguous and similarly situated property." The other lands making up the right of way, namely, lands outside of the incorporated towns, cities, and villages, and which may be called farm lands, amounted to 16,126.3 acres (Exhibit 45). Each tract of land included in this acreage was valued separately by the state's witnesses. The total valuation was then divided by the number of acres, and the result gave \$32 as the average market value of an acre. What was said above in regard to the valuation of station grounds is true of the valuation of the farm lands. Nothing was added for "railway value." Nothing was added as an excess of cost which the company would have to pay over what an individual would have to pay. The \$32 an acre represents the market value of contiguous lands. The total valuation thus obtained by the state's witnesses was \$516,079.05; by the company's witnesses \$756,950.58.

But after obtaining these results the state's witnesses multiplied their amount by $2\frac{1}{2}$ and the company's witnesses multiplied their amount by 3. The result thus obtained by the state before the acreage was revised was \$1,292,483 as the value of the right of way outside of cities and villages. The company now contends that this sum should be accepted as such value. The defendant's claim is that the evidence in this case is essentially different from the evidence in the Minnesota Rate Cases; that there is here proof of the actual market value of contiguous lands, which did not appear in that case. Witt, the state's witness, testified with regard to multipliers as follows:

"You may state why you apply any multiple at all, instead of using just simply the straight acreage value, Mr. Witt. A. It is a well-known fact and I personally know of instances where a railway company has had to pay a sum in excess of the value of the property for ordinary farm purposes, on account of the damage that is done to adjacent property, and for various reasons, such as the desire to get a certain location, and it is my belief that the multiple should be used above the value as farm property. * * * I determined the multiple to be used, if any should be used, by investigating what had been determined by the railroad commissions in making similar valuations of railroad property, and also secured the records of transfers that had been made of property in this state to railroad within the last few years that have built new lines in this state, and, by a comparison of this value with the value as determined from the transfers of adjacent property on file in the offices of the registers of deeds of the different counties; we decided by adopting the ratio of 2.5 we would come, approximately, as close as pos-

sible to the average multiple value or value which the railroad would probably be required to pay for such property. The average value of the state worked out \$32 an acre approximately. Taking the acreage of 16,138.6, multiplying that by 32, and by the multiple $2\frac{1}{2}$, gives a value of \$1,292,483."

Vallette, a witness for the company, and who had been connected with the company for many years as right of way agent, testified:

"Q. What has been your observation as the parity between the land value and the right of way value, and I mean by that the acreage value of the land and the value of the right of way, which, of course, includes damages done to the property traversed by the right of way? A. My observation is that it comes pretty close to three to one, so much so that the Northwestern Railroad has adopted that as a rule in valuing lands as a general proposition. * * * We have found by experience that when we sum up at the end of our buying a piece of right of way through the country our rule of three to one holds pretty close."

Other right of way agents of the railroad company testified to the same effect. (Cleveland, pp. 734-737; Treadway, pp. 745, 746.)

From this evidence the company argues that it is unfair to say that for a strip of land 100 feet wide through the middle of a 160-acre farm it should be allowed no more as the cost of reproducing it than the price per acre if the whole farm were to be bought; that it is a matter of common knowledge that, if a private individual wanted to buy such a strip, it would cost him much more per acre than the value per acre of the whole farm.

It is true that the evidence in this case does differ from that in the Minnesota Rate Cases, and there is much force in the company's argument. But the defendant's claim in this respect is disposed of by what the Supreme Court, in the Minnesota Rate Cases, 230 U. S. on page 455, 33 Sup. Ct. on page 763, 57 L. Ed. 1511, said:

"The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which were embraced in the items of 'engineering, superintendence, legal expenses,' 'contingencies,' and 'interest during construction.'"

I, accordingly, adopt the valuation placed upon these lands by the state before any multiplier is used, namely, \$516,079.

Item 1 as thus revised gives therefore these results:

Station grounds.....	\$ 849,581
Right of way outside station grounds.....	516,079
Gravel pit.....	12,300
	<hr/>
	\$1,377,960

The master accepted as the cost of reproduction of right of way in its present condition the sum of \$3,449,826. This has now by the elimination of the use of multipliers been reduced to \$1,377,960. There was therefore the sum of \$2,071,866 included by the master in his total valuation which should not have been included. Upon this sum

of \$2,071,866 the percentages in items 23A and 29 amounting to 14 per cent. were allowed. This allowance, to wit, \$290,061, also should be deducted from the total cost of reproduction of the railroad property as found by the master. The sum so found by him was \$22,598,602. Deducting the sums of \$2,071,866 and \$290,061, there is left the sum of \$20,236,675, which sum I adopt as the cost of reproduction of the railroad in its present condition.

The master having fixed the cost of reproduction, present condition, at \$22,598,602, for reasons stated in his report, reduced this valuation to \$20,000,000. After carefully considering such reasons, I cannot agree with the master in this reduction. I sustain the company's exception to this finding, and I determine that the value of the company's property in South Dakota was on June 30, 1908, \$20,236,675.

Gross Earnings.

The company's proof (Exhibit 55, sheet 1) showed that its total gross operating revenue in South Dakota for the year 1908 was \$3,060,845.93. The master found that of this sum \$1,605,731.59 was earned in the passenger service, and \$1,455,114.34 in the freight service. To this sum of \$3,060,845.93 claimed by the company to be its total revenue, the master added \$5,552.96 as income from rentals and joint facilities and \$130,890.54 derived from outside income.

The state has filed no exceptions to the master's finding as to earnings. The company does not now make any objection to the item of \$5,552.96, but it does object to the addition of the \$130,890.54. The state in its brief suggests that the company's exception to this conclusion was abandoned when exception No. 25 was withdrawn. Exception 24, however, which raises the point more fully, has not been withdrawn.

The property from which this so-called outside income was derived is described in Exhibit K and in the testimony of Brandriff, a witness for the company. In Exhibit K the following appears:

Dividends on stock owned.....	\$1,903,510 00
Interest on bonds.....	3,150 00
Interest on loans and balances.....	881,962 78
Miscellaneous	388 25

These items make a total of.....\$2,789,011 03

It appears from the testimony of Brandriff and the statements made in the annual reports to the South Dakota commissioners that among the stocks owned by the company were some of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and some of the Union Pacific Railroad Company. The item of interest on balances means the interest paid by banks on the cash balances of the company therein. The item interest on loans Brandriff illustrated by a concrete case as follows:

"The Wyoming & Northwestern Railway, for instance, is owned entirely by the Chicago & Northwestern Company and is considered one of its proprietary companies. The money was advanced by the Chicago & Northwestern

for the building of that road, and there was charged up against that road interest for the amount advanced for the construction of its property."

It appeared that no part of the total of \$2,789,011.03, except possibly \$7,318, was derived from any property of the company in South Dakota, and that it was not, with the exception of \$7,318, in any way connected with the operation of the lines in that state.

The master made certain deductions from this total, and found the revenue from these sources for the year 1908 to be \$2,183,364.78. Dividing this upon the expenses basis, he assigned to South Dakota as its share \$130,890.04. In assigning a part of these earnings to South Dakota, the master I think erred. If to South Dakota had been assigned its share of the property from which this income was received, and the valuation of the company's property therein had been thereby increased, there could be no objection to this assignment. But I am unable to find that the outside property appears anywhere in the valuation. It is said, however, that the expense of maintaining the general offices has been in part assigned to South Dakota, and that this income should therefore be so assigned. This argument cannot prevail, for the amount of money paid out by the company for looking after these investments must necessarily have been so trifling as to be completely negligible.

The state's exceptions based upon the fact that after the test year of 1908 the business of the company had increased, and would increase even if the lower rates were put in force, are overruled on the authority of *Chicago & Northwestern Railway Co. v. Dey* (C. C.) 35 Fed. 866, 1 L. R. A. 744.

The gross revenue for the state for 1908, to wit, \$3,197,289.43 should be reduced by the amount of \$130,890.54. This would leave as such revenue \$3,066,398.89.

Expenses.

The master found that the operating expenses for the year 1908 properly chargeable to the lines in South Dakota amounted to \$2,496,428.53. This is not now criticised by the company. Nor does the state make any complaint thereto, either by exception or in its brief. To this sum of \$2,496,428.53 should be added taxes for the year amounting to \$174,602.51. The total expense was therefore \$2,671,031.04. A summary of valuation, earnings, and expenses would therefore be as follows: Valuation of property, \$20,236,675. Gross earnings, \$3,066,398.89; gross expenses, \$2,671,031.04. The net income would be \$395,367.85. Dividing this income by the valuation, we have a percentage of .0195 as the rate of return from the operation of the entire system in South Dakota for the year 1908.

Upon this showing the company claims that the case falls within the rule of the *Minneapolis & St. Louis R. Case*, reported with the *Minnesota Rate Cases* in 230 U. S. at page 469, 33 Sup. Ct. 729, 57 L. Ed. 1511. It there appeared that the net return on all of the company's business in Minnesota, interstate and intrastate, was in 1907

about 4.14 per cent. on the estimated value of its property in Minnesota; in 1908 it was less than 3.5 per cent.; and in 1909 less than 3.7 per cent. Without pausing to separate the interstate from the intrastate business, the Supreme Court held that the rates there in question were confiscatory. The same thing was done in two of the Missouri cases. *Missouri Rate Cases*, 230 U. S. at 507, 33 Sup. Ct. 975, 57 L. Ed. 1571.

In the case at bar the company claims that its freight rates were established by the railroad commission of South Dakota, and, its passenger rates being so established, it claims that the following quotation from the *Minnesota Rate Cases* is here applicable:

"For the purpose of determining whether the rates permit a fair return, the results of the entire intrastate business must be taken into account."

If this case had been commenced and tried on the theory now advanced, as was done in the case of *Allen v. St. Louis, Iron Mt. & S. Ry.*, 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. Ed. 1625, the argument of the company would have force. That, however, was not done. Neither one of the bills asks any relief except against passenger rates. While each bill alleges that the company makes no money in South Dakota, neither one alleges that the freight rates were fixed by the state, or that they were unreasonable or confiscatory. The case was tried before the master upon the theory that only the passenger rates were involved. His report is limited to that issue. In fact, it was not until the hearing upon the exceptions to the report that the company presented any evidence showing that the commission had fixed the freight rates, and it was then that it for the first time advanced its present claim. It cannot now ask to have the case decided upon an issue not raised by the pleadings nor tried before the master.

It becomes necessary therefore to examine the master's division of value, earnings, and expenses, first between the freight and passenger service, and then between the interstate and intrastate business.

It is to be observed that the master in this case did not fall into the error, pointed out in the *Minnesota Rate Cases*, of making any one of these divisions on the gross earnings basis. This method was pressed upon him by the company, but he refused to adopt it, saying:

"It seems to the master that these results conclusively prohibit the use of gross earnings as a factor in cases of this kind. The \$10,000,000 example shown by Mr. Justice Brewer in the *Tompkins Case*, 176 U. S. 167 [20 Sup. Ct. 336, 44 L. Ed. 417] clearly indicated the same absurd results, and the master therefore feels justified in following Mr. Justice Brewer in the *Tompkins Case* and in declining to follow the *Love Case* and the *Minnesota Rate Case* and the other cases on this subject. In regard to the remark of Judge Sanborn in the *Minnesota Rate Case* heretofore quoted, 'cases may indeed be imagined in which this basis does not produce persuasive results,' the master is of the opinion that no case can be imagined where such absurd results would not appear unless the freight earnings and passenger earnings were reduced or raised in exactly the same proportion."

Apportionment of Expenses Between Freight and Passenger Services.

Table 3, which shows these expenses, is hereto attached:

TABLE 3.

Chicago & Northwestern Railway Co., Lines in South Dakota.

	Apportioned to Lines in South Dakota.	Apportioned to Passenger Traffic.	If Apportioned to Passenger Traffic on the Basis of the Preceding Column (Except that Gross Earnings Is Here Used to Measure Depreciation in M. W. & S. and S. Accounts).	If Apportioned to Passenger Traffic on Gross Earnings (Complainant's Exhibit 2).	If Apportioned to Passenger Traffic on Revenue Train Miles (Complainant's Exhibit 2).	If Apportioned to Passenger Traffic on Basis of Defendants' Exhibit 1.
I. Maintenance of Way and Structures.						
1. Superintendence	\$35,871.20	\$13,329.74	\$16,577.88	\$17,053.17	\$19,369.64	\$13,889.33
2. Ballast	3,480.71	1,229.25	1,639.62	1,654.73	1,782.47	1,614.82
3. Ties	95,043.54	35,508.27	43,808.73	45,183.70	48,671.80	42,600.75
4. Rails	88,820.25	38,370.35	38,370.35	42,225.15	45,484.85	29,691.33
5. Other track material.....	57,164.18	24,694.93	24,694.93	27,175.85	29,273.78	19,116.34
6. Roadway and track.....	323,470.47	114,236.83	152,373.83	153,777.86	165,649.23	128,979.35
7. Removal of snow, sand and ice.....	33,615.58	1,851.54	1,851.54	1,718.85	1,851.54	1,703.15
8. Tunnels	606.71	310.69	310.69	288.43	310.69	279.92
9. Bridges, trestles and culverts.....	78,151.64	27,300.03	36,814.11	37,153.29	40,021.45	35,041.61
10. Over and under grade crossings.....	56.56	19.43	26.89	26.89	28.96	24.60
11. Grade crossing, fences, cattle guards and signs.....	10,003.96	3,445.36	4,755.83	4,755.83	5,123.03	4,364.10
12. Snow and sand fences and snow sheds.....	4,295.50	1,479.37	2,042.08	2,042.08	2,199.73	2,199.73
13. Signals and interlocking plants.....	254.35	87.60	120.92	120.92	130.25	119.52
14. Telegraph and telephone lines.....	8,156.90	2,809.24	3,877.79	3,877.79	4,177.15	3,877.79
15. Buildings, fixtures and grounds.....	60,543.07	20,851.03	28,782.18	28,782.18	31,004.11	28,782.18
17. Roadway tools and supplies.....	3,470.53	1,289.67	1,604.93	1,649.91	1,777.28	1,248.81
18. Work equipment, repairs.....	6,124.74	2,275.95	2,830.55	2,911.70	3,136.48	2,371.50
19. Work equipment, depreciation.....	1,581.86	587.82	731.06	752.02	810.07	612.50
20. Injuries to persons.....	1,932.51	714.78	888.95	914.44	985.03	744.78
21. Stationery and printing.....	1,043.29	387.69	482.16	495.98	534.27	403.96
22. Other expenses.....	296.54	110.19	137.05	140.98	151.86	114.82
23. Maintaining joint tracks, yards and other facilities, Dr....	2,886.58	1,247.00	1,247.00	1,372.28	1,478.22	605.25
24. Maintaining joint tracks, yards and other facilities, Cr....	319.75*	138.13*	138.13*	152.01*	163.74*	67.04*
Total maintenance of way and structures.....	\$786,541.97	\$292,298.58	\$363,831.15	\$373,922.07	\$402,788.15	\$318,414.10

	Apportioned to Passenger Traffic on Basis of Defendants' Exhibit 1.	If Apportioned to Passenger Traffic on Revenue Train Miles (Complainant's Exhibit 29).	If Apportioned to Passenger Traffic on Gross Earnings (Complainant's Exhibit 52).	If Apportioned to Passenger Traffic on the Basis of the Preceding Column (Except that Gross Earnings is Here Used to Measure Depreciation in M. W. & S. and S. Accounts).	Apportioned to Passenger Traffic.	Apportioned to Lines in South Dakota.
II. Maintenance of Equipment.						
25. Superintendence	\$4,764.64	\$5,044.76	\$6,371.62	\$5,030.01	\$5,001.87	\$13,402.65
26. Steam locomotives, repairs.....	66,867.50	66,867.50	73,585.21	66,867.50	66,867.50	154,785.87
27. Steam locomotives, depreciation.....	8,339.71	8,339.71	9,177.54	8,339.71	8,339.71	19,304.89
28. Passenger train cars, repairs.....	31,145.37	31,145.37	31,145.37	31,145.37	31,145.37	31,145.37
29. Passenger train cars, depreciation.....	5,474.79	5,474.79	5,474.79	5,474.79	5,474.79	5,474.79
30. Freight train cars, repairs and renewals.....	76,639.03	76,639.03	76,639.03	76,639.03	76,639.03	76,639.03
31. Freight train cars, depreciation.....	27,639.03	27,639.03	27,639.03	27,639.03	27,639.03	27,639.03
32. Shop machinery and tools.....	8,938.22	8,938.22	9,974.04	8,926.71	8,904.74	10,462.85
33. Injuries to persons.....	719.26	761.54	961.84	759.32	755.07	2,023.23
34. Stationery and printing.....	323.57	342.59	432.70	341.50	339.68	910.18
35. Other expenses.....	64.15	67.93	85.79	67.35	67.35	180.46
Total maintenance of equipment.....	\$121,418.53	\$121,982.41	\$132,208.90	\$121,952.73	\$121,896.08	\$342,215.27
III. Traffic Expenses.						
38. Superintendence	\$6,542.94	\$6,925.75	\$6,776.13	\$6,542.94	\$6,542.94	\$15,645.15
39. Outside agencies.....	11,666.78	10,974.57	9,532.58	11,666.78	11,666.78	20,241.00
40. Advertising	14,881.44	14,881.44	14,879.36	14,881.44	14,881.44	14,901.01
41. Traffic associations.....	423.71	422.49	422.49	422.49	422.49	1,158.26
42. Industrial and immigration bureaus.....	2,001.51	2,273.58	2,232.11	2,001.51	2,001.51	171.07
43. Stationery and printing.....	35,516.88	35,477.35	33,842.67	35,515.16	35,515.16	7,373.93
Total traffic expenses.....	\$35,516.88	\$35,477.35	\$33,842.67	\$35,515.16	\$35,515.16	\$59,498.42
IV. Transportation Expenses.						
44. Superintendence	\$7,535.29	\$12,015.26	\$11,154.18	\$7,740.35	\$7,740.35	\$23,462.72
45. Dispatching trains.....	8,034.31	8,034.31	7,458.53	8,034.31	8,034.31	15,688.95
46. Station employees.....	30,856.84	74,209.64	69,690.31	28,207.45	28,207.45	161,551.28
47. Weighing and car service associations.....	5,051.70	7,740.31	7,180.06	4,972.35	4,972.35	15,115.81
48. Stockyards and grain elevators.....	30.78	30.78	30.78	30.78	30.78	2,280.00
49. Station supplies and expenses.....	228.98	228.98	228.98	228.98	228.98	16,961.31
50. Yard masters and their clerks.....	25	25	25	25	25	18.94
51. Yard conductors and brakemen.....	25	25	25	25	25	25
52. Yard switch and signal tenders.....	25	25	25	25	25	25

53. Yard supplies and expenses.....	47.80*	65*	65*	65*	65*	65*
54. Yard enginemen.....	12,909.22	174.27	174.27	174.27	174.27	174.27
55. Enginehouse expenses, yard.....	5,079.55	68.57	68.57	68.57	68.57	68.57
56. Fuel for yard locomotives.....	18,057.44	243.78	243.78	243.78	243.78	243.78
57. Water for yard locomotives.....	671.17	9.06	9.06	9.06	9.06	9.06
58. Lubricants for yard locomotives.....	182.60	2.47	2.47	2.47	2.47	2.47
59. Other supplies for yard locomotives.....	174.98	2.36	2.36	2.36	2.36	2.36
60. Operating joint yards and terminals, Dr.....	955.34	12.90	12.90	12.90	12.90	12.90
61. Operating joint yards and terminals, Cr.....	3,755.66*	50.70*	50.70*	50.70*	50.70*	50.70*
62. Road enginemen.....	191,088.94	76,369.26	76,369.26	76,369.26	76,369.26	76,369.26
63. Enginehouse expenses, road.....	61,956.76	28,140.76	28,140.76	29,494.24	31,728.06	28,140.76
64. Fuel for road locomotives.....	297,713.48	96,712.84	96,712.84	96,712.84	96,712.84	85,057.31
65. Water for road locomotives.....	16,539.47	5,372.04	5,372.04	7,862.86	7,512.23	5,388.60
66. Lubricants for road locomotives.....	5,655.24	2,568.61	2,568.61	2,688.50	2,568.61	2,649.17
67. Other supplies for road locomotives.....	6,152.02	2,794.25	2,794.25	2,924.67	2,794.25	2,881.89
68. Road trainmen.....	187,058.08	71,605.42	71,605.42	71,605.42	71,605.42	71,605.42
69. Train supplies and expenses.....	45,627.08	25,231.77	25,231.77	21,691.11	23,365.63	25,097.90
70. Interlockers, block and other signals, operation.....	17.22	8.22	8.22	8.19	8.82	8.82
71. Crossing flagmen and gatemen.....	1,866.03	876.85	876.85	887.11	955.59	876.85
72. Clearing wrecks.....	4,235.02	1,990.04	1,990.04	2,013.33	2,168.75	423.50
74. Stationery and printing.....	10,952.59	3,613.26	3,613.26	5,206.86	5,608.82	3,517.53
75. Insurance.....	203.72	67.21	67.21	96.85	104.33	65.43
76. Other expenses.....	609.33	201.02	201.02	299.68	312.04	195.60
77. Loss and damage, freight.....	48,025.65					
78. Loss and damage, baggage.....	325.72	325.72	325.72	325.72	325.72	325.72
79. Telegraph and telephone operation.....	475.38	156.38	156.38	226.00	273.44	158.41
80. Damage to property.....	49,083.00	25,135.40	25,135.40	23,334.06	25,135.40	25,135.40
81. Damage to stock on right of way.....	4,701.69	2,407.74	2,407.74	2,235.18	2,407.74	2,407.74
82. Injuries to persons.....	25,708.54	12,080.44	12,080.44	12,221.84	13,165.34	12,080.44
83. Operating joint tracks, Cr.....	154.76*					
Total transportation expenses.....	\$1,228,607.80	\$405,334.86	\$405,334.36	\$452,364.87	\$465,844.38	\$394,581.05
V. General Expenses.						
84. Salaries and expenses of general officers.....	\$11,078.88	See total	See total	See total	See total	See total
85. Salaries and expenses of clerks and attendants.....	29,129.32	See total	See total	See total	See total	See total
86. General office supplies and expenses.....	5,496.10	See total	See total	See total	See total	See total
87. Law expenses.....	13,308.87	See total	See total	See total	See total	See total
88. Insurance.....	13.71	See total	See total	See total	See total	See total
89. Pensions.....	7,429.14	See total	See total	See total	See total	See total
90. Stationery and printing.....	2,792.49	See total	See total	See total	See total	See total
91. Other expenses.....	10,316.56	See total	See total	See total	See total	See total
Total general expenses.....	79,565.07	28,142.17	30,481.38	37,825.23	40,745.27	28,635.47
Total operating expenses.....	\$2,496,428.53	\$883,186.45	\$957,114.78	\$1,030,163.74	\$1,066,837.56	\$898,565.53

(Note: The figures to which a star is affixed indicate a credit.)

The master in his report says:

"In the Western Advanced Rate Case testimony was offered (page 357) showing that it was entirely feasible to localize about 51 per cent. of the cost of operation between the freight and passenger service; that about 29 per cent. was subject to some arbitrary division, but that for all practical purposes it would be accurate; and that only 20 per cent. remained to be determined upon an arbitrary basis, and that when this was done the results would not vary 5 per cent. from actual cost."

The company in its brief says:

"It appears that a large part of the expense could be definitely allocated. * * * The maintenance of equipment expenses can be largely allocated; at least, the principal items could be directly allocated. The traffic expenses could likewise be fairly apportioned, and most of the operating expenses could be allocated. The heaviest item in the transportation expense was that of fuel, which could be practically allocated, and the enginemen's and trainmen's expenses could be allocated."

After localizing the expenses as far as possible, the master used different methods in apportioning different items. For example, on the basis of revenue train mileage, he apportioned No. 7, removal of sand, snow, and ice; No. 45, dispatching trains; No. 70, interlockers, block and other signals; No. 80, damage to property; No. 81, damage to stock on right of way. On the basis of revenue train mileage switching included, he apportioned No. 71, crossing flagmen and gatemen; No. 72, clearing wrecks; and No. 82, injuries to persons. The large item No. 64, fuel for road locomotives, was apportioned by the master to the amount of \$96,712.84 on road locomotive mileage basis as claimed by the company. The same thing was done with No. 66, lubricants for road locomotives. On the basis of revenue locomotive mileage, switching included, he apportioned No. 26, steam locomotives, repairs; and No. 27, steam locomotives, depreciation. Subdivision V of table 3, general expenses, was apportioned on the relation which the sum total of the preceding assignments of subdivisions I, II, III, and IV, to the passenger service bore to the sum of said subdivisions assigned to the state.

Of the items in subdivision I, of table 3, maintenance of way and structures, the master said that the greatest difficulty arose because none of them could be localized. The expenses incurred under this subdivision he considered as partly due to wear, and partly to weather stress or depreciation. So far as wear was concerned, he considered that for items 2 to 15, inclusive, 23 and 24, train weights, would be the better basis; but he rejected that because the evidence did not sufficiently show what the train weights for 1908 were. For these 16 items, with respect to wear, he adopted as a basis locomotive mileage switching included. With respect to that part of the maintenance of way and structures accounts caused by depreciation or weather stress, he apportioned it upon the proportion which the passenger percentage of the direct costs accounts (which he determined to be all of subdivision II, No. 40, in subdivision III, and all of subdivision IV, except Nos. 44, 74, 75, 76, and 79) bore to the entire amount of direct costs assigned to the state.

The state filed three exceptions to the methods adopted by the master in apportioning the expenses between passenger and freight. If the

state's exception No. 9 were upheld, it would make a difference of \$148.39, and as to the tenth exception a difference of \$225.24. The exact claim made in the eleventh exception does not appear. But it appears that if all of them were allowed the result would not be affected. Moreover, the state does not now in its brief insist upon them. They are, accordingly, overruled.

The only objection which the company now makes to the master's apportionment of expenses between freight and passenger relates to the first subdivision, maintenance of way and structures. It contends that as to these items the revenue train mileage most nearly represents the element of use. It criticises the method adopted by the master, saying:

"The master, after thus finding these expenses of maintenance of equipment and transportation expenses, in general divided the maintenance of way and structure accounts between passenger and freight upon the per cent. which the expenses in the maintenance of equipment and transportation accounts of the two classes bore to each other. What possible connection there can be between such expenses and the transportation expenses, for example, it is difficult to conceive. It cannot be believed that the comparative amount of fuel used in a freight train as compared to a passenger train would be any indication of the comparative amount of wear and tear upon the roadway and tracks made by the freight train and the passenger train. It certainly is not a method which represents the use by the two classes of traffic."

To this it may be answered, adopting the language of the brief: It cannot be believed that the comparative number of freight trains run over the tracks, as compared with the number of passenger trains so run, would be any indication of the comparative amount of the wear and tear upon over grade crossings, for example, or on snow and sand fences and snow sheds, or on buildings, fixtures, and grounds. It is to be observed, also, that this expense is due not only to the wear caused by the movement of trains, but also to weather stress, which in many items is much the larger element. Moreover, as was said by the Supreme Court in the Arkansas cases (*Allen v. Railway Company*, 230 U. S. at page 560, 33 Sup. Ct. at page 1033, 57 L. Ed. 1625):

"It was not sufficient for the complainants to criticise the tests relied upon by the defendants; but, in seeking to override the action of the state upon constitutional grounds, it was incumbent upon them to establish the invalidating facts by definite and convincing proof."

The claims and exceptions of the company to the apportionment of expenses between freight and passenger service are overruled, and the sum of \$883,186.45 is adopted as the amount of expenses attributable to passenger traffic. This does not include the taxes. \$61,774.37 were assigned to the passenger traffic on this account, to which no objection is now made. The total expense assignable to the passenger traffic is therefore \$944,960.82.

The master divided the expense between interstate and intrastate passenger service on the passenger mile basis, and made no allowance for extra cost of doing the local business. For reasons given in the *Minnesota Rate Cases*, the *Missouri Rate Cases*, and the case of *Allen v. St. Louis Railway Company*, the objections of the company to this method are overruled, and the sum of \$504,652.74 is adopted as the expense for that service. To this is to be added \$35,297.88 on account

of taxes assigned to intrastate passenger traffic, making a total of expenses for that traffic of \$539,950.62.

Division of Earnings.

The earnings of the passenger traffic are found to be \$1,461,669.22. Of this amount the master assigned to intrastate passenger traffic \$869,416.14. No objection is made in the briefs to this assignment, and it is adopted as the total earnings of the intrastate passenger traffic. The total earnings of the intrastate passenger traffic being then \$869,416.14, and the total expense of the intrastate passenger traffic being \$539,950.62, the net income for that traffic for the year 1908 was \$329,465.52.

Assignment of Value to Passenger Traffic and to Intrastate Passenger Traffic.

This was assigned to the passenger traffic on the expense basis, the master refusing to follow the prior rulings in this circuit which adopted the gross earnings basis. No objection is now made in the briefs to this expense method. The master found the proportion of passenger expense to total expense to be 35.38. Upon his total valuation of \$20,000,000 he determined the value of the property used in the passenger service to be \$7,076,000. But the total valuation has been raised to \$20,236,675, and upon the percentage of 35.38 the value of the property assignable to the passenger traffic is \$7,159,735.61, which is hereby determined to be the value of the property of the company used in the passenger traffic. The master then apportioned his valuation between the intrastate and the interstate passenger business on the expense basis; that is, the proportion which the intrastate expense bore to the whole passenger expense. This he determined to be 57.14 per cent. 57.14 per cent. of the value assigned to passenger traffic gives \$4,091,092 as the value assigned to intrastate passenger traffic.

The value of the property used in intrastate passenger business being \$4,091,092, and the net income from intrastate passenger traffic being \$329,465.52, it results that the return to the company upon this investment was .0805.

Table 4 made by the master to show the return to the company at the rate of $2\frac{1}{2}$ cents and at the rate of 2 cents, which table is attached hereto,¹ contains the same figures as that showing the return at 3 cents, except that the operating revenue item is changed, with the necessary change in the net income. With the changes in his $2\frac{1}{2}$ -cent table made necessary by the elimination of the outside income, the net profit at the rate of $2\frac{1}{2}$ cents will be \$236,689.44. This upon a valuation of \$4,091,092 would give a return of .05785. At the 2-cent rate, making the same deduction from the net income, we have a net profit of \$133,015.84. This upon the valuation of \$4,091,092 would produce a return of .0325.

In the Minnesota Rate Cases the rate attacked produced in the case of the Minneapolis & St. Louis Railroad Company in 1907, 4.14 per cent. on the estimated value of the property, in 1908 less than 3.5 per cent., and in 1909 less than 3.7 per cent. As in this case the rate of

¹ See table at end of case.

2 cents would produce $3\frac{1}{4}$ per cent. it is, on the authority of that case, held as to this company to be confiscatory. The result is that the act of the Legislature of 1909 fixing the rate of 2 cents per mile is as to the Chicago & Northwestern Railway Company void, and a decree should be entered for the relief demanded in the supplemental bill of Smith.

[2] As to the rate of $2\frac{1}{2}$ cents attacked by the original bill, it appears that the return would be 5.785 per cent., not far from 6 per cent. But even if a fair return should be fixed at 7 per cent., is the evidence sufficiently definite so that the court can say with certainty that the return, if the rate were put in force, would not be more than 5.785 per cent.?

In the case of *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, at page 42, 29 Sup. Ct. 192, at page 196 (53 L. Ed. 382, 15 Ann. Cas. 1034), the court said:

"Of course, there may be cases where the rate is so low, upon any reasonable basis of valuation, that there can be no just doubt as to its confiscatory nature, and in that event there should be no hesitation in so deciding and in enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate. But where the rate complained of shows in any event a very narrow line of division between possible confiscation and proper regulation, as based upon the value of the property found by the court below, and the division depends upon opinions as to value, which differ considerably among the witnesses, and also upon the results in the future of operating under the rate objected to, so that the material fact of value is left in much doubt, a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating, as far as is possible, the doubt arising from opinions as opposed to facts."

No one can read the evidence in a case of this character without being impressed with the fact that it lacks in many particulars that certainty which ought to be found when upon it a court is asked to base its decision that a law of the state is unconstitutional and void. In the matter of assigning the expenses between the freight and passenger departments, in the matter of assigning values between these departments, there is room for a large difference of opinion as to the methods to be adopted; and though in many instances, if not in most, the rulings of the master were against the company, yet even then, where the difference between the return which the evidence shows the railroad company did receive and a fair one, say 7 per cent., is so small, I do not think that it can be said that a rate of $2\frac{1}{2}$ cents, if it were put in force, would be confiscatory.

The original bill should therefore be dismissed. No costs will be taxed for or against any party to either the bill or the supplemental bill. Let a decree be entered accordingly.

The decree, so far as the supplemental bill is concerned, should contain a provision to the effect that the Railroad Commission and the Attorney General of the state may apply at any time to the court by bill or otherwise, as they may be advised, for a further order or decree, whenever it shall appear that, by reason of a change in circumstances, the rates fixed by the state's acts and orders are sufficient to yield to the company reasonable compensation for the services rendered.

TABLE 4

Chicago & Northwestern Railway Co. Lines in South Dakota.
Results for the year ending June 30, 1908, as found by the Special Master.

At Three Cents per Mile.	Total State Traffic	So. Dak. % of Expense of System.	Total Freight Traffic.	Freight % of State Traffic.	Intrastate			Interstate			Interstate Traffic	Interstate % of In- tra and Interstate Passenger Traffic.
					Intrastate	Interstate	Miscellan's	Intrastate	Interstate	Miscellan's		
					\$715,872.10	477,081.62	262,160.62	\$715,872.10	149,798.58	57.14	\$477,081.62	42.86
											149,798.58	
					1,455,114.34			865,670.68			589,443.66	
Operating revenue \$ 3,060,845.93			\$ 1,605,731.59									
Rentals and joint facilities	5,552.96		1,001.92*		6,554.88			3,745.46	57.14		2,809.42	42.86
Outside income	130,890.54	5.9949	84,581.47	64.62	46,309.07	35.33		26,461.00	57.14		19,848.07	42.86
Total income	3,197,289.43		1,689,311.14		1,507,978.29			895,877.14			612,101.15	
Operating expenses	2,496,428.53	5.9949	1,613,242.08	64.62	883,186.45	35.33		504,652.74	57.14		378,533.71	42.86
Taxes	174,602.51		112,828.14	64.62	61,774.37	35.33		35,297.88	57.14		26,476.49	
Total expenses	2,671,031.04		1,726,070.22		944,960.82			539,950.62			405,010.20	
Net income	556,258.39		36,759.08*		563,017.47			355,926.52			207,090.95	
Valuation	20,000,000.00		12,924,000.00	64.62	7,076,000.00	35.33		4,043,226.40	57.14		3,032,773.60	42.86
Percentage of net income to valuation	2.63%		28%*		7.95%			8.80%			6.82%	
<hr/>												
At Two and One-Half Cents per Mile.					Intrastate	Interstate	Miscellan's	Intrastate	Interstate	Miscellan's		
					\$623,096.02	415,864.46	262,160.62	\$623,096.02	149,798.58	57.14	\$415,864.46	42.86
											149,798.58	
					1,301,121.10			772,894.60			528,226.50	
Operating revenue \$ 2,906,852.69			\$ 1,605,731.59									
Rentals and joint facilities	5,552.96		1,001.92*		6,554.88			3,745.46	57.14		2,809.42	42.86
Outside income	130,890.54	5.9949	84,581.47	64.62	46,309.07	35.33		26,461.00	57.14		19,848.07	42.86
Total income	3,043,296.19		1,689,311.14		1,353,985.05			803,101.06			550,883.99	

Operating expenses	2,496,428.53	5.9949	1,613,242.08	64.62	883,186.45	35.33	504,652.74	57.14	878,533.71	42.86
Taxes	174,602.51		112,828.14	64.62	61,774.37	35.33	35,297.88	57.14	26,476.49	42.86
Total expenses	2,671,031.04		1,726,070.22		944,960.82		539,950.62		405,010.20	
Net income	872,265.15		36,759.08*		409,024.23		263,150.44		145,873.79	
Valuation	20,000,000.00		12,924,000.00	64.62	7,076,000.00	35.33	4,043,226.40	57.14	3,032,773.60	42.86
Percentage of Net income to valuation	1.86%		28%*		5.78%		6.50%		4.81%	

At Two Cents Per Mile			Intrastate Interstate Miscellan's	\$519,422.42 342,163.86 262,160.62		Intrastate Miscellan's	\$519,422.42 149,798.58		Interstate Miscellan's	\$342,163.86 112,362.04	42.86
Operating revenue	\$ 2,729,478.49	\$ 1,605,731.59		1,123,746.90			669,221.00			454,525.90	
Rentals and joint facilities	5,552.96	1,001.92*		6,554.88			3,745.46	57.14		2,809.42	42.86
Outside income	130,890.54	84,531.47	5.9949	43,309.07	35.33		26,461.00	57.14		19,848.07	42.86
Total income	2,865,921.99	1,689,311.14		1,176,610.85			699,427.46	57.14		477,183.39	
Operating expenses	2,496,428.53	1,613,242.08	5.9949	883,186.45	35.33		504,652.74	57.14		378,533.71	42.86
Taxes	174,602.51	112,828.14	64.62	61,774.37	35.33		35,297.88	57.14		26,476.49	42.86
Total expenses	2,671,031.04	1,726,070.22		944,960.82			539,950.62			405,010.20	
Net income	194,890.95	36,759.06*		231,650.03			159,476.84			72,173.19	
Valuation	20,000,000.00	12,924,000.00	64.62	7,076,000.00	35.33		4,043,226.40			3,032,773.60	42.86
Percentage of net income to valua- tion	.97%	.28*		3.27%			3.94%			2.38%	

Note: Figures to which a * is appended indicate a deficit.

In re FOSTER PAINT & VARNISH CO.

(District Court, E. D. Pennsylvania. February 3, 1914.)

No. 5049.

1. BANKRUPTCY (§ 44*)—CORPORATIONS—FILING PETITION—AUTHORITY.

Directors of a Pennsylvania corporation, without special authority from stockholders, have power to authorize the filing of a petition to have the corporation declared a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 43-46; Dec. Dig. § 44.*]

2. BANKRUPTCY (§ 43*)—CORPORATION—VOLUNTARY PETITION—INSOLVENCY.

Insolvency is not a necessary prerequisite to the filing of a voluntary petition for bankruptcy adjudication against a corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 38; Dec. Dig. § 43.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Foster Paint & Varnish Company. On a petition to vacate the adjudication. Denied, and petition dismissed.

C. Oscar Beasley, of Philadelphia, Pa., for petitioner.

Rudolph M. Schick, of Philadelphia, Pa., for bankrupt company.

THOMPSON, District Judge. A petition in voluntary bankruptcy was filed January 15, 1914, by the Foster Paint & Varnish Company, a corporation chartered under the laws of Pennsylvania, admitting its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground. The petition was filed by the president and secretary of the corporation under authority of a resolution of its board of directors adopted at a special meeting duly called and held on January 12, 1914. The petition to vacate is based upon the ground that the filing of the petition was not authorized by the stockholders at a stockholders' meeting.

[1] It is contended on behalf of the petitioner that the directors of a Pennsylvania corporation have no such general power over the affairs of the corporation or over the disposition of its property as to empower them to authorize the filing of a petition in bankruptcy without authority from the stockholders.

As is said in "Collier," p. 123:

"In the absence of special provisions in the bankruptcy act, reference must be made to the state statutes, controlling the authority of officers and directors of corporations to dispose of the property of the corporation for the benefit of its creditors."

It must be conceded that, if the directors of the corporation have power to make a general assignment for the benefit of creditors without authority from the stockholders, they have equal power to file the petition in bankruptcy.

It is well settled that a corporation of Pennsylvania has this power.

"Corporations, unless expressly restrained by the act which establishes them or some other act of Assembly, have and always have had an unlimited power over their respective properties, and may alienate and dispose of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

time as fully as any individual may do in respect to his own property. Hence an insolvent corporation may make a general assignment for the benefit of its creditors, and this power may be exercised by the directors, unless special provision to the contrary is made in the charter." *Dana v. Bank of the United States*, 5 Watts & S. (Pa.) 223; *Ardesco Oil Co. v. North American Oil & Mining Co.*, 66 Pa. 375.

As was said by Judge Willard in *Matter of Kenwood Ice Co.* (D. C.) 26 Am. Bankr. Rep. 499, 189 Fed. 525:

"A board of directors ought to have power to put the company into bankruptcy. They have care of the general business of the corporation. They are the persons who know whether the corporation is able to go on or not. It might very well happen that under the articles and by-laws of the corporation it would be impossible to hold a meeting of the stockholders for months. Under these circumstances, the bankruptcy of the corporation might be delayed so long that in many cases the purposes of the bankrupt law would be defeated and preferences given. I am satisfied that a board of directors, at a duly called meeting has the power to put the corporation into bankruptcy."

[2] The petitioner denies the insolvency of the corporation. There is nothing in the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) which requires a voluntary petitioner to be insolvent.

The petition to vacate is dismissed.

J. E. DAVIS MFG. CO. v. FIREMEN'S FUND INS. CO. et al.

(District Court, N. D. New York. February 5, 1914.)

1. INSURANCE (§ 572*)—FIRE LOSS—ADJUSTMENT—PROCEEDINGS BEFORE APPRAISERS.

While a proceeding by appraisers and an umpire to adjust a fire insurance loss need not be conducted with the formalities of a trial in a court of law or equity, there must, nevertheless, be a fair effort on the part of the appraisers and umpire to ascertain the truth, and a consideration of available evidence and information, and a deliberate judgment of those making the award after due consultation and deliberation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1422, 1423, 1427, 1429; Dec. Dig. § 572.*]

2. INSURANCE (§ 574*)—ADJUSTMENT OF LOSS—APPRAISERS—DUTY OF APPRAISER.

Appraisers as well as an umpire appointed to determine an insurance loss should not only be competent but fair and unprejudiced as between the parties to the award, and a refusal or willful neglect of an appraiser or umpire to listen to and consider material sworn statements presented is evidence of bias and interest.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.*]

3. INSURANCE (§ 572*)—DETERMINATION OF LOSS—APPRAISAL.

Where appraisers and an umpire are appointed to determine an insurance loss, it is the duty of the appraisers to consult, and, if they cannot agree, to call in the umpire, whose function is to deliberate with them; it being improper for one or two to consider evidence not submitted to the other or others.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1422, 1423, 1427, 1429; Dec. Dig. § 572.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. INSURANCE (§ 574*)—LOSS—ADJUSTMENT—APPRAISAL—INVALIDITY.

Where the appraisers and an umpire appointed by an insurance company to adjust a loss were not impartial and signed an award for an amount much less than the actual loss, after having refused to consider relevant evidence on such subject, the award would be set aside for fraud.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.*]

In Equity. Suit by the J. E. Davis Manufacturing Company against the Firemen's Fund Insurance Company and others to set aside and declare void a certain award of appraisers in proceedings to adjust a fire insurance loss. Decree for complainant.

Davis & Lusk, of Cortland, N. Y., for complainant.

White, Cheney, Shinaman & O'Neill, of Syracuse, N. Y., for defendant Firemen's Fund Ins. Co.

RAY, District Judge. The salient facts may be stated as follows:

1. "That the plaintiff, J. E. Davis Manufacturing Company, is a business corporation duly organized and existing under the laws of the state of New York, having its office and principal place of business in the city of Cortland, state of New York, and is a citizen and resides within said state of New York and within the judicial district of the United States known as the Northern district of New York."

2. "That the defendant Firemen's Fund Insurance Company is a corporation duly organized and existing under the laws of the state of California, having its principal place of business at San Francisco in said state, and at all the times mentioned in the bill of equity herein and at the time of the commencement of this suit was a resident and citizen of the state of California and at all times in said bill mentioned, and at the time of the commencement of this suit, was doing business within the state of New York, having duly complied with all of the requirements of the law of said state relative to the transaction of business therein, and was at all times in said bill mentioned, and at the time of the commencement of this suit, authorized to do business within the state of New York."

3. "That the defendant the First National Bank of Cortland is a corporation duly organized and existing under the laws of the United States, and having its principal place of business in the city of Cortland in the state of New York, and at the time of the commencement of this suit was a citizen of and resided in said state of New York, and within the judicial district of the United States known as the Northern district of New York. That the defendant the National Bank of Cortland is a corporation duly organized and existing under the laws of the United States, having its principal place of business at the city of Cortland in the state of New York, and was at the time of the commencement of this suit a citizen of and resided in said state of New York, and within the judicial district of the United States known as the Northern district of New York. That the defendant Grace L. Mix, at the time of the commencement of this suit, was a citizen of the state of New York and resided in the city of Cortland in said state and within the judicial district of the United States known as the Northern district of New York. That the defendant John A. Wavle was at the time of the commencement of this suit a citizen of the state of New York and resided in the city of Cortland in said state, and within the judicial district of the United States known as the Northern district of New York. That the defendant Linus W. Peck, at the time of the commencement of this suit, was a citizen of the state of New York and resided in the city of Cortland in said state and within the judicial district of the United States known as the Northern district of New York. That the defendant Frank Begent was, at the time of the commencement of this suit, a citizen of the state of New York, and resided in the village of Groton

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in said state and within the judicial district of the United States known as the Northern district of New York. That the defendants herein the First National Bank of Cortland, the National Bank of Cortland, Grace L. Mix, John A. Wavle, Linus W. Peck, and Frank Begent are each jointly interested with the plaintiff in the maintenance of this suit. That upon bringing this suit the plaintiff duly requested each of the said defendants to join as coplaintiffs herein, and that each of said defendants refused so to do, and that the consent of none of the said defendants could be obtained to appear as plaintiffs in this suit."

4. The matter in suit, exclusive of interest and costs, exceeds the sum of \$3,000.

5. "That this suit is brought in aid of and as ancillary to an action at law now pending in this court between this plaintiff and these defendants to recover upon the policy of insurance hereinafter mentioned."

6. "That in and by its certain policy of insurance No. B-228343, duly signed by the president and secretary of said insurance company, and countersigned by the duly authorized agent of said company at the city of Cortland, N. Y., on or about the 15th day of September, 1911, which said policy of insurance was on or about that day delivered to the plaintiff herein by the defendant Firemen's Fund Insurance Company, in consideration of the sum of \$68 to it then paid by said J. E. Davis Manufacturing Company, did insure the said J. E. Davis Manufacturing Company against loss or damage by fire to the amount of \$8,000 on its property mentioned and described in said policy of insurance. That the said Firemen's Fund Insurance Company in and by said policy of insurance did promise and agree to pay and make good unto said J. E. Davis Manufacturing Company as coinsurer, under a full coinsurance clause as set forth in said policy of insurance, all such loss or damage not exceeding in amount the said sum of \$8,000, as should happen by fire to the property as therein specified, during the term of one year from the 15th day of September, 1911; such loss to be paid within 60 days after notice and satisfactory proof of said loss as in said policy provided."

7. "That on or about the 5th day of April, 1912, and while said contract of insurance was remaining in full force and effect, the buildings, additions, and attachments thereto, a concrete lumber shed, dry kilns, and contents of the same, also the contents of a car situate at the corner of East Court and Pendleton streets in the city of Cortland aforesaid, including office furniture, fixtures, and supplies, being the same property mentioned and described in said policy of insurance, and all the property upon the said premises was destroyed by fire, excepting a small quantity of veneer, some office furniture, and the boilers on said premises. That said fire did not occur from any of the causes excepted in said policy of insurance, and none of said property so destroyed was of the kind for the loss of which said defendant Firemen's Fund Insurance Company was exempted from liability under said policy."

8. "That at the time of said fire and loss, the J. E. Davis Manufacturing Company had, in addition to the said policy of insurance issued by the defendant Firemen's Fund Insurance Company, no other insurance either valid or invalid, nor by solvent or insolvent insurers, excepting 35 certain policies of insurance which were in full force and effect to the amount of \$207,750; said policies covering the same property covered by said policy above mentioned and described."

9. "That the defendants the First National Bank of Cortland and the National Bank of Cortland are the owners and holders of bonds, secured by a trust mortgage covering a part of the real property mentioned and described in said policy of insurance. That each of the defendants Grace L. Mix, John A. Wavle, Linus W. Peck, and Frank Begent is the owner and holder of a bond secured by a mortgage covering a part of the real property mentioned and described in said policy of insurance. That under the terms of said policy of insurance issued by said defendant to said J. E. Davis Manufacturing Company loss on real estate was payable to the said defendants, the First National Bank of Cortland, the National Bank of Cortland, Grace L. Mix, John A. Wavle, Linus W. Peck, and Frank Begent, as their respective interest might appear."

10. "That the plaintiff, J. E. Davis Manufacturing Company, was at the time of the issuance of said policy and at the time of said fire and is the owner in fee simple of all of the said real estate in said policy described, and the unconditional and sole owner of all of the real estate and personal property covered by the said policy of insurance, except such personal property as was held by the said J. E. Davis Manufacturing Company in trust or on commission, sold but not delivered, as mentioned and provided in and by said policy of insurance."

11. "That said defendant Firemen's Fund Insurance Company failed to pay such loss, or any part thereof."

12. "That on or about the 18th day of November, 1912, the J. E. Davis Manufacturing Company, the plaintiff in this suit, commenced an action at law in the Supreme Court of the state of New York, in the county of Cortland aforesaid, against the same parties who are defendants in this suit; the purpose of said action being to recover judgment against the Firemen's Fund Insurance Company for the sum of \$7,978.32, with interest thereon from the 7th day of July, 1912, then claimed to be due, owing, and payable to this plaintiff from said defendant insurance company. That thereafter, upon motion of the defendant Firemen's Fund Insurance Company, said action was removed from the Supreme Court of the state of New York to the District Court of the United States for the Northern District of New York upon the ground that said action involved a controversy between citizens of different states; the matter in dispute between said parties exceeding, exclusive of interest and costs, the sum of \$3,000. That thereafter and on or about the 17th day of January, 1913, the said defendant Firemen's Fund Insurance Company filed its answer in the District Court of the United States for the Northern District of New York. The issues raised thereby are now pending undetermined on the law side in said District Court. That in and by the answer interposed by said defendant Firemen's Fund Insurance Company, in said action at law, so removed from the Supreme Court of the state of New York to the District Court of the United States for the Northern District of New York, the said defendant insurance company set up and pleaded as partial defense thereto that under and pursuant to the terms of said policy an appraisal had been entered into for the purpose of determining the amount of loss sustained by said J. E. Davis Manufacturing Company by reason of said fire, and that under said appraisal an award in writing had been made, fixing the sound value of the property insured on the 5th day of April, 1912, at the sum of \$157,474.04, and the actual damage thereto by fire on that day to be the sum of \$152,625.05; and the said defendant insurance company further alleged that the proportion of said loss for which said defendant would be liable under said policy, if liable at all, was the sum of \$5,659.34, and that in no event could a recovery be had against said defendant by reason of said policy for a greater sum. That under the law, practice, and procedure which was at the time of the beginning of said action at law in the Supreme Court of the state of New York, at the time of the removal thereof to the District Court of the United States for the Northern District of New York, and now is in force and effect in said state of New York, the plaintiff in said action at law so brought upon said policy of insurance might attack, controvert, and set aside the purported award so pleaded by the defendant Firemen's Fund Insurance Company, as a defense thereto, and the Supreme Court of that state in such law action might decree and adjudge, and a jury might find, that the award so pleaded as a defense was in fact invalid, ineffective, fraudulent, and void. That under the law, practice, and procedure which was at the time of the removal of said action at law from the Supreme Court of the state of New York to the District Court of the United States for the Northern District of New York, and still is in force and effect in the District Court of the United States, including the District Court for the Northern District of New York, the plaintiff in said action at law so brought upon said policy of insurance cannot attack, controvert, or set aside the award so pleaded by said defendant insurance company; nor can the District Court in said law action decree or adjudge, nor can a jury find, that the award so pleaded is invalid, ineffective, fraudulent, or void. But the said award is binding and conclusive upon this

plaintiff in said law action until the same shall be canceled or set aside at the suit of this plaintiff in a court of equity."

13. "That after the fire hereinbefore mentioned and referred to, the defendant Firemen's Fund Insurance Company, by its agent duly authorized, notified the plaintiff that it claimed the right under said policy to have the loss or damage to the buildings and machinery destroyed by said fire appraised by appraisers. That the J. E. Davis Manufacturing Company thereupon refused to agree to an appraisal of part only of the property destroyed by said fire, and thereupon demanded that the said Firemen's Fund Insurance Company, under the provisions of said policy, should have the entire loss or damage to such property by said fire appraised by appraisers, and thereafter the said Firemen's Fund Insurance Company, with the other insurance companies having issued insurance policies covering said property, designated one Thomas Fleming as one of the appraisers, and the plaintiff, J. E. Davis Manufacturing Company, designated one Henry Stultz as one of said appraisers, and thereupon an instrument in writing was made and subscribed by the Firemen's Fund Insurance Company by its aforesaid agent and the other insurance companies aforesaid, and this plaintiff, dated the 24th day of June, 1912, which instrument was as follows:

"Agreement for Appraisal.

"This agreement by and between J. E. Davis Mfg. Co., of the first part, and the Insurance Company, or Companies, whose names are signed hereto, each for itself and not jointly, of the second part, witnesseth:

"That whereas, the party of the first part claims to have sustained a loss by fire occurring on the 5th day of April, 1912, to and upon the following described property, to wit:

"J. E. Davis Manufacturing Co.

"\$. On brick metal-roofed building, additions and attachments thereto (excluding smokestack, also foundations below level of ground), and on concrete lumber shed, concrete and frame metal-roofed dry kiln, and contents of same. Also contents of trucks or cars, and lumber in yard or streets adjoining, situate corner of East Court and Pendleton streets, Cortland, N. Y. It is understood, and agreed that part of dry kiln is on land owned by the D. L. & W. R. R. Co.

"It is understood and agreed that the word contents in this form shall cover office furniture, fixtures and supplies, and all property, its own, or held by them in trust or on commission, sold but not delivered, and this company shall be liable therefor; but the word contents shall not cover any articles excepted in line 38 of the Standard policy of the State of New York.

"And whereas, a disagreement has arisen between the parties hereto, as to the amount of such loss, and

"Whereas, it is provided by the policy (or policies) of said party (or parties) of the second part, held by said party of the first, that in the event of disagreement as to the amount of loss the same shall, as in said policy (or policies) provided be ascertained by appraisers.

"Therefore this agreement witnesseth: That in conformity to the terms and conditions of the policy (or policies) of the party (or parties) of the second part, Henry Stultz and Thomas Fleming have been selected, and are merely appointed appraisers, to estimate and appraise, in accordance with the terms and conditions of said policy (or policies), the sound value of said property and the amount of loss or damage directly caused by said fire to and upon the same.

"The said appraisers shall first select a competent and disinterested umpire, as provided by said policy (or policies); the said two appraisers together shall then estimate and appraise the loss in conformity to the conditions of said policy (or policies) stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss. Such loss or damage shall be ascertained or estimated according to the actual cash value of said property at the time of the occurrence of said fire, with proper deduc-

tion for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality, but such appraisalment does not in any respect waive any of the provisions or conditions of said policy (or policies) of insurance, or any forfeiture thereof, or the proof of such loss and damage required by the policy (or policies) of insurance thereon.

"Witness our hands in duplicate at Cortland, N. Y., this 24th day of June, 1912.

"J. E. Davis Mfg. Co.,

"Per J. E. Davis, Pres.

"Northern Assur. Co. of London; Security Ins. Co. of New Haven; Rhode Island Ins. Co. of Providence; Nationale Fire Ins. Co. of Paris; Globe Under. Agency Globe & Rutgers Ins. Co.; Globe & Rutgers Fire Ins. Co.; Ins. Co. of North America, Philadelphia; Firemen's Ins. Co. of Newark, N. J.; Pittsburg Underwriters of Pittsburg; Delaware Ins. Co. of Philadelphia; Atlas Assurance Co. of England; California Ins. Co. of San Francisco; Firemen's Fund Ins. Co. of San Francisco; City of New York Ins. Co.; Scottish Union & National Ins. Co.; Svea Fire & Life Ins. Co.; Commercial Union Assur. Co.; Michigan Fire & Marine Ins. Co.,

"By Harvey W. Russ, Adjuster for Each.

"North River Fire Ins. Co. of N. Y.; National Ben Franklin Ins. Co.; Stuyvesant Ins. Co. N. Y.,

"By James H. Andrews, Adjuster for Each, per Harvey W. Russ.

"North British & Mercantile Ins. Co.,

"By F. W. Kentner, S/A., per Harvey W. Russ.

"North Western National Ins. Co.,

"By John K. Sharkey, S/A., per Harvey W. Russ.

"Norwich Union Assur. Co. of Eng.,

"By C. F. Gant, S/A., per Harvey W. Russ.

"Mechanics' & Traders' Ins. Co. of N. O.,

"By Clarence Rich, S/A., per Harvey W. Russ.

"Allemania Fire Ins. Co. of Pittsburgh; New Jersey Fire Ins. Co. of N. J.,

"By Geo. Berry, S/A., per Harvey W. Russ."

"That on the 24th day of June, 1912, the said appraisers at the city of Cortland, N. Y., signed and swore to a declaration of appraisers as follows:

"Declaration of Appraisers.

"State of New York, County of Cortland—ss.:

"We, the undersigned, do solemnly swear that we will act with strict impartiality in making an appraisalment and estimate of the sound value and loss and damage upon the property hereinbefore mentioned, in accordance with the foregoing appointment, and that we will make a true, just and conscientious award of same, according to the best of our knowledge, skill and judgment. We are not related to the assured, either as creditors or otherwise, and are not interested in said property or the insurance thereon."

"That on said 24th day of June in the city of Cortland, N. Y., the said appraisers did enter into and sign a selection of umpire which read as follows:

"Selection of Umpire.

"We, the undersigned, hereby select and appoint David Nicholson of Syracuse, New York, to act as umpire to settle matters of difference that shall exist between us, if any, by reason of and in compliance with the foregoing agreement and appointment."

"That on the 9th day of July, 1912, at the city of Cortland, N. Y., the said David W. Nicholson, selected as aforesaid, signed and swore to a qualification of umpire as follows:

"Qualification of Umpire.

"State of New York, County of Cortland—ss.:

"I, the undersigned, hereby accept the appointment of umpire, as provided in the foregoing agreement, and solemnly swear that I will act with strict

impartiality in all matters of difference that shall be submitted to me in connection with this appointment, and I will make a true, just and conscientious award, according to the best of my knowledge, skill and judgment. I am not related to any of the parties to this agreement, nor interested as a creditor or otherwise in said property or insurance.'

"That on the 29th day of August, 1912, at the City of Syracuse, New York, the said Thomas Fleming, appraiser, and the said David W. Nicholson, umpire, signed an award as follows:

"Award.

"We, the undersigned, pursuant to the within appointment, do hereby certify that we have truly and conscientiously performed the duties assigned us, agreeably to the foregoing stipulations, and have appraised and determined and do hereby award as the sound value of said property on the 5th day of April, 1912, and the actual damage thereto by the fire on that day, the following sums, to wit:

	Sound Value	Loss and damage
1st item.....	\$157,474.04	\$152,625.05'

14. "That the plaintiff duly served all notices of loss and all signed and sworn statements and proofs of loss provided for by said policy of insurance, and that the defendant Firemen's Fund Insurance Company waived the service of any additional statements and notice required by said policy of insurance, and that the plaintiff duly complied with all of the requirements of said policy in reference to notices, claims, and proofs of loss, and all conditions precedent to bringing a suit or action on said policy. That more than 191 days elapsed after the delivery and service by the plaintiff upon the defendant Firemen's Fund Insurance Company of the proofs of loss and statement provided for under said policy, and before the commencement of this action, and that twelve months had not elapsed after said fire before the commencement of an action at law upon said policy."

15. The said award of \$152,625.05, made and signed by Fleming and Nicholson, is inadequate in a large amount, as the value of said property insured and so destroyed by said fire was greatly and materially in excess of the said amount so fixed by said award.

16. The evidence is quite conclusive and satisfactory, and I must find that the appraiser selected by the defendant Firemen's Fund Insurance Company was not a competent and disinterested appraiser, and that the umpire so selected by the said appraisers was not a competent and a disinterested umpire, and the selection of such umpire was secured and brought about by acts and conduct on the part of said Fleming and one Charles H. Phillips amounting to fraud and was done collusively for the purpose of securing an umpire who was interested and biased in favor of the said insurance companies, and who was, in fact, biased and interested (nor financially interested) in favor of said insurance companies, and that the acts and conduct of said appraiser, Thomas Fleming, throughout the appraisal and proceedings connected therewith and upon the making of the award, indicated and showed a purpose to defraud the plaintiff by purposely and consciously bringing about and securing an appraisal and award grossly inadequate and largely less than the actual and bona fide loss by reason of such fire and which he succeeded in doing. In this the umpire, David Nicholson, was either a willing and a designing party, or so grossly negligent and disregardful of his duty to the parties interested that his conduct amounted and amounts to fraud in its results, and such award so made by said Fleming and Nicholson was in its effect and results a fraud upon the plaintiff, and that such award so made dated August 29, 1912, the award set up and pleaded in the law action before referred to, must be held invalid, ineffective, fraudulent, and void, and not binding on the J. E. Davis Manufacturing Company.

The insurance, in the aggregate, was large, but the business was large and the plant a large one. There was a large stock on hand, and it was and is impossible to arrive at the exact value of such stock.

There was a large amount of raw material, that is, sawed lumber upon which no further labor had been expended, but the greater part was in various stages of manufacture and a large amount was ready for delivery, that is, completed so far as the J. E. Davis Manufacturing Company completed such work. Many, and perhaps most, of the papers of said company were destroyed in the fire and to get at the actual loss, with any reasonable certainty great care on the part of the appraisers and umpire was demanded and was the right of the insured. The situation was such as to demand the careful scrutiny of such appraisers and of the umpire, but it also demanded of them the securing and consideration of the best obtainable evidence. They had no right to assume a fraud or a false or an excessive claim of loss. There was no presumption on the face of the proofs of loss, made out in great detail, that the claim was excessive. They had no right unbiased and unprejudiced, to start in as they did with the assumption and declaration that they did not believe the J. E. Davis Manufacturing Company had sustained the loss claimed; that they did not believe it had, at the time of the fire, the amount of property or stock on hand, set out in the proofs of loss. At least, it was the duty of each of the appraisers and of the umpire to carefully consider the sworn statements and other evidence offered and submitted for their consideration. The defendant insurance company secured the services of an unsworn person who, acting as its agent, prepared a report as to the loss which was based in part on an assumed profit, not based on any proof of fact or facts and which, in fact, was erroneous, and this report contained material errors and was materially misleading and gave values of material and stock on hand and destroyed in the fire at much less than their actual value. This agent of the insurance company acted upon insufficient evidence and ignored information at hand and available, but, nevertheless, the said Fleming, without making investigation as to the accuracy and reliability of such report, and utterly disregarding sworn statements as to the amount and value of such stock and material, accepted and acted upon such report. The evidence is convincing that Fleming without evidence assumed from the very beginning that the proofs of loss and claims of the insured were grossly exaggerated and fraudulent and adhered to that assumption, declining to examine into the facts and make an honest effort to ascertain the truth. This report of the agent of the insurance company was not furnished to the appraiser appointed and named by the plaintiff, J. E. Davis Manufacturing Company, for his information and consideration, and was not examined or considered by him. The result was, as to this, that Fleming and Nicholson, Nicholson making no examination or investigation as to the accuracy of such statement made by such agent of the defendant, acted on erroneous information and rejected and refused to consider sworn information offered.

The evidence also discloses that certain material evidence furnished by the plaintiff through its appraiser, Stultz, as to buildings and plumbing and its amount and value was not seen or examined by said Fleming. The evidence shows that these appraisers did not at any time

consider in detail the quantity and value of the property destroyed by the fire, and insured, but, on the other hand, attempted to fix a value in gross without going over the items and attempting to arrive at a fair and just estimate of their quantities and values. The appraisers and umpire did not go over the lists and statements of the property destroyed, furnished, or one of their own, together, and together never considered in any detail the quantity or value of the property destroyed, and the appraisers with the umpire never went over the lists of such property destroyed by said fire for the purpose of attempting to arrive at an award which should be the result of the joint action and deliberations of either such appraisers or of said appraisers and said umpire. At best, the result arrived at by one appraiser and the umpire was arbitrary, and biased and based on unwarranted assumptions and inaccurate and biased information accompanied by a refusal to examine and consider the sworn evidence offered and consult and deliberate together.

[1] It is true that such a proceeding by appraisers and an umpire does not demand the formalities of a trial in a court of law or in equity, but it does demand a fair effort to ascertain the truth and a consideration of available evidence and information and the deliberate judgment of the ones making the award after due consultation and deliberation.

[2] I take it that the appraisers as well as the umpire should be not only competent, but fair and unprejudiced as between the parties to the award and the determination of whose interests are confided to them. In the language of the policy of insurance, the appraiser is to be "disinterested," and this means "fair and unprejudiced." *Bradshaw v. Insurance Co.*, 137 N. Y. 137, 32 N. E. 1055. It is the duty of the appraiser, undoubtedly, to bring out all the facts favorable to the party nominating him; but he is not the agent of the party so naming him. A refusal or willful neglect of the appraiser or umpire to listen to and consider material sworn statements presented is evidence of prejudice, bias, and interest. *Kaiser v. Hamburg-Bremen Fire Ins. Co.*, 59 App. Div. 525, 69 N. Y. Supp. 344, affirmed 172 N. Y. 663, 65 N. E. 1118.

[3] And it was the duty of these appraisers to consult together, and, if they did not agree, to call in the umpire whose function it was to deliberate with them. It was improper for one or two to consider evidence or information not submitted to the other or the others. *New York Mut. Sav. Ass'n v. Manchester Assur. Co.*, 94 App. Div. 104, 87 N. Y. Supp. 1075, where it is said:

"The scheme of appraisal contemplates that the two appraisers shall estimate the amount of the loss, and in case of their disagreement 'their differences' shall be submitted to the umpire. It is not within the purpose of the provision that one appraiser shall present no estimate to his associate appraiser, but confer with the umpire in the absence of and without any notice whatever to the other appraiser."

[4] But this, substantially, is what was done here, and such action barely rose to the dignity of a real conference between Fleming and Nicholson. Each obtained information upon "his own hook," so to

express it, and then each made figures based on his private information, to a large extent, and ignoring the other appraiser proceeded to make an award. Really Fleming was ignorant of the evidence or information on which Nicholson acted, and Nicholson was ignorant of that on which Fleming acted, and Stultz knew little if anything of the real information on which either or both of the others acted. This award was not the result of information furnished to all or considered by all or by any two, or of the joint deliberation of the three or of any two. True two signed the award, and so two agreed in the final result, but it by no means follows that the two would have agreed on that result had they consulted all the evidence and information possessed by each and deliberated thereon.

I think that an examination and consideration of the evidence of Mr. Fleming is conclusive against the fairness and justice of the award made. "Palmer's report" was the report of a gentleman engaged by the insurance companies, and this report was not accurate or based upon full information or correct information. Mr. Palmer was not sworn, and still Mr. Fleming on this trial testified as follows:

"Q. Now, Mr. Fleming, in other words in making your appraisal of stock you gave full credit to Palmer's report and no credit whatever to the sworn proofs of loss and the affidavits presented by the company; that is the substance of it, is it? A. Yes, sir; you are correct."

This witness also said:

"Q. Did you, while you were sitting as an appraiser on this case, did you ever hear of any figures made by Hollister or Lane on this plumbing? A. No, sir.

"Q. So that if the umpire had before him figures on plumbing made by Mr. Hollister and Mr. Lane he had information before him that you never saw upon the appraisal of this loss? A. That is true."

From reading the evidence of Mr. Fleming, it is apparent that he proceeded on the assumption from the very beginning that the quantities of material, etc., set forth in the proofs of loss were wrong, and that the company did not have the amount set forth in the proofs of loss. In short, he failed to give the sworn proofs of loss and the sworn affidavits submitted in support thereof any consideration whatever.

Without going into detail, the evidence also shows that on the prior trial of one of the cases against one of the insurance companies involved in this loss Mr. Fleming made statements almost exactly opposite to the statements made on the trial of this case in important matters. My impression is that he saw the force of the admissions made by him on that trial and sought to avoid their force and effect by changing his evidence on this trial. His explanation was that he did not understand the questions put to him on the former trial, but it seems to me clear that those questions were very plain and unmistakable, and that the answers were equally clear and emphatic. If it be true that Mr. Fleming was unable to understand and comprehend the questions put to him on the other trial, a fair inference may be drawn that he was incompetent to act as an appraiser in this important matter. The questions

referred to were fair, clear, and explicit. It does not appear that the witness was confused or that he could have misunderstood.

My conclusions are that the appraisal made should be set aside, and that the whole matter should be determined before a court and jury.

There will be a judgment setting aside the award accordingly, with costs.

In re METALLIC SPECIALTY MFG. CO.

(District Court, E. D. Pennsylvania. January 23, 1914.)

No. 4189.

BILLS AND NOTES (§ 438*)—DISCHARGE—CANCELLATION OR SURRENDER OF NOTES.

To induce a creditor of a corporation who had issued an attachment against it to withdraw its attachment and contribute a specified amount to enable the corporation to meet its pressing demands, it was agreed that certain other creditors would release their demands, among whom was the president's mother-in-law. At his request, the president's wife obtained her notes from the mother-in-law, stating that the company wanted to show them to a creditor in order to show the amount of the indebtedness to her and that she would bring them back to the mother-in-law as soon as she was through with them. The president, however, produced the notes for cancellation at a meeting of the creditors, and, without any inquiry as to his authority to deliver them for cancellation, though they were not indorsed by the mother-in-law, the signatures were torn off and they were treated as canceled. *Held*, that the notes were not in fact discharged, as the president had no authority to surrender them for cancellation, having obtained them for a specific purpose, and there was no reason for applying the doctrine of estoppel, as the notes on their face showed the president's lack of title.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1277, 1278; Dec. Dig. § 438.*]

In Bankruptcy. Proceeding against the Metallic Specialty Manufacturing Company. On certificate of the referee concerning the claim of Mary Needles. Order of the referee allowing the claim affirmed.

See, also, 193 Fed. 300.

Allen S. Morgan, of Philadelphia, Pa., for claimant.

C. Wilfred Conard, Frederick W. Bauer, and Simpson & Brown, all of Philadelphia, Pa., for trustee.

J. B. McPHERSON, Circuit Judge. This controversy is over a claim made by Mary Needles against the bankrupt upon two promissory notes. The trustee attacked the claim on the ground that the debt had been released and canceled by Mrs. Needles on or about February 4, 1910. The facts will appear by the report of the referee (Edward F. Hoffman, Esq.):

"It appeared that Mrs. Needles was the mother-in-law of Marc Sternberg, the president of the corporation. She had been for years a confirmed invalid, suffering from a rheumatic affliction, which confined her to her room and the use of a rolling chair for moving about in her residence. Her depositions were taken by me at her home, 1815 North Broad street, Philadelphia.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Prior to the loan in question she had derived a fund of some \$17,000 from the sale of real estate, and there is no dispute as to the loan, nor the circumstances under which the notes in question were procured from her, and the occurrences at the meeting I have alluded to.

"The facts are, briefly, as follows: The Metallic Specialty Manufacturing Company was a corporation with a stock issue of \$250,000 divided into shares of the par value of \$25 each. On or about the time that the loan was made, Mrs. Needles was given, as collateral for a loan of \$11,000, 440 shares, or an equivalent to the amount of the loan, taking the stock at par value as collateral security.

"In February, 1910, the Metallic Specialty Manufacturing Company was financially embarrassed. It was being pressed by George S. Rominger for the collection of a claim of \$12,948.32 for loans made by him to the corporation. He had placed the collection of his claim in the hands of Messrs. Simpson & Brown, attorneys, and Frederick W. Bauer, Esq., on behalf of this firm, issued a foreign attachment against the corporation.

"As a result of the legal proceedings, a proposition was made to Rominger that for the purpose of avoiding insolvency of the company several of its creditors should release their demands against the company if Rominger would withdraw his attachment and contribute the amount of \$2,000 to enable the company to meet its pressing demands, the company to give him its notes for the amount of his original demand with an added amount of \$2,000 to be loaned by him. This negotiation with Rominger was conducted on the part of the company by Marc Sternberg, president.

"Of the claims to be released to carry out this negotiation with Rominger it was stipulated in a written agreement that Mrs. Needles should surrender her notes in amount of \$11,000 for cancellation. Mrs. Needles, however, was not on terms with her son-in-law, Marc Sternberg. She did not speak to him or have communication of any kind with him, nor was she informed of the transaction that was contemplated with Rominger.

"Marc Sternberg, who was optimistic as to the future of the company if rescued from its impending insolvency, resorted to a fraud to obtain the notes from his mother-in-law. He asked his wife to obtain the notes from her mother without giving to his wife information as to the purpose for which they were to be procured except that they were to be exhibited at a meeting.

"Mrs. Needles' account of the circumstances under which the notes were procured is as follows:

"My daughter asked me to let her have the notes to take over to the company, so they could show it to Rominger that I was not any larger creditor than \$11,000.

"Q. Did she state who directed her to call upon you?

"(Objected to.)

"A. The company.

"Q. Was anything said at the time about the return of the notes?

"A. She was to bring them back to me just as soon as she was through with them."

"There is not a word in the testimony that shows that the notes were delivered for any other purpose than that of exhibiting them to show the amount of indebtedness.

"I find as a fact that Mrs. Needles delivered the notes for the sole purpose of allowing the notes to be exhibited to show the amount of the company's indebtedness to her, and if any agency was created by delivery of the notes it was limited to authority only to exhibit them to show amount of indebtedness. The notes having been thus obtained by Mrs. Sternberg were placed in the possession of Marc Sternberg, who in turn took them to the meeting arranged to be held on the 4th of February, 1910.

"He reported to the meeting that he produced Mrs. Needles' notes for cancellation in accordance with the negotiation that had been arranged and without any inquiry as to his authority to deliver the notes other than the possession of them, the signatures were torn off the notes, and they were thereby considered as canceled, and Rominger carried out the agreement he had made

as to the cash contribution and the raising of the foreign attachment against the property.

"A few days after she had delivered these notes, Mrs. Needles made inquiry from her daughter as to the return of the notes. She was first met with evasive answers, and finally, Mrs. Needles having threatened legal proceedings to procure the return of the notes, her daughter told her if she would let her have the stock she would give her new notes. Thereupon Mrs. Needles gave the daughter the 440 shares of stock and new notes were given to her in the amounts of the notes that had been previously trusted to the daughter, but nothing was said to her at any time about the agreement with Rominger or the cancellation of the original notes.

"From the facts I have found I cannot see any terms of agency under which the notes were delivered that could enable Sternberg to affect Mrs. Needles' claim on the notes. If agent at all, he was simply an agent for the custody of the notes. They were obtained from Mrs. Needles by a mere trick devised by Marc Sternberg, and perpetrated through the intervention of the daughter, whom she trusted, and through whom they were obtained without any authority from the party giving the transfer to make any other use of the notes except to exhibit them to show the amount of the company's indebtedness.

"Under these circumstances, I do not see that there is any question of agency in the case.

"When the notes were produced at the meeting, it was incumbent upon the parties interested in the negotiation to show that the debt of which the notes were an evidence were properly released. Mere delivery of the notes without establishing the authority of the holder of the notes to deliver them is not a valid delivery for the purpose of canceling the debt. It is not surprising that when Sternberg produced his mother-in-law's notes at the meeting, offering them for cancellation, that it was taken for granted he did so with the sanction of Mrs. Needles; but this assumption was at the risk of those who acted on it, as the mere possession of a paper that does not pass by delivery does not impart authority to release or collect the debt of which it is the evidence.

"It is settled by innumerable cases that the principal is only bound by the extent of the authority he has conferred upon the agent, and if the agent exceeds the authority conferred the action does not bind his principal. See *Ency. of Law, Agency*, p. 986.

"In the case of *Fletcher v. Integrity Trust Co.*, 31 Wkly. Notes Cas. (Pa.) 503, it was held that the agent of a depositor in bank to make a deposit in the possession of a deposit book is not authorized to draw on the deposit, though it was deposited in his name as trustee.

"In the case of *Investment Co. v. Eldridge* [175 Pa. 287, 34 Atl. 629] where the president of a corporation gave false information to a debtor of the corporation as to the value of the stock of the corporation held by the debtor and thus involved the debtor in a loss, in passing upon the effect of these declarations as binding upon the company, Green, J., Supreme Court of Pennsylvania, uses this language: 'It is enough to know that for the wrongful conduct of its president in giving untrue information in the manner proposed to be proved in this case it cannot be that the plaintiff must lose its debt. He had no right to bind the company by any such declarations. He was outside the line of his duty in giving false information, and such action on his part can only be regarded by the law as a transgression of duty and tortious in character.'

"Though the facts in the case quoted are not at all similar to the case in hand, the language is very pertinent.

"The second transaction, the giving of new notes, might have some bearing on the case if Mrs. Needles had been informed of the first transaction; but, having no knowledge whatever of the negotiations with Rominger, the delivery to her of the second notes was simply an attempt at another piece of tortious conduct by Sternberg, which was of no effect. The corporation had just been delivered from immediate insolvency by the contribution of \$2,000, and his attempt to conceal his first wrong committed in delivering up the original notes by claiming that the second notes were for the purchase of the stock at par was an absolutely invalid transaction, but Mrs. Needles, not having made a

surrender of her original notes, had a right at any time to surrender the stock and claim on the debt for which the notes were given, and therefore the second transaction, as she was in ignorance all the time of the Rominger negotiations, did not defeat her right to claim on the original indebtedness.

"I therefore admit her claim in amount as filed, \$12,086.34."

Little need be added to the foregoing report. As will be observed, the case turns on the facts, and these can hardly be described as in dispute. At all events, I think the evidence does not leave them in doubt, and I concur in the referee's findings.

It is clear that Sternberg had no authority from Mrs. Needles to surrender the notes for cancellation. He had obtained possession of them by a trick, but they had been put into his hands for a specific purpose, namely, to be exhibited to Rominger, and then to be returned to Mrs. Needles. She did not indorse them, and he had no title to them, either real or apparent. They were merely in his custody, and they showed his lack of title on their face. No reason exists therefore to apply the doctrine of estoppel, as in the case where the owner indorses a certificate of stock in blank and delivers it to another person who abuses his trust. I agree that *Miller Piano Co. v. Parker*, 155 Pa. 208, 26 Atl. 303, 35 Am. St. Rep. 873, is practically identical with the case at bar. As the Supreme Court of Pennsylvania said:

"Mere possession is at best but evidence, *prima facie*, of ownership of a personal chattel. It is never conclusive of the title. The reason is that it may result from a purchase, a bailment, or a trespass. The general rule is that one cannot make to his vendee a good title to articles that he does not own. If the possession of the seller is that of a bailee or a trespasser, the rule that declares that where one of two innocent persons must suffer loss the loss should fall on him whose act or omission made the loss possible does not apply. A bailment for hire makes it possible for a dishonest bailee to sell the goods to an innocent purchaser, but such a sale will not pass the title of the bailor, for he has done or omitted nothing that should estop him from asserting his ownership of the goods. The contract of bailment made it necessary to give possession of the thing bailed to the bailee for the special and temporary purposes of the bailment, but the title remained in the owner. The fault in such a case is that of the dishonest bailee."

The order of the referee under date of June 17, 1913, allowing the claim of Mary Needles, is affirmed.

PORTLAND RY., LIGHT & POWER CO. V. CITY OF PORTLAND et al.

(District Court, D. Oregon. January 12, 1914.)

No. 6,222.

1. COURTS (§ 282*)—FEDERAL COURTS—JURISDICTION—FEDERAL QUESTIONS.

Where a complaint sought to restrain the enforcement of a city ordinance compelling street railway companies to sell six tickets for 25 cents and alleged that complainant had a franchise authorizing it to charge a five-cent fare; that the ordinance, if enforced, would violate the contract clause of the federal Constitution and would also deprive complainant of its property without due process of law; that the rates prescribed by the ordinance were confiscatory; and that the penalties prescribed by the ordinance were so excessive as to prevent persons affected thereby from resorting to the courts to determine the validity of the ordinance, and thereby deprived complainant of the equal protection of the laws—each of such allegations presented a federal question and was sufficient to confer federal jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-824; Dec. Dig. § 282.*]

2. COURTS (§ 299*)—FEDERAL COURTS—JURISDICTION.

When federal jurisdiction is invoked on the ground that federal questions are involved, jurisdiction depends on the questions presented by the pleadings and not on the ultimate determination thereof.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841; Dec. Dig. § 299.*]

3. COURTS (§ 263*)—FEDERAL COURTS—JURISDICTION—RETENTION.

Where federal jurisdiction has been properly invoked in a suit involving a federal question, the court will retain the case and administer complete relief on other grounds, though the state courts may afford an adequate remedy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 799, 800; Dec. Dig. § 263.*]

4. COURTS (§ 489*)—FEDERAL COURTS—FEDERAL QUESTIONS.

Where a city, in the exercise of certain enumerated state powers delegated to it, transgresses the federal Constitution, the federal courts have jurisdiction to right the wrong, though the act may not have been authorized by the state, or may have been forbidden by the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

5. CONSTITUTIONAL LAW (§ 135*)—CORPORATE FRANCHISE—CONTRACT—REGULATION.

A street railway franchise, providing that the grantee may charge a fare not exceeding five cents per passenger, does not constitute a contract suspending the governmental power of regulation during the life of the franchise.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 380-387; Dec. Dig. § 135.*]

6. CONSTITUTIONAL LAW (§ 247*)—ORDINANCES—STREET RAILWAY RATES—REGULATION—PENALTIES.

Where a city ordinance requiring street railway companies to sell six tickets for 25 cents provided a penalty of a fine of \$100 or 30 days in jail, or both fine and imprisonment, such penalty was not so excessive or unreasonable as to prevent persons affected thereby from resorting to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the courts to determine the validity of the ordinance and for that reason operate to deny equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 703; Dec. Dig. § 247.*]

7. CARRIERS (§ 1*)—STREET RAILROADS—RATES—REGULATION—PUBLIC UTILITY LAW—EFFECT—CITY ORDINANCES.

Since the right to regulate rates of public service corporations is a governmental power vested in the state in its sovereign capacity, the state of Oregon having passed a public utility law (Laws Or. 1911, c. 279) vesting in the State Railroad Commission jurisdiction to supervise and regulate every public utility in the state, giving to such commission exclusive authority to investigate rates charged by public utilities and, if found unreasonable, to fix and order substituted therefor such rates as shall be just and reasonable, and providing that every public utility shall file with the commission schedules of its rates and that no changes shall be made therein except as in the law provided, such act deprived the city of Portland of power to pass an ordinance requiring a street railway company in such city which had filed its rates with the Railroad Commission to sell six tickets for 25 cents after the ordinance took effect.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 2; Dec. Dig. § 1.*]

In Equity. Suit by the Portland Railway, Light & Power Company against the City of Portland to enjoin the enforcement of a city ordinance requiring street railway companies in the city to sell six tickets for 25 cents. On motion to dismiss. Denied. Preliminary injunction granted.

F. V. Holman and Harrison Allen, both of Portland, Or., for plaintiff.

L. E. Latourette, Asst. City Atty., of Portland, Or., for defendants.

BEAN, District Judge. The court has not been able to formulate a written opinion owing to the fact that the last brief in the case was not filed until Friday afternoon. However, I have reached a conclusion in the matter, and in order that there may be no unnecessary delay I feel that I should announce it this morning.

The suit is brought to enjoin the enforcement of an ordinance of the city, adopted November 5, 1913, requiring street railway companies within the city engaged in the transportation of passengers to sell six tickets for 25 cents, and to provide conductors with such tickets for sale whenever demanded by a passenger, upon payment of the price specified. Upon the filing of the bill an order was made requiring the defendant to appear and show cause why a preliminary injunction should not issue. In obedience to this order the defendant appeared and filed a motion to dismiss the complaint on the ground that the court was without jurisdiction and because it does not state facts sufficient to constitute a cause of suit.

[1] Now, the jurisdiction of this court is invoked on several grounds. First, it is alleged that the franchise under which the plaintiff is operating contains a provision that it may charge a fare of five cents, and no more, for each passenger carried, and that such provision constitutes a contract valid during the life of the franchise which cannot be im-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

paired, and therefore the ordinance which undertakes to reduce the fare below five cents is violative of the provisions of section 10 of article 1 of the Constitution of the United States, which inhibits a state from passing any law impairing the obligations of contracts. This clearly gives the federal court jurisdiction, and it is immaterial that it may ultimately hold that no such contract exists.

[2] The jurisdiction depends on the questions involved and not the ultimate decision thereof, and the court will not lose jurisdiction because it may decide that question against the complainant.

[3] The jurisdiction of the court having been properly invoked, it will retain the case and administer relief on other grounds, although the state courts may afford an adequate remedy. It was so held in the Michigan Railroad Tax cases (C. C.) 138 Fed. 223.

Again, it is claimed that the ordinance in question if enforced will deprive the plaintiff of its property without due process of law, and therefore violates the fourteenth amendment to the federal Constitution because the city has no authority to pass such an ordinance, since the amendment to the charter, under which it was enacted, is in conflict with the Utility Laws of the state and therefore void. This also presents a federal question under the recent case of Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278, 33 Sup. Ct. 312, 57 L. Ed. 510, and gives this court jurisdiction. In that case it is said that:

"The fourteenth amendment provides * * * for a case where one who is in possession of state power uses that power to the doing of the wrongs which the amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the amendment is that, where an officer or other representative of a state in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the amendment, inquiry concerning whether the state has authorized the wrong is irrelevant, and the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."

[4] Now, the city of Portland possesses certain enumerated state powers, and if in the exercise of such powers it transgresses the Constitution of the United States the federal court has jurisdiction to right the wrong, although the act may not have been authorized by the state or indeed may have been forbidden by the state, as was the fact in the Home Telephone Case.

Again, it is claimed that the rates fixed by the ordinance are confiscatory and will deny the company a reasonable return on its investment and therefore deprive it of its property without due process of law. This presents a federal question, and, if the averments of the bill are sufficient to state a cause of action, plaintiff is entitled to be heard upon this point.

And, finally, it is claimed that the penalties provided in the ordinance are so excessive as to prevent persons affected thereby from resorting to the courts for the purpose of determining the validity of the ordinance, and they are therefore denied the equal protection of the

laws and their property liable to be taken without due process of law. If true, this also presents a federal question within the ruling of the Supreme Court of the United States in *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. I think, therefore, clearly the court has jurisdiction.

As already said, no answer has been filed, but the case has been submitted on a motion to dismiss, which serves the purpose of a demurrer. The allegations of the complaint must therefore be taken as true, and if it states facts sufficient to constitute a cause of suit the plaintiff is entitled to the preliminary injunction prayed for.

[5] This court held, in *Portland Ry., Light & Power Co. v. City of Portland*, 201 Fed. 119, that the provision in the franchise of the plaintiff concerning the rates to be charged by it does not constitute a contract suspending the governmental power of regulation during the life of the franchise, and I take it, therefore, plaintiff is not entitled to relief on this ground.

I doubt whether the complaint as amended states facts sufficient to show that the rates as fixed by the city will be confiscatory. The value of plaintiff's property devoted to street railway purposes within the city is stated in the complaint, but it is silent as to the income derived therefrom or the operating expenses. The only averment in that connection is that from the present revenues the plaintiff is earning only a certain per cent. on its investment. This is but a conclusion, and under the recent decisions of the Supreme Court in the Minnesota and kindred rate cases is not sufficient. The omission in the complaint is probably due to an error of some amanuensis in copying the amendment. In the original bill it was alleged that the total revenues of the company for the year ending June 30, 1913, were \$3,577,627.94, and the total expenses, including taxes, fixed charges, etc., for the same period, were \$2,878,263.56, leaving a net revenue of \$499,364.38, being an income of about 4 per cent. on the \$12,284,487, the alleged present value of the railway plant within the city. But these averments are omitted from the amended bill, no doubt by an oversight in drafting the amendment. Nor do the affidavits filed give any data upon which the court could proceed in this connection. An affidavit filed on behalf of the city shows that from the reports of the company filed with the city auditor the revenues for the year preceding the filing of the bill were \$4,012,706.78, and the expenses \$2,183,698.34, leaving a net revenue of \$1,829,008.44. But upon attention being called to alleged errors in this statement, a supplemental affidavit was filed, in which the operating expenses are undertaken to be stated in detail, and as so stated show that the total was \$4,214,434.09, or in all \$200,000 more than the income. It is apparent therefore that there must be some error in these affidavits. The operating expenses, as stated in the last affidavit, probably include those of the entire system.

[6] I do not think the penalties provided in the ordinance for a violation thereof are so excessive or unreasonable as to come within the rule laid down in the *Young Case*. The law under consideration in that case fixed two cents a mile as the passenger rates to be charged by

railroads in Minnesota, and made a violation thereof by any person, agent, or employé of the company a felony punishable by a fine not exceeding \$5,000 or by imprisonment in the state penitentiary for a period not exceeding five years, or both fine and imprisonment, and the court held that the fine was so enormous and the penalty imposed so serious as to amount to an intimidation of the company and its employés from resorting to the courts to test the validity of the law, and therefore violated the federal Constitution. But here the penalty does not exceed a fine of \$100 or 30 days in the city jail, or both fine and imprisonment, and is, I take it, such a penalty as might lawfully be provided to compel obedience to the ordinance.

[7] The remaining question, and the vital one, as I take it, is whether section 81 of the city charter so far as it undertakes to vest the municipality with power to fix rates to be charged by public utility companies operating within the city is valid. It was adopted by the legal voters of the city in May, 1913, as one of several amendments to the city charter. At that time a general law of the state was in force known as the Public Utility Act (Laws 1911, c. 279), which vested the Railroad Commission with the power and jurisdiction to supervise and regulate every public utility in the state, and gave to such commission the exclusive authority to investigate any rates charged by public utilities and if found unreasonable to fix and order substituted therefor such rates as shall be just and reasonable. The law provides that every public utility in the state must file with the commission within a time fixed by it schedules of its rates, and that no changes shall be made therein except as in the law provided. It is also made an offense, punishable as such, for any public utility to charge or collect a greater or less compensation than specified in such schedule until the same is changed as provided by law, or to accept or receive any rebate, commission, or discrimination whereby any service shall be rendered at a less rate than named in the published schedule and tariff in force as provided in the act. The purpose of these provisions was to prevent unjust discrimination and to require public utilities to afford the same service to all patrons under the same circumstances. The plaintiff, in compliance with this law, filed its schedule of rates with the commission prior to the adoption of the amendment to the city charter and prior to the enactment of the ordinance in question. The rates stated in these schedules are materially different from those prescribed by the city. It is apparent, therefore, that both the Utility Act and the city ordinance cannot be enforced. If the plaintiff obeys the Utility Act and charges the rates made lawful thereby, it will be violating the city ordinance and be liable to punishment therefor, for the charges provided in the ordinance are less than those fixed in the schedule filed with the Public Utility Commission. If, on the other hand, it obeys the city ordinance and charges the rate provided therein, it will be violating the Utility Act for a like reason. It is clear therefore that both cannot stand. One or the other must give way. There cannot be two public bodies existing at the same time with original jurisdiction to prescribe and fix the only lawful rates to be charged by a public utility. Cali-

fornia-Oregon Power Co. v. City of Grants Pass (D. C.) 203 Fed. 173; and Seattle Electric Co. v. City of Seattle (D. C.) 206 Fed. 953.

Now, the right to regulate rates of public service corporations is a governmental power vested in the state in its sovereign capacity. It may be exercised by the state directly or through a commission appointed by it, or it may delegate such power to a municipality. But I do not understand that a municipality may assume to itself such power without the consent of the state where there is a general law on the subject emanating from the entire state. It is true that under the Oregon system the legal voters of every city or town are given power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state. But this does not authorize the people of a city to amend its charter so as to confer upon the municipality powers beyond what are purely municipal or inconsistent with a general law of the state constitutionally enacted. *Straw v. Harris*, 54 Or. 424, 103 Pac. 777, and *Kiernan v. Portland*, 57 Or. 454, 111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 339. It was so held by the Supreme Court of the state in *Riggs v. City of Grants Pass*, 134 Pac. 776, where a city attempted to amend its charter so as to authorize its council to incur an indebtedness for the building of railroads. The regulation of fares to be charged by public service corporations is not primarily a municipal matter, but is a sovereign right belonging to the state in its sovereign capacity. All authority over the subject must emanate from the state. The effect of the amendment to the charter of the city of Portland is an attempt to ignore the state authority and to assume sovereign rights superior and contrary to the expressed will of the state as manifested in its legislation. If the amendment is valid and takes the public utilities within the city of Portland out of the operation of the Public Utility Act and the jurisdiction of the commission created by it, then every municipality in the state may amend its charter with like effect, and the Public Utility Act will become a useless and emasculated piece of legislation, the will of the entire people as expressed therein be practically ignored, and the people of a part of the state become greater than the whole. The Public Utility Act was not only passed by the Legislature but approved by a majority of the people on a referendum vote. It is therefore the expressed will of the sovereign power of the state concerning a subject over which it has jurisdiction, and it cannot be amended or abrogated by the people of a particular or given locality. The purpose was to provide a uniform system throughout the entire state for the control and regulation of public utilities and fixing the rates to be charged by them, and to create a tribunal for that purpose. It is true the Public Utility Act does recognize the authority of municipalities over public service corporations within its boundaries for certain purposes, but not in the matter of regulating or prescribing rates or fares. That power is vested alone in the Public Service Commission.

Now, Portland, or the people of Portland, are not without remedy if the rate charged by the plaintiff is unreasonable or unjust. They have a full and complete remedy by application to the tribunal created

by the state for the purpose of determining such questions, and which is provided with the necessary machinery and expert assistants to deal with the subject intelligently. I take it therefore that the preliminary injunction should issue; the form thereof and the amount of the bond to be determined hereafter.

THE CITY OF MONTGOMERY.

(District Court, S. D. New York. December 15, 1913.)

1. SEAMEN (§ 6*) — CONTRACT OF EMPLOYMENT — CONSTRUCTION — TERM OF SERVICE.

Articles by which a seaman engaged for service on a steamship for "one or more trips" from New York to Savannah and return to New York or Boston, and such other coastwise ports or places as the master might direct, for a term not exceeding one calendar month, the port of discharge to be New York or Boston, as practically construed by the parties, *held* not to bind the seaman to serve more than one round trip.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 8-18; Dec. Dig. § 6.*]

2. SEAMEN (§ 33*)—WAGES—FAILURE TO PAY ON TERMINATION OF SERVICE—VALIDITY OF CONTRACT—CONSTRUCTION OF STATUTE.

The provisions of Rev. St. § 4529, as amended by Act Dec. 21, 1898, c. 28, § 4, 30 Stat. 756 (U. S. Comp. St. 1901, p. 3077), requiring the payment of seamen within two days after the termination of their term of service or on their discharge if before that time, under penalty of payment of wages during the time such payment is delayed, if "without sufficient cause," cannot be abrogated by contract between the parties, and a failure to pay within the time prescribed, in reliance on the terms of such a contract, is without sufficient cause and does not relieve the shipowner from such penalty to be computed to the time payment is made or tendered.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 218, 219; Dec. Dig. § 33.*]

In Admiralty. Suit by John Rueb against the steamship City of Montgomery; the Ocean Steamship Company of Savannah, claimant. Decree for libelant.

William F. Quigley, of New York City, for libelant.

Barry, Wainwright, Thacher & Symmers, of New York City (James K. Symmers and Earle Farwell, both of New York City, of counsel), for claimant.

MAYER, District Judge. The suit is for seaman's wages and also to recover the statutory penalty of a dollar for each day of delayed payment.

Libelant Rueb had been a seaman on the City of Montgomery for three trips between New York and Savannah, Ga., prior to August 23, 1912. On that day he was paid off, and on August 24, 1912, he re-shipped, after having signed new shipping articles.

Two round trips were made by Rueb, and on arrival of the steamship at New York, on September 10, 1912, he notified the mate Olsen of his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—43

intention to leave. The mate did not object to Rueb's departure, saying to him:

"You can get out right away, but you will not get your money before the end of the month."

While the answer of claimant contains a general denial of various allegations of the libel, the defense that libelant left the ship without the consent of claimant or master or officers of the ship is disposed of by the uncontradicted testimony just quoted.

The real defense of claimant is set forth in the following allegations of its separate defense:

"Fifth. That the claimant refused to pay the libelant for the work theretofore performed by him until the first arrival at New York, N. Y., or Boston, Mass., after one calendar month had elapsed from the date of said articles, as prescribed by said articles. That the said steamship City of Montgomery arrived at New York, N. Y., on or about the 30th day of September, 1912, which was the first arrival at either New York, N. Y., or Boston, Mass., after one calendar month had elapsed from the date of said articles. That on or about the 30th day of September, 1912, the seamen of said steamship City of Montgomery were paid their wages through the United States Shipping Commissioner at the port of New York, and that the wages of the libelant herein, under said articles, for the time he worked, were sent to the said Shipping Commissioner for the purpose of being paid the libelant, and the said Shipping Commissioner was then, and ever since has been, ready and willing to pay the same to the libelant. That the libelant refused to accept the same."

After the argument, a new theory was suggested by claimant which does not accord with the testimony nor with the answer as I read it.

[1] Now the contention is that Rueb's engagement was for a period of time not to exceed one month, irrespective of the number of trips. It becomes necessary, therefore, to examine the articles before considering the other interesting and important questions presented in this controversy. These articles, so far as relevant, are as follows:

"Articles of Agreement between Master and Seamen in the Merchant Service of the United States,

"Required by Act of Congress, Title LIII, Revised Statutes of the United States.

"Office of the U. S. Shipping Commissioner for the Port of [New York, Aug. 24, 1912].

"It is agreed between the master and seamen, or mariners, of the [S. S. City of Montgomery of Savannah, Ga.] of which [C. S. Burg] is at present master, or whoever shall go for master, now bound from the port of¹ [New York], to [Savannah, Ga., for one or more trips], and such other ports and places [coastwise] as the master may direct, and back to [New York or Boston, Mass.], a final port of discharge in the United States, for a term of time not exceeding [one (1) calendar month].²

"(Here follows the scale of provisions.)

"It is also agreed that the crew is to be paid off and discharged at either New York, N. Y., or Boston, Mass., on the first arrival at either of said ports, after one calendar month shall have elapsed from the date of these articles. Any member of the crew leaving the vessel without permission of the head of his department may be fined not more than two days' pay. * * *

¹"Here the voyage is to be described, and the places named at which the ship is to touch; or, if that cannot be done, the general nature and probable length of the voyage is to be stated, and the port or country at which the voyage is to terminate.

²"If these words are not necessary they must be stricken out."

The articles are on a printed form, and in the above quotation the parts thereof in handwriting are indicated by brackets.

The physical form of the articles will be of some service in construing them, when it is remembered that section 4511 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 3068) provides that, among other particulars, the articles shall contain:

"First. The nature and, as far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate."

It will be noted that while the voyage was to Savannah and back to New York or Boston, as a final point of discharge, yet the master could decide to go to other ports and places coastwise (and doubtless intermediate), all not to exceed one month. Non constat, a round trip from New York to Savannah, stopping coastwise, might take one month, and in such event the seaman must serve. On the other hand, the master was not obligated to employ the seaman for more than one month in any event.

The meaning of the articles is by no means free from doubt, but the practical construction by the parties has resolved that doubt in favor of the conclusion that, when the seaman performed his duties for one round trip voyage (in this case "one or more trips," to wit, two), he had done the service he agreed to do. So the mate understood the engagement, and so did the claimant by depositing Rueb's wages with the Shipping Commissioner and, in its answer, by giving as its reason for delayed payment, not that the wages were not earned, but that they were not due and payable.

[2] If, therefore, the seaman had carried out his agreement so far as duration of service was concerned, the next question is whether the provision postponing the payment of wages is lawful.

Here section 4529, United States Revised Statutes, as amended in 1898 by act of December 21st (chapter 28, § 4, 30 Stat. 756 [U. S. Comp. St. 1901, p. 3077]), intervenes. That provides:

"The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he shipped, or at the time such seaman is discharged, whichever first happens. * * * Every master or owner who refuses or neglects to make payment in manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the Court. * * *"

It is claimed that the provisions of this statute may be waived, and in support of this view claimant cites *The Lillian* (D. C.) 131 Fed. 375, and *The Joseph B. Thomas* (D. C.) 136 Fed. 693, and *Id.* (C. C. A.) 148 Fed. 762. I think these cases are distinguishable from that at bar, but, in any event, I am of opinion that the master and seaman cannot, by contract, abrogate the provisions of section 4529. Without enlarging on the history of legislation of this character, it may be said that Congress has long regarded seamen in the nature of wards whose rights must be safeguarded. The requirement to pay them promptly is not to be overridden. If, in the practical conduct of a re-

sponsible steamship company, such a provision is found inconvenient or otherwise unsatisfactory, the remedy is by appeal to the legislative body, but the courts must construe such a statute, not merely by its letter, but in sympathy with the legislative intent.

It is true that the statute does not in terms declare void an agreement in contravention thereof, but, in speaking of the termination of "the agreement," it is clear that Congress had in mind that, no matter what "the agreement" was, the seaman's wages must be paid within two days after the man had duly performed the service required by "the agreement." Holding this view, I am of opinion that the statute is controlling, and that the provision in the articles here discussed was void and of no effect.

It remains to determine whether claimant must pay the penalty prescribed by the statute where the master or owner neglects to pay "without sufficient cause." I can readily imagine occasions where the master refuses or neglects to pay for "sufficient cause." Such an instance is illustrated in *The Amazon* (D. C.) 144 Fed. 154.

In *George W. Wells* (D. C.) 118 Fed. 761, it was not necessarily to be expected that a master would know that an outstanding assignment of wages was void as matter of law. But, in the case at bar, the failure to pay is because of the articles themselves, and the fault is clearly attributable to the owner. But, whether in such instance the fault be that of the owner or the master, the result is the same.

To hold that an owner or master may escape the penalty prescribed in the very statute which he seeks to avoid is to strip the statute of the precise purpose for which, in that particular, it was enacted. However debatable a question arising under a statute may be, it is no excuse that one has made an honest error in the interpretation of that statute.

The final question to be considered is the amount of the penalty. Fifteen days elapsed between the date when Rueb's wages became due and the date when claimant deposited the amount of these wages with the Shipping Commissioner. Libelant claims that the penalty should run to January 30, 1913, the date when claimant filed its answer. I see no logical reason for this measure of time. Penal statutes are strictly construed, and I think a reasonable and sound rule is to count the time between the date when payment was due and the date when the amount of the wages was deposited with the Shipping Commissioner.

Libelant may therefore have a decree for the \$18 wages and \$15 wages by way of penalty, with costs.

THE KLOTAWAH.

(District Court, N. D. New York. January 12, 1914.)

SHIPPING (§ 209*)—SUIT FOR LIMITATION OF LIABILITY—PLEADING AND PROCEDURE.

In a suit for limitation of liability, the court will not determine petitioner's liability and right to limitation before passing on an appraisal of the vessel and stipulation for value, nor have damage claimants any standing to raise or contest such issues until they have been brought in by monition, presented their claims, and answered the petition as permitted by admiralty rule 56 (13 Wall. xiii).

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*]

In Admiralty. Petition by Edson Bradley, owner of the steam yacht Klotawah, for limitation of liability. On application for order affirming appraisal, approving stipulation with sureties for payment into court, and directing that monition issue. Order granted.

Smith & Phelps, of Watertown, N. Y., for petitioner Bradley.
Breen & Breen, of Watertown, N. Y., for respondents.

RAY, District Judge. The question particularly involved at present is whether the court shall try the question whether the Klotawah was at fault in doing the damage complained of "without the knowledge or privity" of the owner, Edson Bradley, prior to confirming the appraisal of the vessel, approving the stipulation to pay its value into court, and directing that monition issue, or after making such orders.

The petitioner, Edson Bradley, is the owner of the steam yacht Klotawah. On or about the 30th day of July, 1913, when said vessel was navigating the St. Lawrence river in the vicinity of Alexandria Bay in the charge of a pilot or master, the owner being on board, it collided with the yacht Frances owned by the respondents, George R. Cornwall, Riley H. Perry, and Walter C. Smith, doing her great damage so that she sank. There was an engineer on board who went into the water. Thereafter the said owners of the Frances brought action in the Supreme Court of the state of New York against said Edson Bradley to recover the damages alleged to have been sustained by them by reason of the damage to the said yacht (laid at the sum of \$3,000), and which they claim was caused by negligence for which Bradley is responsible and which is charged in the following language:

"Plaintiffs further allege that the defendant was guilty of negligence in that he did not employ a competent navigator or captain to operate or navigate his said vessel Klotawah, but, to the contrary, employed and had in charge of said vessel as captain or navigator at the time of the said accident, a person who was addicted to the excessive use of intoxicants, and was at the time of the collision, as plaintiffs are informed and believe, intoxicated and unable and unfit to navigate the said vessel Klotawah; that the said captain or navigator was also physically disabled by reason of failing or defective eyesight, and for that reason was not a competent or proper person to have the charge of said vessel or competent to navigate the same; that in the vicinity where the above accident occurred many boats and small craft were navigating the waters of the St. Lawrence river daily, and it was neces-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sary in order to navigate the Klotawah properly and with safety that the navigator should be in possession of all his faculties."

Bradley thereupon instituted this proceeding for limitation of liability under the provisions of sections 4283, 4284, and 4285, of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 2943, 2944) and the admiralty rules applicable, by filing his petition, procuring the appointment of appraisers, and an appraisal, etc., on notice, and now on such proceedings and the appraisal and on presenting the proper stipulation moves for orders confirming such appraisal, approving the stipulation to pay the appraised value of the yacht which did the damage into court, and directing the issue and service of a monition, etc.

The respondents above named, owners of the Frances, appear and contest the application by presenting and filing affidavits tending to show that Bradley was on board his yacht, the Klotawah, at the time of the collision, and had to do more or less with the course and management of same at the time, and that the master and pilot in charge had defective vision and was under the influence of liquor and a drinking man and was therefore an incompetent master, and that the petitioner Bradley knew these facts, and such respondents claim that, as this incompetency, known to Bradley, and Bradley's active participation in navigating the yacht at the time, brought on or resulted in the collision and damage, it cannot be said that the loss, damage, etc., was incurred "without the privity or knowledge" of Bradley, the owner, and that he is not entitled to the benefits of the sections of the Revised Statutes referred to. Such respondents claim that this question should be heard and determined on affidavits preliminary to the granting of the orders prayed for and not on the return of the monition, etc. I do not think this should be done, or that it properly can be done. The institution and pendency of this proceeding may be pleaded as a bar in the action in the state court, or this court may stay further proceedings in the action in the state court until this proceeding is disposed of. *Norwich Co. v. Wright*, 13 Wall. 104, 125, 20 L. Ed. 585. The vessel itself is not seized or put in the possession of the court, but an appraisal is made on notice (which in this case was given), and thereupon, and before proceeding further, this appraisal must be confirmed so as to determine the sum to be paid into court or for which a stipulation shall be given. If the appraisal is confirmed, the owner pays into court the amount thereof or gives the stipulation to pay it when required. These are the questions on that part of the application. All interested parties may appear and object to the appraisal or the sufficiency of the stipulation offered. If the appraisal is confirmed and the stipulation approved and filed, and the proceedings are regular, then the monition issues as matter of course, and all who come in and file claims may then answer the petition and put all its allegations at issue, and one issue, and possibly the main issue in some cases, will or may be: Was the damage done "without the privity or knowledge of such owner or owners"?

This proceeding is regulated by rule 56 of "supplementary rules of practice in Admiralty under the act of March 3, 1851, entitled an act

to limit the liability of shipowners and for other purposes," and which rule is found, page xiii, 13 Wall. It reads as follows:

"56. In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both."

See, also, 2 Rose's Code of Fed. Proc. § 1304, p. 1190.

Under this rule all claimants must come in under the monition and file their claims and then, being a party, each may file an answer and contest all the questions including that of the right of the petitioner to maintain the proceeding. If it should be determined that the loss or damage was, in fact, incurred with the privity or knowledge of the owner, then he would not be entitled to limitation of liability, and his petition would be denied. Until the monition issues and the time to come in and answer has expired, it cannot be known who will come in and contest, and a trial of the main question prior to that time if had between one or two claimants and the petitioner might have to be gone through with again on the coming in of another or of other claimants. This is made clear in *The Pere Marquette* 18 (D. C.) 203 Fed. 127, where it is held:

"Under admiralty rule 56 (29 Sup. Ct. xlv), which provides that, in a proceeding by a shipowner for limitation of liability, any claimant of damages 'who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition and contest the right of the owner or owners of said ship or vessel either to an exemption from liability or to a limitation of liability,' a person who has not so presented a claim has no standing as a claimant to answer the petition."

The court also says:

"Such proceeding has for its object the bringing into the admiralty court all claimants, to the end that, if exemption is granted or liability limited, all will be bound."

See, also, *Re Davidson* S. S. Co. (D. C.) 133 Fed. 411.

It is clear, I think, that the question whether the petitioner is entitled to limitation of liability should be tried once only and when all claimants are before the court. If the right thereto is sustained, then the various claims are proved and distribution made by a final decree; the former being interlocutory. The parties hereto will find valuable information as to the meaning of the words "privity" and "knowledge" of such owner or owners, in *La Bourgogne*, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973; *The Annie Faxon*, 75 Fed. 312, 21 C. C. A. 366; *The Pere Marquette* (D. C.) 203 Fed. 127, 131; *The Colima* (D. C.) 82 Fed. 665, 679. In *The Colima*, *supra*, Judge Brown said:

"The knowledge or privity that excludes the operation of the statute must therefore be in a measure actual, and not merely constructive; that is, actual through the owner's knowledge, or authorization, or immediate control of the

wrongful acts, or conditions, or through some kind of personal participation in them. The Republic, 9 C. C. A. 386, 61 Fed. 109, 112, 113, and cases there cited."

In *La Bourgogne*, supra, the court held:

"Mere negligence of the officers and crew of a vessel, pure and simple and of itself, does not necessarily establish the existence on the part of the owner of the vessel of privity and knowledge within the meaning of the limited liability act of 1851 as re-enacted in sections 4282-4287, Rev. Stat. [U. S. Comp. St. 1901, pp. 2943, 2944]. The Main, 152 U. S. 122 [14 Sup. Ct. 486, 38 L. Ed. 381] distinguished."

The orders now prayed for are granted, and the granting of same is in no sense an adjudication or holding that the collision and damage was without or with the knowledge or privity of the owner. That issue can be raised by the answer of the respondents and all other claimants who file claims pursuant to the monition. It will then be tried once for all. There will follow an interlocutory decree after which the value of the vessel or money paid into court will be apportioned to the claims established

Ex parte GREGORY et al.

(District Court, W. D. Washington, N. D. January 27, 1914.)

1. HABEAS CORPUS (§ 92*)—DEPORTATION PROCEEDINGS—SCOPE OF REVIEW.

In habeas corpus proceedings to review a judgment directing the deportation of certain aliens, the court is limited to ascertaining whether the petitioners were denied a hearing and whether the facts found constituted a statutory ground for exclusion; the immigration officers being unauthorized to exercise a mere arbitrary power, free from judicial review.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87-96; Dec. Dig. § 92.*]

2. ALIENS (§ 54*)—EXCLUSION—GROUNDS—REVIEW.

Where certain alien farm laborers applied to enter the United States, findings of the immigration board that they were persons likely to become a public charge because there was no work for them in the United States, because they had but a limited amount of money insufficient to maintain them during the winter, and because there were 800 to 1,000 Russians unemployed in one of the cities of the state, and thousands of other nationalities in the same condition, that the supply of common laborers far exceeded the demand, and that any addition to the unemployed should be guarded against and alien laborers not permitted to enter at that time, was insufficient to justify their exclusion.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

Application by K. Gregory and others for a writ of habeas corpus to secure a discharge from certain deportation warrants in immigration proceedings. Granted.

Parker & Kalina, of Seattle, Wash., for petitioners.

Clay Allen, U. S. Atty., of Seattle, Wash., and G. P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash., for respondent.

NETERER, District Judge. K. Gregory and seven others filed a petition praying a writ of habeas corpus, alleging that they are in good faith seeking admission into the United States to make the United States their permanent home; that they do not come within any of the classes prohibited admission. A show cause order was issued, and the Commissioner of Immigration made return setting forth in substance: That the petitioners sought admission and were held for special inquiry by the immigrant inspector, and a board of special inquiry was organized as provided by law, and—

“that on December 23, 1913, after a full hearing (a duplicate report of which appears in the immigration files of this cause and is marked Exhibit A and made a part of this return), the board decided to reject the aliens on the ground that they were persons who were likely to become a public charge, for the following reasons: First. Because they are common or farm laborers, and there is no work for them in the United States. Second. Because they have but a limited amount of money, insufficient to maintain them during the winter. Third. Because there are 800 to 1,000 Russians unemployed in Seattle, and thousands of other nationalities in the same condition, and reports from the interior are to the effect that the supply of common labor is far in excess of demand. Fourth. That any addition to the unemployed should be guarded against, and alien laborers should not be permitted to enter the United States at this time.”

That the petitioners appealed to the Secretary of Labor, who affirmed the decision of the board of special inquiry.

The petitioners move that they be forthwith discharged for the reasons:

“(1) That the return shows that they are detained and restrained of their liberty for unlawful reasons and contrary to the statutes in such cases made and provided; (2) that the special examining board and the Secretary of Commerce and Labor and said Commissioner exceeded their authority and jurisdiction; (3) that the alleged reasons for detaining said petitioners are irrelevant, immaterial, and not supported by evidence, and are frivolous and sham; (4) that said petitioners had all the personal qualifications required of them by the statutes, and to entitle them to immediate and unconditional discharge.”

[1] This court held in *In re Moola Singh* (D. C.) 207 Fed. 780, that the jurisdiction of this court is limited to ascertaining whether the petitioners were denied a hearing, and, if a hearing has been accorded, the court is precluded from a re-examination of the issue presented merely because it is contended that the conclusion of the immigration officers based upon the testimony was wrong. In the *Moola Singh* Case a trial was had, and the conclusion of the examining board was that the aliens be excluded from admission under the laws of the United States. The conclusion of the board found delinquency in the personal qualifications of the applicants which brought them within the exclusion provisions of the act. This court cannot examine into the testimony produced upon the hearing in this case before the special examining board, nor enter upon a re-examination of the facts. This court is bound by the facts as found by the board of special inquiry.

[2] Do the facts as found bring the petitioners within the exclusion provisions of the act? Are the petitioners qualified to enter under the findings of the board, and is the act of the board beyond its jurisdic-

tion, and does the personal condition of the applicants, as found, preclude their exclusion?

Section 1 of the Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 499), reads:

"That there shall be levied, collected, and paid a tax of four dollars for every alien entering the United States."

Section 2 of the act provides who are to be excluded, among whom are "persons likely to become a public charge."

Section 10 of the act provides:

"That the decision of the board of special inquiry, hereinafter provided for, based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens affected with tuberculosis or with a loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section two of this act."

Section 24 of the act provides:

"* * * Immigration officers shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter the United States, and, where such action is necessary, to make a written record of such evidence."

A provision for the punishment of any persons who shall knowingly or willfully give false oaths or swear to any false statement is made, and it is also provided that the decision of such officer in admitting an alien shall be subject to challenge by any other officer, and such challenge shall operate to take the alien, whose right to land is challenged, before a board of special inquiry for its investigation. It is further provided:

"Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry."

"Sec. 25. * * * All hearings before boards shall be separate and apart from the public, * * * and the decision of any two of the board shall prevail,—but either the alien or any dissenting member of said board may appeal * * * to the Secretary of * * * Labor * * * that in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of * * * Labor."

Under section 2 an alien "likely to become a public charge" is excluded; and under section 25 the decision of the board of special inquiry is final where the alien is by law excluded. The findings and conclusions of the board with relation to the petitioners, however, eliminate all physical and mental deficiencies legislated against. Shall it be said, under such a record, that the examining board can exclude an alien upon the conclusion that he is "likely to become a public charge," when, upon the facts found and reasons given, the applicant is not brought within the provisions of the act excluding him from admission?

In the findings made there is no disqualification personal to the applicants, nor any objection made because of inability to conform to new conditions and relations. They are not excluded by the provi-

sions of the act. The reasons given do not exclude them under the act. These reasons are proper subjects for the consideration of Congress, but they do not authorize the temporary suspension of the Immigration Act, which the adoption of these findings will do. The laws and principles upon which our government rests forbid the exercise of arbitrary power. Immigration officers must act within the powers given. Courts have power to intervene where they exceed their authority. *Ex parte Saraceno* (C. C.) 182 Fed. 955; *Lewis v. Frick* (C. C.) 189 Fed. 146; *In re Feinknopf* (D. C.) 47 Fed. 447; *Ex parte Koerner* (C. C.) 176 Fed. 479; *In re O'Sullivan* (C. C.) 31 Fed. 447; *United States v. Martin* (D. C.) 193 Fed. 795; *Gonzales v. Williams*, 192 U. S. 1, 24 Sup. Ct. 177, 48 L. Ed. 317.

The petitioners are discharged; but, if within ten days after the filing of this decision the respondent appeals, the petitioners must give recognizance with sufficient surety in the sum of \$250 each, conditioned to appear and answer the judgment of the appellate court in accordance with Supreme Court rule 34 (32 Sup. Ct. xiii).

THE SAXOLEINE.

(District Court, E. D. New York. February 26, 1913.)

SALVAGE (§ 10*)—RIGHT TO COMPENSATION—SAVING SHIP FROM FIRE.

Salvage awards made to a number of tugs for the rescue of a steamship from her slip, where she was in serious danger from an oil fire.

[Ed. Note.—For other cases, see *Salvage*, Cent. Dig. §§ 18-20; Dec. Dig. § 10.*]

In Admiralty. Suits by Peter Cahill, owner of the steam tug O. L. Halenbeck, by George I. Forsyth, owner of the tugs G. I. and Lester A. Forsyth, by the East Jersey Railroad & Terminal Company, owner of the tug S. G. Brown, by the Standard Oil Company of New York, owner of the tug Standard Oil No. 11, by the Standard Oil Company of New York, owner of tug White Rose, and by George B. Gifford, Jr., against the steamship Saxoleine. Decrees for libelants.

Foley & Martin, of New York City, for Peter Cahill.

Convers & Kirlin, of New York City (Wm. H. McGrann, of New York City, of counsel), for the Saxoleine.

Haight, Sandford & Smith, of New York City (Mr. Hewitt, of counsel), for Forsyths.

Burlingham, Montgomery & Beecher, of New York City (Mr. Clark and Mr. Wells, of counsel), for East Jersey R. & Terminal Co. and Standard Oil Co.

CHATFIELD, District Judge (orally). As far as the facts are concerned, it seems to me that the activities of the tugs and the testimony can very largely be harmonized. It was a salvage service and the risk of destruction to the Saxoleine was great because of the serious con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sequence of any flame coming in contact with any part of the cargo where there happened to be vapor.

I think that the Forsyth is entitled to substantially as much credit as she would have been otherwise, even though she was *invited* to perform the service, because she was invited for that purpose, and not hired in any ordinary sense. Her line did part, she had to have help, and her service was short in time.

The Halenbeck had nothing to do with the fire before she went to the Saxoleine. She arrived there in time to take one of the ship's lines from the pier, and also to help at about the time when the tide was having some effect on the efforts of the Forsyth (which at first had been pulling the Saxoleine out from behind the pier where the tide was not so strong). From that time on the Halenbeck, with her large power and generally greater capacity, must have performed a substantial share in the work. The danger was increased to some extent by the bow of the Saxoleine swinging towards the Dunholm. But the proximity at all times was sufficient so that the Saxoleine had to be removed if it could be done, and as she came out she must have swung close enough to the Dunholm, so that it explains, in the way that has been discussed on the argument, the movements of the boats and the view that the different people had of them.

The S. Q. Brown must have arrived shortly after the George Forsyth, and could not have been very much longer in reaching a position around on the starboard side, but where she was substantially out of sight of any of the others and substantially covered by the stern of the Dunholm at the same time. But the S. Q. Brown could not have had such an important part in pulling the boat out of the slip, and the Saxoleine must have been nearly out of the slip by the time the Brown could combine any work with its nozzle with any force in towing.

No. 17 had been doing valuable work in the line of its own duty in saving the boats at the other piers, and then continued in the line of its own duty in coming to the help of the Saxoleine. It did do something in the nature of helping the towing by putting its nose in between the Brown and the ship and taking hold before the Saxoleine got entirely straightened around in the stream, and then the White Rose was on the scene in time to give some assistance and to have been of greater aid if the other boats had not been successful in what they were trying to do.

I think as far as the three men are concerned—Gifford, Warnock, and Place—that on the pier they deserve about equal compensation. The lack of discretion in Gifford was partially prevented in the case of Warnock and Place, because the captain of the Saxoleine gave instructions to Warnock and Place. They were going to act about as Gifford was doing until the captain spoke to them. Each one of them was endeavoring to do what was according to his best judgment, and Gifford followed that up by going on the tug, getting up on the steamer, and attempting to render further service.

As to the amount of salvage to be awarded, the first consideration is that this was an oil fire. That increases the inflammable phase of the danger, and increases the stubbornness of the fire should it once

get hold. It increases the amount of heat, and greatly increases the appearance of danger. All this made the offering of salvage service a thing greatly to be desired and something to be rewarded.

On the other hand, the construction of the boat, the fact that the danger was soon over, and that the fire on board was quickly put out, take the case out of the category of an heroic standing by a ship that is going down, or the saving of life, and puts the case midway between a service that is based upon possible chance of doing great benefit, but where the danger proves to be small, and instances where not only is the danger great, but the service great as well, and long continued and difficult in execution. If the case comprised all of those elements, I think the award, upon a valuation of \$250,000, might mount up well towards the bond. If the case had fallen within the category where imminent danger seemed great, but where it afterwards proved to be a matter of chance, the award should run down to something like the amount fixed in the case of the *Narragansett*.

I think the total amount should be graduated, and, considering the matter both from the standpoint of per cent. and the proportionate credits to the different boats, I fix the following awards: For the two Forsyth tugs together \$8,000, of which I award to the George Forsyth \$6,000, and to the Lester Forsyth \$2,000, to the Halenbeck \$5,500, to the S. Q. Brown \$3,000, to the No. 17, \$1,750, to the White Rose \$500.

As to three men, while I think their efforts should be encouraged and their services were helpful, it is very difficult to fix a proper award. Without attempting to establish a standard, simply upon my impression, I award to Mr. Warnock \$75, to Mr. Place \$75, to Mr. Gifford \$100.

In the case of the awards to the tugs two-thirds will go to the owners and one-third to the crew in each instance.

UNITED STATES v. LAMAR.

In re LAMAR.

(District Court, S. D. New York. October 13, 1913.)

BAIL (§ 80*)—COMPLIANCE—FORFEITURE—DEFENSES.

Accused, having been indicted in New York, was arrested in Washington, D. C., and on being taken before a commissioner pleaded not guilty and was released on bond for his appearance in the District Court of the Southern District of New York on October 7, 1913. Bail was given, but accused was surrendered by his principal, the surrender accepted, and an exoneretur issued purporting to discharge the surety, whereupon accused filed a petition for a writ of habeas corpus, and a writ of certiorari returnable October 10th, pending which accused was again released on bail. *Held* that, accused having voluntarily given bond for his appearance in the District Court of New York on October 7th, such contract was binding, and, he not having so appeared, the surrender and habeas corpus proceedings were no defense to forfeiture of his bond.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 328-334; Dec. Dig. § 80.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Prosecution by the United States against David Lamar, alias David H. Lewis. On application to forfeit defendant's bond. Granted.

H. Snowden Marshall, U. S. Atty., of New York City (Harold Harper, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Henry E. Davis, of Washington, D. C., for defendant.

HUNT, Circuit Judge. Indictments were returned against David Lamar in the Southern district of New York on July 17 and 25, 1913. Bench warrants were issued and returned not found. On September 11, 1913, Lamar was arrested in Washington, D. C., by the marshal for the District of Columbia to whom had been issued a warrant by the United States commissioner for that district; the assistant United States attorney having made complaint to the commissioner based on the indictments above referred to. Lamar pleaded not guilty and was released on \$3,000 bond to appear before the commissioner on September 17th. On September 17th Lamar was present at the hearing by the commissioner and was also represented by counsel. Copies of the indictments and bench warrants from the District Court of the United States for the Southern District of New York were received in evidence over the objection of Lamar's counsel, and Lamar's identity was admitted. The evidence consisted solely of the copies of the indictments and bench warrants and the admission of identity of Lamar, and it appeared to the commissioner that the laws of the United States had been violated as charged in the complaint and that there was probable cause to believe the defendant guilty of the alleged offenses. The commissioner therefore ordered that Lamar give bail in the sum of \$3,000 for his appearance in this court on October 7th, or be committed. Lamar elected to give bail, and Mr. George W. Ray went on his bond. On October 4th Mr. Ray surrendered his principal to the commissioner. The commissioner, over the objection of the United States attorney, accepted the surrender and issued an *exoneretur* purporting to discharge Mr. Ray as bondsman. Lamar, over the objection of counsel for the United States, was then committed to the custody of the marshal for the District of Columbia, but immediately thereafter filed a petition in the Supreme Court of the District of Columbia for a writ of habeas corpus and a writ of certiorari in aid thereof. Writ was issued returnable on October 10th, and it is stated in court that Lamar was released on bail pending the return and hearing.

In this court on October 7th, Lamar failing to appear, the United States attorney moved for a forfeiture of the bond given for Lamar's appearance on that day. Counsel for Lamar objected to the granting of the motion, and on October 8th argument was heard from counsel for Lamar and for the United States. The United States attorney presented a letter he had received from counsel for Ray, surety on the bond, calling attention to the surrender to the commissioner in the District of Columbia of his principal and requesting that he be notified if the bond was to be forfeited so that he might have an opportunity to produce the body of his principal. There was also filed a transcript of the proceedings before the commissioner in the District of Columbia

and a copy of the petition for a writ of habeas corpus heretofore referred to, as well as copies of the exoneretur and the order of recommitment issued by the commissioner upon Lamar's surrender by his surety. From these papers the facts as above set forth appear.

The bond for appearance here not having been complied with, what does Lamar now present to this court as an excuse for default? He is not unable to comply, for he voluntarily proceeded in habeas corpus and has obtained bail in the District of Columbia pending disposition of that matter. Whether the bail bond voluntarily given in the original hearing in the District of Columbia was satisfied or exonerated by the surrender to the commissioner and the order of that official, and whether as a necessary consequence the District Court for the Southern District of New York may not enter judgment upon the bond, are questions to be tested after action may be instituted upon a forfeiture within this district. But Lamar having voluntarily given the bond for his appearance here in person, it must, on this motion, be held that his contract to appear is binding and that he cannot voluntarily remain away and informally ask, through counsel, that the usual procedure of the federal courts in forfeiture be put aside.

It is not to be presumed, however, that the several proceedings had within the District of Columbia by application for a writ of habeas corpus and by the surrender to the commissioner and that the order of commitment were in bad faith, or that the failure to appear in this court upon October 7th was due to purpose merely to interfere with the regular proceedings in this district. Under such circumstances, therefore, this court may exercise a discretion in the matter of ordering the forfeiture applied for by the United States district attorney. Accordingly, to the end that Lamar may have an opportunity to comply with his bond and come within the Southern District of New York, here to respond in person to any indictments that are now pending against him, formal order of forfeiture will be held in abeyance until Wednesday, October 15, 1913, at 10:30 o'clock a. m. If by that time Lamar makes appearance, the court will make no order of forfeiture; but, if he fails to respond, order will be made as prayed for.

NOTE.—Lamar failed to appear and the forfeiture was ordered on October 15th.

VOSE v. ROEBUCK WEATHER STRIP & WIRE SCREEN CO.

(District Court, E. D. New York. January 8, 1914.)

COURTS (§ 262*)—JURISDICTION OF FEDERAL COURTS—JOINDER OF CAUSES OF ACTION.

Under Equity Rule 26 (198 Fed. xxv, 115 C. C. A. xxv), authorizing a joinder of causes of action, a suit of which a federal court has jurisdiction because of the nature of the cause of action cannot be used as a means for bringing within its jurisdiction a different cause of action between the same parties, over which the court would have jurisdiction only on the ground of diversity of citizenship which does not exist.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. § 262.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by Mary E. Vose against the Roebuck Weather Strip & Wire Screen Company. On motion to strike out testimony and to dismiss certain causes of action. Sustained in part.

H. B. Philbrook, of New York City, for plaintiff.

Walter H. Dodd, of New York City, for defendant.

CHATFIELD, District Judge (orally). Without repeating any discussion or statements that were made at the beginning of the case, I will decide first, that under rule 26 (198 Fed. xxv, 115 C. C. A. xxv) a suit of which the court would have jurisdiction because of the nature of the cause of action cannot be used as the means to bring into the equitable jurisdiction of this court a cause of action between the parties over which the court could not have jurisdiction unless diverse citizenship of the parties gave the United States Courts generally jurisdiction over the case.

If diversity of citizenship exists, the choice of the district in which the action should be tried might be waived, and so a cause of action between diverse citizens might be united with a patent suit between the parties or as to the same transaction as in the patent case. But in such a case as the one at bar the choice of forum in which the action is to be tried has not been waived. The objection as to jurisdiction is made upon the ground that the cause of action is not one over which this court has jurisdiction, and therefore not an objection that could be waived.

I will hold that the defendant's motion as to everything except the charge of infringement of patents No. 752,729 and No. 717,641 must be granted. All other causes of action, or alleged causes of action, and the portions of the complaint setting them up, must be stricken out of the pleadings of the case.

In so far as the trial of the issue of infringement may raise questions as to contract relations of the parties, the record will be allowed to stand as it is, and the motions to strike out the testimony will be denied (any objection to the introduction of testimony as irrelevant to the patent issue being overruled), and the plaintiff may have exceptions to that.

As to the question of infringement there are two matters: First, as to the present ownership or right to the patents; and, second, as to whether the plaintiff has ratified or acted upon an assignment which was made by a person assuming to be a principal, but who, if the matter had been already assigned, could only have acted as agent or attorney. As to those two questions I will reserve decision.

ANDERSON v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Sixth Circuit. February 3, 1914.)

No. 2,392.

1. DEATH (§ 31*)—ACTIONS FOR CAUSING—PERSONS ENTITLED TO SUE—ANCILLARY ADMINISTRATOR.

The federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), making railroad companies liable in damages for the death of an employé to his personal representative for the benefit of his surviving widow and children, does not vest the right of action solely in the administrator appointed in the state of the deceased employé's domicile, and the action may be maintained by an ancillary administrator appointed in another state in view of the remedial character of the statute, and the representative character of the suit authorized, especially where the ancillary administrator is appointed in the state where the death occurred and where the suit is brought and prosecuted with the approval of the domiciliary administratrix who is also the principal beneficiary.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37-46, 48; Dec. Dig. § 31.*]

2. EXECUTORS AND ADMINISTRATORS (§ 519*) — ANCILLARY ADMINISTRATION — POWERS OF ANCILLARY ADMINISTRATOR.

No privity exists between a domiciliary and an ancillary administrator, and within the respective states of their appointment the authority of each is paramount to that of the other.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2310-2322; Dec. Dig. § 519.*]

3. DEATH (§ 36*) — ACTIONS FOR CAUSING—VENUE — LOCAL AND TRANSITORY ACTIONS.

An action for the wrongful death of an employé, brought by his administrator under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), is not local but transitory.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 51; Dec. Dig. § 36.*]

4. DEATH (§ 101*)—ACTIONS FOR CAUSING—DAMAGES—DISTRIBUTION.

Under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), making railroad companies liable in damages for the wrongful death of employés to the employé's personal representative for the benefit of the surviving widow and children, the court in which suit is brought by the administrator having control of the plaintiff can compel distribution of the amount recovered according to the terms of the statute, and thus protect defendant against the claims of every one else, including the beneficiaries.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 132-140; Dec. Dig. § 101.*]

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action by W. K. Anderson, administrator of Ray Farmer, deceased, against the Louisville & Nashville Railroad Company. To review a judgment of dismissal, plaintiff brings error. Reversed and remanded.

Plaintiff's decedent, Ray Farmer, was in the employ of the railroad company as a brakeman on its line between Etowah, Tenn., and Corbin, Ky. He was a resident of Whitley county, Ky., and the railroad company is a cor-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—44

poration of that state. January 1, 1909, Farmer was killed in the yards of the company at Knoxville; and on the 5th of the month, his widow, Sallie Farmer, was appointed in Whitley county as administratrix of his estate. Afterward (the date not appearing) the county court of Knox county, Tenn., upon proof that at the time he was killed Farmer had some money and certain chattels of value on his person, appointed W. K. Anderson administrator of the estate of the deceased. September 19, 1909, Anderson, as such administrator, commenced suit in the Knox county circuit court against the railroad company to recover damages for the death. October 5, 1909, on petition of the railroad company, the cause was removed to the court below. January 10, 1910, the declaration was filed, alleging the interstate character and use of the railroad and of decedent's employment and work, and specific acts of negligence, as well as negligent omissions, of the railroad company, without fault of the decedent; setting out portions of the applicable federal Employers' Liability Act of April 22, 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]); and praying recovery of the amount (\$15,000) mentioned in the summons sued out in the state court for the benefit of the widow, Sallie Farmer, and their two children, aged respectively eight years and one year. The sufficiency of the declaration was challenged in various ways. Demurrer was interposed on the ground that the Employers' Liability Act was unconstitutional; that under the facts alleged the act was inapplicable; and that upon this theory no recovery could be had at common law, because the death occurred through the negligence of a fellow servant. Hearing upon the demurrer was by consent postponed until the constitutional validity of the federal act then involved in a suit pending in the Supreme Court should be decided. February 22, 1912, the demurrer was overruled. May 8, 1912, the railroad company filed a plea of ne unques administrator, alleging that the county court of Knox county, on May 7, 1912, had revoked the appointment of Anderson as administrator and ordered his letters of administration to be canceled. May 25th demurrer to this plea was sustained because the plea did not allege that the judgment of the county court was final. Further pleas, the second and third, were then interposed, setting up the prior appointment of the widow as administratrix of the estate, and alleging that the right of action, if any, passed to her. June 21, 1912, demurrer to these pleas was overruled. Later in the same month a fourth plea was filed by the railroad, alleging that the circuit court of Knox county had, on appeal, affirmed the decree of the county court removing Anderson as administrator; but demurrer to this plea was also sustained for failure to allege that such judgment of affirmance was final. July 15, 1912, replication was filed by the administrator to the second and third pleas mentioned, alleging in substance that his appointment as administrator was made and his suit commenced at the request of Sallie Farmer, widow and the principal beneficiary of Ray Farmer, deceased, and that for these reasons no suit other than his had been commenced. August 3, 1912, demurrer to the replication was sustained on the ground that under the act of Congress no right of action existed "in the plaintiff as the Tennessee administrator," but that this right vested "solely in the administratrix * * * appointed in Kentucky"; and, the plaintiff declining to make further replication to the second and third pleas, the suit was dismissed with costs, whereupon this proceeding in error was instituted.

Shields, Cates & Mountcastle, of Knoxville, Tenn. (C. T. Cates, Jr., of Knoxville, Tenn., of counsel), for plaintiff in error.

J. G. Johnson and J. B. Wright, both of Knoxville, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above).
[1] The decisive question is whether, notwithstanding the previous appointment of the Kentucky administratrix, the Tennessee adminis-

trator can for the purposes of the suit be rightfully treated as the decedent's "personal representative" within the meaning of that portion of the federal Employers' Liability Act, which in terms declares the railroad company "shall be liable in damages" to the deceased employé's "personal representative, for the benefit of the surviving widow * * * and children of such employé" (35 Stat. L. 65).

The most obvious features of this statute, which have present relevancy, are that in both structure and design it is remedial and the suit it authorizes is representative. The learned trial judge appears to have regarded the principle announced in *American R. R. Co. v. Birch*, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879, as controlling. That case decides, because the law is so written, that such a suit shall be brought in the name of the employé's personal representative. It was there sought to maintain the suit in the names of the surviving widow and son, not in the name of an administrator, of the deceased; and so, we think, the present question was not involved. The reasons for requiring such a suit to be instituted in the name of a personal representative, rather than in the names of the beneficiaries, manifestly differ from any reason that would limit the right to maintain such an action in the name only of the personal representative, who may happen to be appointed at the last domicile of the deceased. The District Judge believed, as pointed out in the statement, that the right of action vested "solely in the administratrix of said Ray Farmer first appointed in Kentucky." If there be error in this conclusion, it is because more importance was attached to the right of the representative in whose name the action must be prosecuted, and less to the rights of those for whose benefit an action is preserved, than the statute really intends. The dominant views of the District Judge may in substance be stated thus: (1) Congress could not have intended that "a concurrent right of action should be vested" in each of a number of personal representatives, "with the multiplicity of actions and endless confusion that would result therefrom"; and (2), since the general rule is that the place of a decedent's last domicile determines the probate jurisdiction to grant the principal letters of administration on his estate, the representative appointed at that place, and not one appointed in another state to administer assets there found, should be regarded as the only one entitled to maintain the suit. After all, the first of these views is an inference as to possible consequences of the act, rather than an interpretation of its language. And it is to be observed of both views that there is nothing in the act which explicitly clothes a domiciliary administrator with the exclusive right to maintain such an action; and it is by no means certain that such a restriction might not, simply through inability to obtain service of process upon the negligent employer at the last domicile of the deceased, cause greater inconvenience and hardship than could arise through distinct appointment of another administrator elsewhere and his prosecution of the suit. The statute employs the generic term "personal representative," and so describes a familiar class that would naturally include members that are ordinarily appointed in outside jurisdictions for legitimate objects of administration. In the absence then of express restriction to particular members of such a class, it can hardly be pre-

sumed that there was legislative apprehension of abuses from inclusion of the whole class. It is not suggested that abuses have arisen through unnecessary appointments and suits in the administration simply of estates; nor is it perceived why this situation should change merely because damages recovered here would belong to the beneficiaries instead of the estate, much less why possibility of abuses could be a true test of the right of plaintiff to maintain the instant suit.¹ In any event, there could be but one satisfaction. *N. E. Mutual Life Ins. Co. v. Woodworth*, 111 U. S. 138, 147, 4 Sup. Ct. 364, 28 L. Ed. 379; *Southern Pac. Co. v. DaValle DaCosta*, 190 Fed. 689, 696, 111 C. C. A. 417 (C. C. A. 1st Cir.). Further, there is no possibility of a multiplicity of suits in the present instance; for, as pointed out in the statement, the widow sanctioned the appointment of the plaintiff and his commencement and prosecution of the action, and in consequence suffered the time to expire within which she as administratrix could bring the suit.

It should be observed that the proceeding, mentioned in the statement, which was commenced by the railroad in the county court of Knox county to remove the plaintiff as administrator, was taken to the Supreme Court of Tennessee, where the decree of removal was reversed (*Anderson, Adm'r, v. L. & N. R. R. Co.* [Tenn.] 159 S. W. 1086, decided October 11, 1913, and not officially reported);² but it is to be added that the court below assumed for the purposes of the case that Anderson's appointment was valid.³

[2] It results that the plaintiff is in Tennessee as distinctly an independent personal representative of the deceased employé, as the widow is or ever was in Kentucky; they derived their authority respectively from different sovereigns and over different property; no privity

¹ However, we do not overlook the facts or the reasoning which led to the conclusion reached in *Baltimore & O. R. Co. v. Evans*, 188 Fed. 6, 110 C. C. A. 156 (C. C. A. 3d Cir.), and also in the equity case reported under the same name (188 Fed. 8, 110 C. C. A. 158); but the facts developed an exceptional case—an apparent imposition concerning the release involved—which would seem to call for relief independently of any question touching the vesting of a right of action, under a death act, exclusively in a domiciliary administrator; and, moreover, a West Virginia statute, not the act now under consideration, was construed; and no question of right in the administrator appointed in West Virginia to maintain an action in that state or of the power of the court having charge of the suit or of the court appointing him to control or supervise the settlement, arose. If it were conceded that the right to sue upon a death claim includes the power to compromise it fairly (*Schouler on Wills & Admin.* §§ 386, 387, and notes; *Werner on Admin.* [2d Ed.] § 628, and citations), such power is open to abuse by a domiciliary as well as an ancillary administrator; and so no progress is made on the theory that a nondomiciliary administrator might abuse his authority.

² In the course of the opinion in that case it was said: “* * * The deceased had certain goods, chattels or assets in the county of Knox when he died. * * * The value of these goods and chattels is immaterial for the purposes of administration. * * * Such property is alike subject to administration, whether it be found on the person of deceased, or whether it be found in his bank. It was located in Knox county at the time of his death, and that is the material circumstance.”

³ This was in accord with the course pursued by this court in *Dayton Coal & Iron Co. v. Dodd*, 188 Fed. 597, 601, 110 C. C. A. 395, 37 L. R. A. (N. S.) 456.

exists between them either in law or in estate; and within the respective states of their appointment the authority of each is paramount to that of the other. *Stacy v. Thrasher*, 6 How. 44, 59, 12 L. Ed. 337; *Johnson v. Powers*, 139 U. S. 156, 160, 161, 11 Sup. Ct. 525, 35 L. Ed. 112; *Brown v. Fletcher's Estate*, 210 U. S. 82, 90, 28 Sup. Ct. 702, 52 L. Ed. 966; *Wilson v. Hartford Fire Ins. Co.*, 164 Fed. 817, 820, 90 C. C. A. 593, 19 L. R. A. (N. S.) 553 (C. C. A. 8th Cir.); *Low v. Bartlett*, 8 Allen (Mass.) 259, 262, 265; *Price v. Mace*, Adm'r, 47 Wis. 23, 26, 27, 1 N. W. 336; *Keaton's Distributees v. Campbell*, 2 Humph. (Tenn.) 224, 238, 239; *Robert D. Carr v. W. Lowe's Executors*, 7 Heisk. (Tenn.) 84, 92, 93.⁴

[3, 4] What reason then remains to accord to the domiciliary administrator, and deny to the other independent administrator, the right to maintain the suit? Certainly the statute law, as we have seen, is not so written. The Tennessee administrator's official character, as well as that of the Kentucky administratrix, corresponds with the statutory description, "personal representative"; and, inasmuch as the authority of the former is in Tennessee superior to that of the latter, the denial of such right in the former is equivalent to saying that a suit cannot be maintained in Tennessee at all. And yet the statute within its prescribed scope operates and is effective as the paramount law in Tennessee as well as in Kentucky and the other states. *Second Employers' Liability Cases*, 223 U. S. 1, 53, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. Besides, the action is not local, but transitory (*Dennick v. Railroad Co.*, 103 U. S. 11, 18, 26 L. Ed. 439; *Stewart v. Baltimore & Ohio R. Co.*, 168 U. S. 445, 448, 18 Sup. Ct. 105, 42 L. Ed. 537); and since, as stated, the death occurred in Tennessee and the suit was brought and prosecuted there with the approval of the Kentucky administratrix and principal beneficiary, no question of conflict in jurisdiction, or of difference between the plaintiff and the other administrator or the beneficiaries, arises. Thus the right to maintain the suit in the name of the present plaintiff is met by objection only of the alleged negligent railroad; and while it is true that the defendant is entitled to have the suit instituted so that any final judgment rendered will protect it against every one else, including the beneficiaries, it cannot be doubted that the court having control of the plaintiff can compel distribution of any amount received according to the terms of the statute. *Dennick v. Railroad Co.*, supra, 103 U. S. at page 20, 26 L. Ed. 439; *Stewart v. Baltimore & Ohio R. Co.*, supra, 168 U. S. at page 450, 18 Sup. Ct. 105, 42 L. Ed. 537.

Now, the effect of the remedial nature of the Employers' Liability Act and the representative character of the present suit cannot escape attention in a situation like this. Both of these features, together with the liberal construction they manifestly imply, would seem to be in-

⁴It is to be remarked of the Carr Case, just cited, that the Tennessee statute there passed upon was in form the same as the present applicable statute of that state (Code of Tenn. [Ann. Ed. 1896] § 2935, p. 953; Code of Tenn. [Ed. 1884] § 3043, p. 553; Code of Tenn. [Ed. 1858] § 2203, p. 445); approval was given to the Keaton Case, supra, and in both of these decisions a portion of the opinion of Mr. Justice Story in *Harvey v. Richards*, 1 Mason, 381, Fed. Cas. No. 6,184, was adopted.

consistent with the idea that a right of action was vested solely in the domiciliary administrator. This is true, no matter whether the statute be regarded simply as destroying the effect of the common-law maxim that a personal action dies with the person, and so removing an obstacle to the recovery of damages to the extent necessary to compensate those for whose benefit the law was enacted (*Stewart v. Baltimore & Ohio R. Co.*, supra, 168 U. S. at page 448, 18 Sup. Ct. 105, 42 L. Ed. 537), or whether it be treated as designed "to save a right of action to certain relatives dependent upon an employé wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death" (*Mich. & Cent. R. Co. v. Vreeland*, 227 U. S. 59, 68, 33 Sup. Ct. 192, 57 L. Ed. 417), or as creating a new right of action, as was declared of kindred acts in decisions cited approvingly in the *Vreeland Case*, as also stated in respect of the present act in *Garrett v. Louisville & N. R. Co.*, 197 Fed. 715, 720, 117 C. C. A. 109 (C. C. A. 6th Cir.); for the controlling purpose of the present act of Congress, like the statutes involved in *Stewart v. Baltimore & Ohio R. Co.*, and like Lord Campbell's Act itself, the parent act of all such statutes (*Vreeland Case*, supra, 227 U. S. at page 69, 33 Sup. Ct. 192, 57 L. Ed. 417), is to benefit the surviving relatives, not the personal representative, of the deceased. Hence, as it seems to us, it is more in consonance with the statute, and is but giving effect to one of its paramount objects, so to construe it as to permit any validly appointed personal representative of a deceased employé to maintain the suit; and especially must this be so where it is plain, as here, that no injustice can thereby result either to the beneficiaries or the defendant. *Lang v. Houston, W. S. & P. F. R. Co.*, 75 Hun, 151, 27 N. Y. Supp. 90, 92; s. c., affirmed, 144 N. Y. 717, 39 N. E. 858; *Southern Pac. Co. v. Da Valle Da Costa*, supra, 190 Fed. pages 689, 692, 696, 111 C. C. A. 417.

Furthermore, in *Stewart v. Baltimore & Ohio Railroad Co.*, supra, a Maryland statute was involved, providing that whenever the death of a person should be caused by the wrongful act, neglect, etc., of another, "the person who would have been liable if death had not ensued, shall be liable to an action for damages" (*Rev. Code Maryland [Ed. 1878] p. 724*); and, after specifying the beneficiaries, it further provides that the action shall be brought "by and in the name of the state of Maryland, for the use of the person entitled to damages." The death occurred in that state, but the action was brought in the District of Columbia in the name of an administrator appointed there. The statute of the District was like that of Maryland, except that the District statute provided that:

"Every such action shall be brought by and in the name of the personal representative of such deceased person." Act Feb. 17, 1885, c. 126, 23 Stat. L. 307.

It is to be noticed that, apart from the names in which actions shall be instituted, both of these statutes are substantially the same as Lord Campbell's Act (9 and 10 Vic., c. 93), and so, as already pointed out, are in purpose like the Employers' Liability Act. Mr. Justice Brewer said (in *Stewart v. Baltimore & Ohio R. Co.*, 168 U. S. 449, 18 Sup.

Ct. 106, 42 L. Ed. 537), when considering the difference in parties plaintiff as prescribed by the statutes there involved:

"But neither the state in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff."

It is not perceived how any difference of substance can exist between the language of those acts and that of the act now under consideration, so far as the vesting or the beneficial object of the right of action is concerned.

Again, in *Mo., Kans. & Tex. Ry. v. Wulf*, 226 U. S. 570, at page 576, 33 Sup. Ct. 135, 137 (57 L. Ed. 355), where the plaintiff below, as sole beneficiary of the deceased employe, had commenced the action in her own name, but subsequently, and after the limitation prescribed by section 6 of the Employers' Liability Act had expired, took out letters and was allowed to amend her petition by alleging that she sued in the capacity of administratrix, it was held that the amendment was clearly within section 954, Revised Statutes (U. S. Comp. St. 1901, p. 696); Mr. Justice Pitney saying:

"Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by section 6 of the Employers' Liability Act. The change was in form rather than in substance. *Stewart v. Baltimore & Ohio Railroad Co.*, 168 U. S. 415 [18 Sup. Ct. 105, 42 L. Ed. 537]."

And in *Am. R. R. of Porto Rico v. Didricksen*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456, a similar change by amendment concerning the capacity of the plaintiff to maintain the suit appears to have been sanctioned. The present case in principle falls clearly within the liberal practice thus approved, and approved, no doubt, for the purpose of effectuating the real intent of the statute.

It is requested in the brief for plaintiff that, if it be held that the suit can be maintained only by the Kentucky administratrix, the case be remanded "for amendment by joining or substituting Mrs. Farmer, administratrix, as plaintiff." It hardly need be said that we do not think such an amendment is necessary. No effort was made in the trial court to amend; and, while we should upon our own motion have been disposed to do so, we have not seen how we could avoid passing upon the error assigned, by reversing and remanding upon a ground which was neither presented nor considered below; but, if the plaintiff should be advised that the right of the administratrix to maintain the action is not barred by the statute, and that time can still be saved by amendment, the present reversal shall be treated as made without prejudice to such rights in that behalf as may exist.

The judgment is reversed, with costs, and the case remanded for further proceedings in conformity with this opinion.

CENTRAL IMPROVEMENT CO. v. CAMBRIA STEEL CO. et al.

GUARDIAN TRUST CO. v. CAMBRIA STEEL CO. et al.

(Circuit Court of Appeals, Eighth Circuit. December 2, 1913.)

Nos. 3,489, 3,490.

1. APPEAL AND ERROR (§ 266*)—NECESSITY OF EXCEPTIONS—REPORT OF MASTER—DISCRETION OF COURT.

The general rule that, where exceptions are taken to parts of a master's report, the parts not excepted to will stand as correct, and will not be open to review in an appellate court, is subject to the exception that if the report is clearly erroneous in any particular it is within the discretion of the court to correct the error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1552-1565, 1568-1571; Dec. Dig. § 266.*]

2. EQUITY (§ 427*)—DECREE—CONFORMITY TO PRAYER.

Suits in chancery are tried and reviewed in view of the fact that a court of equity has, and frequently exercises, the power, where justice may thereby be done, to grant to litigants the right remedy although they have sought the wrong one.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1001-1014; Dec. Dig. § 427.*]

3. APPEAL AND ERROR (§ 274*)—APPEALS IN EQUITY—POWERS OF APPELLATE COURT—SCOPE OF REVIEW.

A federal appellate court in an equity suit is not compelled to affirm an unjust decree, nor is the appellant so conclusively estopped that it may not attack such a decree by the fact that it gave a wrong reason for its exceptions to the erroneous conclusion of the master which it assails.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1591, 1592, 1605, 1606, 1607, 1624, 1631-1645; Dec. Dig. § 274.*]

4. APPEAL AND ERROR (§ 266*)—APPEALS IN EQUITY—REPORT OF MASTER—EXCEPTIONS TO CONCLUSIONS.

Where it appears on the face of a master's report that he has drawn an erroneous conclusion from the facts he found, the absence of an exception does not disable an appellate court from correcting the error and entering a just final decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1552-1565, 1568-1571; Dec. Dig. § 266.*]

5. RAILROADS (§ 30*)—REORGANIZATION—PARTICIPATION OF STOCKHOLDERS—LIABILITY FOR DEBTS OF OLD COMPANY.

A reorganization of an insolvent corporation, by which both its mortgage bondholders and its stockholders in exchange for their bonds and stock are given an interest in the new company, which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization and by the consent of the old company and its stockholders is fraudulent in law as to unsecured creditors of the old company, whose claims are left unpaid, and renders the new company liable for the claims of such creditors, at least to the extent of the value of the interest in the new company secured by the stockholders of the old company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 32; Dec. Dig. § 30.*]

6. EQUITY (§ 426*)—JURISDICTION—GRANTING AFFIRMATIVE RELIEF TO DEFENDANT.

That a claim has not been reduced to judgment and an execution returned unsatisfied does not prevent the creditor from asserting the lia-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bility of a fraudulent trustee therefor in a federal court of equity in a suit to which the creditor is made a party defendant and wherein the court has acquired jurisdiction of the subject-matter and the parties, and where the adjudication of such liability is necessary to the disposition of the case.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 999, 1000; Dec. Dig. § 426.*]

7. RAILROADS (§ 30*)—REORGANIZATION—PARTICIPATION BY STOCKHOLDERS—RIGHTS OF CREDITORS.

Where the property of a corporation through a reorganization plan and a consent decree of foreclosure was acquired by a new company in which the stockholders of the old were given an interest by an exchange of their stock for stock of the new company, thus withdrawing such property from the reach of unsecured creditors of the old company, such a creditor is not limited to his remedy against the exchanging stockholders, but may hold the new company liable as a fraudulent trustee of the property.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 32; Dec. Dig. § 30.*]

8. RAILROADS (§ 30*)—REORGANIZATION—PARTICIPATION OF STOCKHOLDERS—LIABILITY FOR DEBTS OF OLD COMPANY.

Where, through a reorganization scheme, the property of a corporation was purchased by a new company under a consent decree of foreclosure, and the stockholders of the old company were given in exchange for their stock, bonds, and stock of the new company of substantial value, leaving the claims of unsecured creditors of the old company unpaid, the new company is estopped to deny that the equitable interest of such creditors in the property was at least equal in value to the amount it paid the stockholders.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 32; Dec. Dig. § 30.*]

9. RAILROADS (§ 30*)—REORGANIZATION—PARTICIPATION OF STOCKHOLDERS—LIABILITY FOR DEBTS OF OLD COMPANY—REMEDIES OF CREDITOR.

In such case the remedy of a creditor in equity is not limited to a decree subjecting the property to his claim although he is entitled to such remedy, but he may recover directly against the new company to the extent of the value of such payment to the stockholders, which in equity belonged to its creditors.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 32; Dec. Dig. § 30.*]

10. RAILROADS (§ 30*)—REORGANIZATION—RIGHTS OF CREDITORS—ESTOPPEL.

The fact that a creditor of the old company, which was also a stockholder, joined in the reorganization agreement, assisted in its promotion, and exchanged its stock thereunder for the bonds and stock of the new company, did not estop it from enforcing its claim against such company, where the agreement did not contain anything requiring the committee in charge, or the new company as successor in trust to the stockholders of the old, to violate their legal obligation to provide for the debts of the old company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 32; Dec. Dig. § 30.*]

11. RAILROADS (§ 30*)—REORGANIZATION—RIGHTS OF CREDITORS—LACHES.

A creditor of a corporation held not barred by laches from prosecuting its claim against a new corporation which acquired the stock and property of the debtor under such circumstances as to render it and the property in its hands liable for the debts of the old company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 32; Dec. Dig. § 30.*]

12. APPEAL AND ERROR (§ 1175*)—APPEALS IN EQUITY—ENTRY OF FINAL DECREE—VARIANCE FROM PRAYER FOR RELIEF.

An appellate court in an equity suit has power to remand the case to permit the filing of new or amended pleadings by a party praying for the specific relief to which such party is shown by the proofs to be entitled; but, where such new pleadings would serve no useful purpose, it may enter a final decree granting such relief, although different from that prayed for.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

13. ESTOPPEL (§ 52*)—NATURE AND ELEMENTS OF ESTOPPEL—"ESTOPPEL IN PAIS."

The indispensable elements of an "estoppel in pais" are: (1) Intentional or reckless misrepresentation of a known and material fact inconsistent with the subsequent claim of him who makes the misrepresentation; (2) ignorance of the truth and absence of equal means of knowledge of it by the party who claims the estoppel; (3) action by the latter induced by the misrepresentation and injury to the latter if the truth is permitted to be proved.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121-125, 127; Dec. Dig. § 52.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2497-2508; vol. 8, p. 7655.]

Appeals from the Circuit Court of the United States for the Western District of Missouri; John F. Philips, Judge.

Suits in equity by the Cambria Steel Company against the Central Improvement Company and others, and by the Provident Life & Trust Company against the Kansas City Suburban Belt Railroad Company and others. From the decrees, the Central Improvement Company and the Guardian Trust Company appeal. Reversed.

See, also, 120 C. C. A. 121, 201 Fed. 811.

George H. English, Jr., and D. J. Haff, both of Kansas City, Mo. (Edward P. Gates and E. C. Meservey, both of Kansas City, Mo., on the brief), for appellant Guardian Trust Co.

Frank Hagerman, of Kansas City, Mo., for appellee Cambria Steel Co.

Samuel Untermeyer, of New York City, and Samuel W. Moore, of Kansas City, Mo., for appellee Kansas City Southern Ry. Co.

Newell H. Clapp, of St. Paul, Minn., and Enoch J. Price and Harry S. Mecartney, both of Chicago, Ill., for appellees Edward A. Shedd, and others.

Before SANBORN, Circuit Judge, and MARSHALL and WILLIAM H. MUNGER, District Judges.

PER CURIAM. The paramount issue in these cases is: Did the Southern Company become liable to pay the unsecured debt of the Belt Company to the Trust Company by participating in the execution of a scheme whereby it acquired the title to the property of the Belt Company, deprived its creditor, the Trust Company, of recourse thereto by execution to collect its claim and yet reserved to itself and other stockholders of the Belt Company an equity in its property and a benefit therefrom more valuable than the amount of the Trust Company's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

claim? After exhaustive arguments and briefs and a review of the master's report on which this case came to this court, the conclusion was reached that this question should be answered in the affirmative. This question had been at issue between the Trust Company and the Southern Company in this suit and in actions at law in the state courts for many years. The prosecution of those actions had been repeatedly enjoined and delayed by orders of the court below, and those orders had been as often reversed by this court. While the pleadings of the parties squarely presented the issue, while this issue had been litigated strenuously in this suit, the Trust Company had not in any of its pleadings made a specific prayer for a decree for the payment of its claim by the Southern Company, nor for the seizure or sale to pay it of the property of the Belt Company which the Southern Company had taken. The question had been suggested by three of the stockholders of the Trust Company whether or not, in view of the long delay, this court could or should direct an entry of a decree for such relief in these cases rather than to leave that relief to be granted upon trials of the cases in the state court, and, as this question had not been argued, counsel for all the parties were permitted to be heard upon it. That hearing developed into a reargument of all the salient issues in the cases, and at the close of that hearing they were taken under advisement by the court. It is the purpose now to state the conclusions at which we have arrived after another consideration of the issues presented.

The history of this litigation, the issues, and many of the facts found by the master are set forth in our former opinion. *Central Improvement Co. v. Cambria Steel Co.*, 201 Fed. 811, 120 C. C. A. 121.

[1] 1. From all the facts pertinent to the issue which are set forth in many printed pages of his report, the master deduced this decisive conclusion:

"That the Southern Company is not liable in any way for the floating indebtedness of the Belt Company."

To this conclusion the Trust Company excepted on the ground that, in view of other conclusions which the master reached adverse to it, it was unnecessary for him to determine that issue. A consideration after argument of all the facts relating to this issue which the master found in his report convinced this court that the conclusion lawfully deducible from them was that the Southern Company was liable to pay to the Trust Company the debt which the Belt Company owed it. Counsel for the Southern Company now insist that this court was without power to consider or correct this conclusion of the master which the court below followed, and that the Trust Company must suffer the loss of this amount because its counsel did not state in its exception that the conclusion was wrong on the merits of the issue. They invoke the conceded general rule that where no exception is taken to the master's report it will be deemed to be true, and where exceptions to parts of it are taken the parts to which no exception is taken will stand as correct and will not be open to review in an appellate court. *Burns v. Rosenstein*, 135 U. S. 449, 10 Sup. Ct. 817, 34 L. Ed. 193; *Provident Life & Trust Co. v. Railway Co.*, 177 Fed. 854,

859, 101 C. C. A. 68. But this rule, like most rules of law or practice, is not without its exceptions. In *Sheffield, etc., Ry. Co. v. Gordon*, 151 U. S. 285, 291, 14 Sup. Ct. 343, 344 (38 L. Ed. 164), the Supreme Court, while holding the exceptions in that case insufficient to present the questions argued, said:

"It is true that, if the report of the master is clearly erroneous in any particular, it is within the discretion of the court to correct the error; but we see no occasion for exercising such discretion in this case."

In 2 Daniell's Chancery Pleading & Practice, at page 1314, it is said that it is entirely discretionary with the court to grant an opportunity to except to a report after it has been absolutely confirmed.

[2] Counsel also claim that by the Trust Company's exception they were induced to forego a review of the finding of the master that the Belt Company was indebted to the Trust Company, and that thereby an equitable estoppel from reviewing the issue of the liability of the Southern Company was created. But suits in chancery are tried and reviewed in view of the fact that a court of equity has and frequently exercises the power where justice may thereby be done, to grant to litigants the right remedy although they have sought the wrong one. *Clark v. Clark*, 62 N. H. 267, 272; *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. Ed. 1141; *Wiggins Ferry Co. v. Ohio & Mississippi Ry. Co.*, 142 U. S. 396, 414, 415, 416, 12 Sup. Ct. 188, 35 L. Ed. 1055; *Bradford v. Bank*, 13 How. 57, 69, 70, 14 L. Ed. 49; *Walden v. Bodley*, 14 Pet. 156, 164, 10 L. Ed. 398; *Moran v. Hagerman*, 64 Fed. 499, 503, 504, 12 C. C. A. 239.

[3] As an appeal in equity in the federal courts results in a trial de novo, the appellate court is not, in our opinion, so powerless that it is compelled to affirm an unjust decree; nor is the appellant so conclusively estopped that it may not attack such a decree by the fact that it gave a wrong reason for its exception to the erroneous conclusion of the master it assails.

[4] Moreover, the conclusion here challenged was a mere deduction from the facts disclosed in the master's report, and, where it appears on the face of the report that the master has drawn an erroneous conclusion from the facts he found, the absence of an exception does not disable the court from correcting the error and entering a just final decree. 2 Daniell's Chancery Pleading & Practice, *p. 1310; 17 Encyc. of Pleading & Practice, 1048; *Celluloid Mfg. Co. v. Celonite Mfg. Co. (C. C.)* 40 Fed. 476, 477; *Burke v. Davis*, 81 Fed. 907, 910, 26 C. C. A. 675, 678; *Haymond v. Murphy*, 65 W. Va. 616, 64 S. E. 855, 857; *Hayes v. Hammond*, 162 Ill. 133, 44 N. E. 422, 423; *Hurd v. Goodrich*, 59 Ill. 450, 456; *Von Tobel v. Ostrander*, 158 Ill. 499, 42 N. E. 152, 153. The contention that the Trust Company was estopped from seeking a correction of this error and that this court was powerless to correct it does not seem to be well founded, and this court is unwilling to affirm what it deems an unjust decree on account of the defect in the exception.

2. It is conceded that by the transaction described in the former opinion of this court and deemed by it violative of the rights of the Trust Company, a creditor of the Belt Company, if that transaction be

valid, was deprived of legal recourse to the property of the Belt Company to obtain payment of that company's debt to the Trust Company of about \$360,000. At that time the Southern Company, by an exchange of its stock and bonds for the stock and bonds of the Belt Company, and by a formal foreclosure by itself, as holder of about 89 per cent. of its bonds, by means of its representative, the Provident Company, trustee for the bondholders, against and with the consent of itself as the holder of about 97 per cent. of its stock, and by a foreclosure sale of the property of the Belt Company to itself obtained the title to the Belt Company's property to itself, the bondholders of the Belt Company secured about \$1,330,000 par value of the bonds and \$250,000 of the preferred stock of the Southern Company, aggregating at their par value \$1,580,000 for their \$1,000,000 par value of bonds of the Belt Company, and the stockholders of the Belt Company secured for their \$4,750,000 par value of the stock of that company about \$1,187,500 par value of the preferred stock and about \$3,562,500 par value of the common stock, in all about \$4,750,000 par value of the stock of the Southern Company.

[5] The following propositions of law are deemed incontestable:

"A reorganization of an insolvent railroad company, by which both its mortgage bondholders and its stockholders, in exchange for their bonds and stocks, are given an interest in the new company, which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization and by the consent of the old company and its stockholders, is fraudulent in law as to unsecured creditors of the old company whose claims are left unpaid, and renders the new company liable for the claims of such creditors, at least to the extent of the value of the interest in the new company secured by the stockholders of the old company." *Northern Pacific Ry. Co. v. Boyd*, 177 Fed. 804, 101 C. C. A. 18; *Luedecke v. Des Moines Cabinet Co.*, 140 Iowa, 223, 118 N. W. 456, 32 L. R. A. (N. S.) 616; *Hurd v. New York & Commercial Steam Laundry Co.*, 167 N. Y. 89, 60 N. E. 327.

Where such a transaction is consummated without offering to the unsecured creditor a fair share of the benefits to be derived from the vesting of the title in the purchaser at the foreclosure sale, the intent or purpose to deprive him of recourse to the property to collect his debt becomes immaterial and the fact that it has that effect charges the purchaser with liability.

"As against him the sale is void in equity, regardless of the motive with which it was made; for if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company." *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482, 502, 33 Sup. Ct. 554, 559 (57 L. Ed. 931).

"For, if purposely or unintentionally a single creditor was not paid or provided for by the reorganization, he could assert his superior rights against the subordinate rights of the old stockholders in the property transferred to the new company. They (the stockholders of the old company) were in the position of insolvent debtors who could not reserve an interest as against creditors. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with the payment of corporate liabilities. Any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditors was invalid. Being bound by the debts, the purchase of

their property, by their new company, for their benefit, put the stockholders in the position of a mortgagor buying at his own sale. If they did so in good faith and in ignorance of Boyd's claim they were none the less bound to recognize his superior right in the property, when years later his contingent claim was liquidated and established." *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 504, 33 Sup. Ct. 560, 57 L. Ed. 931.

"No such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. * * * Any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of prior rights of either class of creditors comes within judicial denunciation." *Louisville Trust Co. v. Louisville, etc., Ry. Co.*, 174 U. S. 674, 683, 684, 19 Sup. Ct. 827, 830 (43 L. Ed. 1130).

The transaction in hand, if valid, had the effect to deprive the creditors of the Belt Company of and to secure to the stockholders of that company out of its property the value of \$1,187,500 par value of the preferred stock and \$3,562,500 par value of the common stock of the Southern Company, and upon its face it seems to fall within the denunciation of these rules of law.

But counsel for the Southern Company argue that, although the completed transaction has the effect of an illegal proceeding, it is not such because it is composed of two independent and valid transactions, to wit: (1) The organization in March, 1900, of the Southern Company and the exchange of the bonds and stock of the Belt Company for the bonds and stock of the Southern Company, so that by April 1, 1900, the latter had acquired 97 per cent. of the stock and 89 per cent. of the bonds of the Belt Company, and the taking possession of the property of the Belt Company by the Southern Company by virtue of its ownership of these bonds and stock on April 1, 1900, when it filled the offices of the Belt Company with its chosen agents and proceeded to control and operate it, and (2) the filing on September 6, 1900, by the Provident Trust Company, the trustee in the Belt mortgage, at the instance of the Southern Company, the owner of 89 per cent. of the bonds, of the bill to foreclose the mortgage of the Belt Company, 97 per cent. of whose stock was owned by the Southern Company, the appearance and consent of the Belt Company on the same day to the appointment of receivers of its property, its answer on October 19, 1901, admitting the material averments of the bill, the decree on November 6, 1901, of foreclosure and sale of the Belt property and the sale thereof on December 31, 1901, under this decree to the Southern Company, the owner of nearly all its bonds and stock. The contention is that, while the former transaction was the result of the scheme of reorganization, the latter was independent and free from the influence thereof, and that each of these transactions taken by itself, as counsel insist they should be, is free from any just objection by any creditor of the Belt Company.

The plan of reorganization was made November 7, 1899, and it became effective December 20, 1899. This plan was made a part of the reorganization agreement, and it stated that it was expected and intended that the property of the Gulf Company would be purchased by the reorganization committee, that a successor of the company would

be organized to which this property and the stocks and bonds of the Belt Company deposited under the plan would be conveyed, that all this property was to be made subject to the mortgage of the new company, and that it was "intended, as soon as practicable, that the new company acquire the property of the terminal companies in fee and bring them directly under the lien of the mortgage." It was then one of the objects of the scheme of reorganization which the committee and the Southern Company, which it organized, were empowered and expected to carry into effect, that the latter company should acquire the property of the Belt Company "in fee" and bring it "directly under the lien of the mortgage," and the acquisition of the stocks and bonds of that company and their pledge under that mortgage were but the means to the accomplishment of this end which the plan contemplated.

It is conceded that the organization of the Southern Company, its purchase of the Gulf Company property, its exchange of its stocks and bonds for those of the Belt Company, and its possession and control of its property on April 1, 1900, by means of its ownership of this stock, were steps in the execution of the scheme. But the reorganization committee did not cease its work until October 1, 1900, and before that date the Southern Company by its representative, the Provident Company, had, on September 6, 1900, commenced the suit to foreclose the Belt mortgage and to put its property in the hands of receivers and had caused the Belt Company to consent to the receivership. For what purpose did the Southern Company take these steps? It had the possession and absolute control of the Belt property by its ownership of 89 per cent. of its bonds and 97 per cent. of its stock. A default on its bonds was in reality a default of itself to itself. Foreclosure could give it no more power over the Belt Company than it already had. For what purpose then was the foreclosure? Evidently to carry out the reorganization agreement, as it was within the power and as it was the duty of the committee and of that company, its creature, to do, to acquire the property of the Belt Company in fee and bring it directly under the lien of the mortgage. Why did the Southern Company exchange its stock for the stock of the Belt Company? Was it not for the purpose of silencing the opposition of the Belt stockholders to the coming foreclosure, and to its acquisition of the fee of the Belt Company's property, and was not the scheme of reorganization the primary cause, the vesting of the fee of the Belt property in the Southern Company by the foreclosure the object and effect of that scheme, and the exchange of the stock and the foreclosure of the Belt mortgage the means contemplated and authorized by that scheme to attain that end? To the minds of the members of this court the record in this case leaves no alternative but to answer these questions in the affirmative.

Moreover, the property of the Belt Company was a trust fund. The stockholders of that company were trustees charged with the duty to apply that property to the payment of the claims of the trust company and of the other creditors of the Belt Company before they took to themselves any share in or benefit therefrom. When the Southern

Company took their stock and gave them \$4,750,000 par value of its stocks and bonds for their interest in the property of the Belt Company, it stepped into their shoes and became a trustee for the creditors of the Belt Company with plenary notice that the interest of those creditors in the property was at least as much as the value of the stocks and bonds it was giving for the interest of the stockholders, for the rights of the creditors in the Belt property were prior and superior to those of the stockholders. By virtue of the plan of reorganization the Southern Company had become such trustee. The agreement of reorganization and its ownership of 89 per cent. of the bonds and 97 per cent. of the stock of the Belt Company gave the committee and the Southern Company unrestricted power to discharge its duty to the creditors of the Belt Company, as their trustee, and to accomplish the object of the agreement regarding this property, the vesting of the fee of it in the Southern Company. They had the power to attain this object in a just and lawful way, to pay, to buy, or to compromise the claims of the creditors, or to offer them a just share in the benefits of the reorganization, a share at least as valuable as that given to the stockholders. They did neither, but, in the face of the danger signal that "any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation," the Southern Company proceeded by a foreclosure caused by itself, the owner of 89 per cent. of the bonds, trustee for the creditors, really against and with the consent of itself as such trustee, owner of 97 per cent. of the stock, to obtain against the protest of the Trust Company, whom the court expressly excepted in the decree from its effect, a foreclosure decree and sale of this property in effect by itself as trustee to itself as trustee, and thenceforth to insist that it had thereby secured to itself and deprived its *cestuis que trust*, the creditors of the Belt Company, of all interest in the property. In view of the fact that the acquisition of the fee of the Belt property by the Southern Company was stated in the reorganization plan and agreement to be one of their intended results, that this result has been obtained, that the exchange of the stocks and bonds were the means specified therein to attain it, and were the means by which the consent decree of foreclosure and sale of the Belt property to the Southern Company was effected, and that this foreclosure and sale were the means by which the intended result of the plan of acquisition of the fee of the Belt properties by the Southern Company was secured, this court is unwilling to hold that the validity of these proceedings can be sustained against the rule that "any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditors, was invalid" (228 U. S. 504, 33 Sup. Ct. 560, 57 L. Ed. 931), by contemplating or treating them as two separate and independent transactions, one consisting of that part of the proceedings conducted before, and the other of that part of the proceedings conducted after, April 2, 1900. They appear to this court to constitute a single transaction instituted, conducted, and consummated pursuant to the preconceived plan to vest the fee of the prop-

erties of the Belt Company in the Southern Company and to bring them directly under the lien of its mortgage.

[6] 3. Counsel for the Southern Company contend that the Trust Company is entitled to no favorable decree for the payment of the liability of the Southern Company to it and to no affirmative relief because it did not obtain a judgment against the Belt Company and a return of nulla bona to an execution before it presented its claim and demanded relief. But that is an objection only to the jurisdiction of a national court in equity of an original and independent bill to charge a fraudulent trustee. A claim of the nature of that made by the Trust Company in the absence of judgment or execution may be presented by intervention in a foreclosure suit and may there, or in any other suit wherein the court has acquired jurisdiction of the subject-matter and the parties, be adjudicated. *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 379, 14 Sup. Ct. 127, 37 L. Ed. 1113. The objection is not tenable here because the decision of the question of the liability of the Southern Company to the Trust Company became, as conceded by counsel for the Southern Company, necessary to the disposition of this case (201 Fed. 817, 120 C. C. A. 121), to which the Trust Company was originally made a defendant against its will. This is now a suit in equity in which the court below and this court have full jurisdiction of the subject-matter and the parties to the controversy regarding this liability, and under a familiar and salutary rule the power is conferred and the duty is imposed upon a court of equity, which has acquired such jurisdiction, to consider and determine all the rights and claims of the parties relating to the subject-matter and to enter a decree that will finally determine them to the end that a multiplicity of suits may be avoided and litigation may cease. *Hopkins v. Grimshaw*, 165 U. S. 342, 358, 17 Sup. Ct. 401, 41 L. Ed. 739; *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 325, 12 Sup. Ct. 235, 35 L. Ed. 1025; *Ward v. Todd*, 103 U. S. 327, 329, 26 L. Ed. 339; *In re Blake*, 150 Fed. 279, 283, 80 C. C. A. 167, 173; *United States v. Standard Oil Co. (C. C.)* 152 Fed. 290, 296; *Campbell v. Golden Cycle Mining Co.*, 141 Fed. 610, 614, 73 C. C. A. 260, 264.

[7] It is contended that the remedy of the Trust Company is limited to a pursuit of the stockholders of the Belt Company who exchanged their stock for the stock of the Southern Company. But the liability of those stockholders is founded on their relation as trustees for the creditors of the corporation. The Southern Company with full notice of their and its liability and duty to the creditors of the Belt Company by the exchange of stock became such a trustee, and by as much as its power over the property of the Belt Company by its ownership of nearly all its bonds, as well as stock, was greater than that of the former stockholders, by so much was its duty to protect the rights and interests of its cestuis que trust, the creditors, higher and more imperative. It owed them the duty to exercise good faith, care, and diligence to secure and deliver to them their full equitable share of the property or the value of that share. Any sale or conveyance of the property to itself whereby they were deprived of and it secured that share, or its value, was a breach of duty and of trust which in-

vokes plenary relief from a court of chancery, and as by its formal foreclosure sale to itself of the property of the Belt Company it took to itself and deprived the creditors of their equitable interest in the property and of the value of that interest, it is not less liable in equity for this breach of trust than were the stockholders with whom it exchanged its stock. The duty and liability of the majority stockholders to minority stockholders is not less than this (*Jones v. Missouri Edison Electric Co.*, 144 Fed. 765, 771, 75 C. C. A. 631, and cases there cited), and their duty to creditors whose equitable rights and interests in the property of the corporation are superior to those of stockholders cannot be less.

Moreover, where the property of a corporation is sold to a purchaser and part or all of the purchase price thereof is paid or distributed to its stockholders to the exclusion of its creditors from a collection of their debts from the property of the corporation, the latter may recover that part of its value from the purchaser with notice, on the ground that the conveyance is fraudulent in law. *Central of Georgia Ry. Co. v. Paul*, 93 Fed. 878, 882, 884, 35 C. C. A. 639; *Luedecke v. Des Moines Cabinet Co.*, 140 Iowa, 223, 118 N. W. 456, 457, 32 L. R. A. (N. S.) 616; *Hibernia Ins. Co. v. St. Louis & N. O. Trans. Co.* (C. C.) 13 Fed. 516; *Grenell v. Detroit Gas Co.*, 112 Mich. 70, 70 N. W. 413; *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931. And the fact must be constantly borne in mind, in the consideration of this case, that as against the Trust Company the entire transaction was in effect that the Southern Company knowingly purchased and took to itself without even a formal foreclosure the property of the Belt Company and paid the latter's stockholders the value of \$4,750,000 of its stock therefor to the exclusion of the Belt Company's creditors therefrom, for by the express provision of the foreclosure decree the Trust Company was excepted from all its effects.

Another argument is that the Trust Company is entitled to no relief because the equitable interest of the creditors in the property of the Belt Company was of no value. This contention is founded on the findings of the master that there was no direct testimony of the fair value of the Belt Company's property at or before the time of the foreclosure, no proof that it was worth more than the \$1,000,000 for which it was sold at the foreclosure sale, and therefore that it was sold at its fair market value. The mortgage was \$1,000,000, and the deduction is that the equitable interest of the creditors was valueless. But the crucial issue here was not what the fair market value of the mortgaged property was, nor was it how much more the mortgaged property was worth than the amount of the mortgage. Although evidence upon these subjects would have been competent in the consideration of the real issue here in the absence of an estoppel, that issue was: What was the equitable interest of the creditors in the mortgaged property of the Belt Company worth during the execution of the scheme and immediately after the foreclosure sale and the appropriation of it thereby by the Southern Company, the trustee for the creditors, to itself, for a trustee who violates his trust may not prof-

it thereby? *Ervin v. Oregon Railway & Navigation Co.* (C. C.) 27 Fed. 625, 633; *Jones v. Missouri Edison Electric Co.*, 144 Fed. 765, 779, 75 C. C. A. 631. The creditors were entitled to the highest value their interest had during this time, either for the purpose of sale or for the purpose of preventing a foreclosure of the mortgage upon the Belt property, or for the purpose of compromising their claims or conditioning the foreclosure, or for the purpose of the present or future control of the property.

"If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever." *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 508, 33 Sup. Ct. 561, 57 L. Ed. 931.

[8] The report of the master discloses other facts than that he received no direct evidence of the fair market value of the property except the bid at the foreclosure sale, which leave no doubt that the equitable interest of the creditors was worth much more than the amount of the Trust Company's claim, \$360,000. That report shows that the Southern Company paid \$1,330,000 of its bonds and \$250,000 of its preferred stock, or \$1,580,000 of its new bonds and stock for the \$1,000,000 of the old bonds of the Belt Company. The fact to which counsel call attention, that the new bonds drew but 3 per cent. interest per annum while the old bonds drew 5 per cent., has not been overlooked. But even so, the reorganization committee and the Southern Company would not have given for these old bonds a bonus of 33 per cent. in new bonds and \$250,000 in the stock of the Southern Company unless the old bonds had been well secured. The master's report also shows that the Southern Company gave \$1,187,500 of its preferred stock and \$3,562,500 of its common stock to the stockholders of the Belt Company for their equitable interest in the property of that company, that at the same time stockholders of the Gulf Company paid, and the Southern Company received, \$10 per share in cash and an equal number of shares of the stock of the Gulf Company for tens of thousands of shares of the Southern Company's common stock. That stock must therefore have been worth at least the \$10 cash per share which was paid for it, and it was worth as much more as the value of the stock of the Gulf Company. The preferred stock of the Southern Company could not have been worth less than its common stock. The Southern Company therefore paid in value at least \$475,000 for the equitable interest of the stockholders of the Belt Company in its property when it gave them \$4,750,000 of its preferred and common stock for their stock in that company. But the equitable interest of the creditors in the property of the Belt Company was superior to that of the stockholders, and its value could not have been less, and was undoubtedly greater, than the \$475,000. That interest was therefore worth more than enough to have paid the \$360,000 which the Belt Company owed to the Trust Company, and the Southern Company cannot escape liability on the ground that it was worthless. The fact that at the foreclosure sale, where there was no com-

petition, the Belt Company was bid in at \$1,000,000, fails to disprove or to even render doubtful this conclusion, and the Southern Company which gave \$4,750,000 of its full paid stock, which it was readily selling for \$10 cash per share, and Gulf stock of equal amount, for the inferior stock of the Belt Company, cannot be heard to say that the superior equity of the creditors therein was worthless. *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 508, 33 Sup. Ct. 554, 57 L. Ed. 931; *Rankin v. Gardner* (N. J.) 34 Atl. 935, 937; *Garrison v. Monaghan*, 33 Pa. 232, 234.

Deliberate consideration has been given to the earnest objection to the consideration by this court of the question of the value of this equitable interest of the creditors in the Belt property on the ground that the master found that there was no direct evidence that the property of the Belt Company was worth more than \$1,000,000, and hence that this was its fair value, that no exception was taken to that finding, and that the evidence is not here. But because the finding of the fair market value of the mortgaged property is not conclusive of the value of the creditors' equity therein, and because other facts and findings contained in the master's report, all of which are available to this court for the determination of that issue, have convinced that the value of that equity was more than \$475,000, the objection of counsel has not been thought fatal to the consideration and determination of this question.

Counsel say that because the original stockholders of the Belt Company, by the exchange of their stock for that of the Southern Company retained, as they claim, only $3\frac{1}{3}$ per cent. of the value of their equitable interest in the Belt property, therefore the Southern Company is liable for only $3\frac{1}{3}$ per cent. of that interest. But the measure of the creditors' recovery is the value of the creditors' equity which was diverted from them by their trustees, the stockholders of the Belt Company, including the Southern Company, the successory trustee, and vested in that trustee. If the Southern Company had been the owner of the bonds of the Belt Company only, and knowing the condition and indebtedness of the Belt Company, as it did, had paid to the stockholders of that company \$475,000 to the exclusion of the creditors for a conveyance of its property by the Belt Company to the Southern Company, it could not have escaped liability to the creditors of that company for that amount. Much less can it do so when it became owner of nearly all the Belt Company's stock, and in equity a trustee for its creditors. *Story's Equity Jurisprudence*, §§ 1261, 1262; *Grenell v. Detroit Gas Co.*, 112 Mich. 70, 70 N. W. 413; *Camden Interstate Ry. Co. v. Lee* (Ky.) 84 S. W. 332, 333; *Central of Georgia Ry. Co. v. Paul*, 93 Fed. 883, 884, 35 C. C. A. 639; *Luedecke v. Des Moines Cabinet Co.*, 140 Iowa, 223, 118 N. W. 457, 458, 32 L. R. A. (N. S.) 616; *Hibernia Ins. Co. v. St. Louis & N. O. Trans. Co.* (C. C.) 13 Fed. 516, 519.

[9] It is another contention of counsel for the Southern Company that the remedy of the Trust Company in this court of equity is limited to the subjection of the property of the Belt Company in the possession of the Southern Company to the payment of its claim and that

it may not have a decree that the Southern Company pay it. This court does not concede the soundness of this position and the leading case on the subject cited by counsel for the Southern Company does not sustain it. The quotation they make from that case is in these words:

"A sale may be void for bad faith though the buyer pays the full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts, and, giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller, it may hold him excused from further responsibility. The cardinal principle in all such cases is that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud." *Clements v. Moore*, 6 Wall. 299, 312 (18 L. Ed. 786).

The application of the principles there announced in that suit, which was in equity, was this: Nicholson, the debtor, had sold his property to Moore for \$6,310.35 to defraud his creditors, and Moore had paid Nicholson for the goods in cash and his own notes which Nicholson had disposed of and Moore had sold the goods. But Nicholson had applied all of the \$6,310.35 to the payment of his debts except \$1,500. The Supreme Court held that Moore was liable to the creditor Clements for that amount. By the same mark the Southern Company became liable to the Trust Company to the extent of its claim for the value of the \$4,750,000 of its stocks which it issued to the stockholders of the Belt Company to secure the property of the Belt Company and divert it from its creditors. *Central of Georgia Ry. Co. v. Paul*, 93 Fed. 883, 884, 35 C. C. A. 639; *Camden Interstate Ry. Co. v. Lee* (Ky.) 84 S. W. 332, 333.

The question, however, is not material in the case at bar because the transaction was a conveyance of the property of the Belt Company in fraud of creditors and a breach of trust by the Southern Company, which company, with full knowledge of all the facts, actively participated in the entire transaction and thereby acquired the property of the Belt Company, so that that property and the improvements the Southern Company has made thereon, free from the \$1,000,000 Belt mortgage and free from any charge for the expenses which the Southern Company has made thereon, stands in its hands charged with a trust to pay the claim of the Trust Company against the Belt Company which the court may execute by a seizure and sale by its master or receiver. *Railroad Co. v. Soutter*, 80 U. S. (13 Wall.) 517, 522, 524, 20 L. Ed.

543; *Guckenheimer v. Angevine*, 81 N. Y. 394, 397; *Goble v. O'Connor*, 43 Neb. 49, 61 N. W. 131, 132.

And if the Southern Company has disposed of the property or destroyed it, or placed it beyond the reach of the Trust Company or the court, or given a mortgage or incumbrance upon it to a party without notice, the court has plenary power, and it is its duty to require the Southern Company to account for and pay over the proceeds of the property or the value of it, or the proceeds of the mortgage, or the amount of it, to the extent of the Trust Company's claim, and to so conduct its proceedings and mold its decrees that full relief may be secured by the Trust Company. And as the property of the Belt Company was worth many times the amount of the claim of the Trust Company at the time of its transfer to the Southern Company, the ultimate result will be the same whether the decree be for the seizure and sale of the Belt property or for the payment of the claim of the Trust Company by the Southern Company, for it must ultimately be paid either out of the property in its hands or by the Southern Company itself. 20 Cyc. 630, 631; *Doherty v. Holliday*, 137 Ind. 282, 32 N. E. 315, 317, 36 N. E. 907, 908; *Jones v. Reeder*, 22 Ind. 111; *Swinford v. Rogers*, 23 Cal. 234, 237; *Mason v. Pierron*, 69 Wis. 585, 34 N. W. 921, 925; *Blair v. Smith*, 114 Ind. 114, 15 N. E. 817, 819, 820, 5 Am. St. Rep. 593; *Williamson v. Williams*, 11 Lea (Tenn.) 355; *Murtha v. Curley*, 90 N. Y. 372; *Post v. Stiger*, 29 N. J. Eq. 554, 561; *Chamberlin v. Jones*, 114 Ind. 458, 16 N. E. 178, 179; *Muskegon Valley Furniture Co. v. Phillips*, 113 Ala. 314, 21 South. 822, 823; *Coale v. Moline Plow Co.*, 134 Ill. 350, 25 N. E. 1016, 1018; *Dilworth v. Curts*, 139 Ill. 508, 29 N. E. 861, 864; *Hulley v. Chedic*, 22 Nev. 127, 36 Pac. 783, 786, 58 Am. St. Rep. 729; *Morrell v. Miller*, 28 Or. 354, 43 Pac. 490, 494, 45 Pac. 246.

[10] 4. Counsel argue with great force and ability that the Trust Company is estopped from enforcing against the Southern Company its claim for its breach of trust to it as a creditor of the Belt Company:

(1) Because it signed and induced others to sign, the trust agreement which contained this paragraph:

"No right is conferred, nor any trust, liability or obligation (except the agreements herein contained in favor of the holders of certificates of deposit hereunder) is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of any bondholder or any other creditor or any holder of any claims whatsoever against the said companies, nor in favor of any company now existing or to be formed hereafter (whether such claim be based on any bonds, coupon stocks, securities, lease, guaranty or otherwise) with respect to any security deposited under this agreement or any moneys paid to or received by the committee or by the depositor hereunder, or with respect to any property acquired by purchase at any foreclosure sale, or with respect to any new certificates to be issued hereunder, or with respect to any other matter or thing."

(2) Because it was one of the depositories under the agreement, and on June 26, 1900, it accepted bonds and stock of the Southern Company in exchange for bonds and stock in the Gulf Company and other companies reorganized under the agreement, and especially because it accepted stock of the Southern Company in exchange for stock of the

Belt Company which it held, and (3) by its laches in presenting its claim against the Southern Company.

It may be that if, when the Trust Company signed the agreement, that instrument had disclosed a purpose or had by its terms required the committee, or the stockholders of the Belt Company, or their successor trustee, the new company, the Southern Company, to violate their trust and divert the equity of the creditors of the Belt Company in its property to its stockholders, the Trust Company's signature to it, its action as a depository of the bonds and stocks under it, and its exchange of its Belt Company stock for the Southern Company stock, might have wrought an estoppel against it. But the agreement must be read in the light of the law which was necessarily a part of it. It was to execute a plan, which it disclosed, to transfer the property of the Belt Company to a new company by means of the exchange of the stock of the new company for that of the Belt Company. The law was that as against creditors of the Belt Company such a plan could be lawfully executed in but one way, and that was by offering and, if accepted, by paying to the creditors of the Belt Company either in cash or in stock of the new company, or in some other property at least as much in value as the stockholders should receive, and, in the absence of such an offer or payment the transfer would be fraudulent and voidable as to the creditors. Unless there was in the agreement some term or provision which required the committee or the Southern Company to violate this law and to make a transfer fraudulent and voidable as to the creditors, the legal presumption was that the agreement contemplated, and that the committee and the Southern Company would make, such an offer and payment to the creditors, and upon that presumption the Trust Company had the right to rely when it signed the agreement and thenceforth until it was clearly notified to the contrary. The legal presumption was that the committee and the new company, the Southern Company, which was to succeed to the trusteeship of the stockholders of the Belt Company, and all others executing the agreement would obey the law, would refrain from making the transfer of the property from the Belt Company fraudulent and voidable, and would make it fair, just, and valid. The Trust Company had the right to calculate the natural and probable result of its signature to the agreement and of all its acts and omissions in reliance upon this presumption. Indeed, it could reckon upon no other, for it is alike impracticable and impossible to predicate and administer the rights and remedies of men upon the theory that their associates and fellowmen will either violate the laws or disregard their duties. *Cole v. German Savings & Loan Co.*, 124 Fed. 113, 119, 59 C. C. A. 593, 599, 63 L. R. A. 416; *Little Rock & M. R. Co. v. Barry*, 84 Fed. 944, 950, 28 C. C. A. 644, 650, 43 L. R. A. 349; *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 247, 28 N. E. 1, 13 L. R. A. 97; *American Bridge Co. v. Seeds*, 144 Fed. 605, 609, 75 C. C. A. 407, 411, 11 L. R. A. (N. S.) 1041.

The reorganization agreement has been searched in vain for any provision which required or notified the committee or the new company that they must violate the law and make the transfer fraudulent and

void as to creditors. On the other hand, that agreement declared that the results of its execution would be: (a) The placing of the properties of the Belt Company, the Gulf Company, and the Dock Company under one corporate ownership, management, and control; "(b) the payment of the floating debt and the existing car trust obligations." It set apart \$475,000 for the payment of floating debts; it expressly authorized the committee to acquire, hold, or extinguish "any obligation in the nature of floating debt or otherwise against any company or property embraced in said plan," and under this power the committee actually expended \$1,164,172.50. It declared that it was intended to confer on the committee any and all powers which they might deem necessary or expedient towards carrying out and promoting the purposes of the plan and the agreement, and that the methods to be adopted for carrying out the reorganization consolidation and unification of the properties should be entirely discretionary with the committee. The committee and the Southern Company, therefore, had ample power to realize and pay to the creditors of the Belt Company the value of their equity in the property of the Belt Company before they transferred that property to the Southern Company. Let us now turn to the paragraph in the agreement on which counsel for the Southern Company rely for their estoppel by deed. So far as material it provides that:

"No right is conferred, nor any trust, liability or obligation * * * is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of * * * any holder of any claims whatsoever against the said companies, * * * with respect to any property acquired by purchase at any foreclosure sale."

There are two reasons why the Trust Company did not, by signing this paragraph, deprive itself of its equity in the property of the Belt Company, which it held as the cestui que trust of its stockholders, nor of its claim against the Southern Company, the stockholder's successor trustee: First, if that equity and trust were created or conferred by or under the agreement, they were created and conferred, not by the just and lawful execution of that agreement, but by the inequitable and fraudulent appropriation of the Trust Company's equity in the property to the benefit of its stockholder or stockholders, and the paragraph in question barred the Trust Company from asserting only such rights, trusts, liabilities, and obligations as arose out of the lawful and equitable execution of its contract. It did not bar it from enforcing its claims accruing from illegal or inequitable acts or omissions of those engaged in the execution of the agreement. If the committee or any one engaged in such execution had unlawfully appropriated to their or his benefit the property, money, or securities of signers of the contract which came to them or him under the agreement, the signers would not have been estopped by that paragraph from recovering the property or from enforcing the personal liability of the appropriators. Second, the Trust Company's right, trust, and equity in the property of the Belt Company acquired by the Southern Company "by purchase at any foreclosure sale" was neither created nor conferred by the reorganization agreement. It existed in all its force and inhered in the

Belt Company's property by virtue of the relation of the Trust Company as a creditor of the Belt Company to the latter's stockholders before the agreement was made, and there it still inheres, so that it did not fall within the terms of the paragraph in question, and therefore was not affected thereby. Nor did the liability and obligation of the Southern Company for its breach of that trust now here in suit fall within the terms of that paragraph, for it was not created by that agreement, but by the Southern Company's subsequent transfer of the equity of the creditors of the Belt Company to itself, its stockholder, and the trustee for its creditors without securing and paying to them the value of that equity. For these reasons the court is of the opinion that the Trust Company was not estopped by its signature to and activity in inducing others to sign the agreement from enforcing its claims as a creditor of the Belt Company against the Southern Company and against the property of the Belt Company in its possession or control.

[11] Was the Trust Company equitably estopped from presenting and enforcing its claim by its promotion of the reorganization agreement, its participation in its execution and its acceptance on July 26, 1900, of stock of the Southern Company in exchange for its stock in the Belt Company and its acceptance of stock and bonds of the Southern Company in exchange for its stock and bonds in the Gulf Company and some of the other reorganized companies, or by its laches? Laches is equitable estoppel under another name, and these two claims of estoppel will be considered together. A statement in chronological order of the salient facts material to the issue here presented will greatly aid in its disposition.

The plan of reorganization was made on November 7, 1899. It became effective on December 20, 1899. In December, 1899, or during the early part of the year 1900, the Trust Company requested a prominent member of the reorganization committee to adjust or settle and pay its claim against the Belt Company, and he answered that it was asserted that the Belt Company did not owe the Trust Company anything, that an examination of the books of the Belt Company and the books of the Trust Company was being made and that when that was completed he would take up the question of whether anything could be done towards an equitable settlement of the claim. On February 5, 1900, the decree of foreclosure and sale of the Gulf Company's property was rendered. On March 19, 1900, the Southern Company was incorporated. On March 19, 1900, the Southern Company purchased the property of the Gulf Company at its foreclosure sale. By April 1, 1900, it had acquired, by its exchange of its stocks and bonds for those of the Belt Company, 97 per cent. of the Belt Company's stock and 89 per cent. of its bonds. On April 1, 1900, it placed its chosen agents in the offices of the Belt Company and took possession of its books and property by virtue of its ownership of its stock. On June 6, 1900, the reorganization committee purchased of the Trust Company and paid it \$35,000, which they applied in part payment of the debt of the Belt Company to it, for certain shares of the stock of the Terminal Company and of the Airline Company, which the Trust

Company held in pledge to secure the payment of its claim against the Belt Company. On July 26, 1900, the Trust Company exchanged its stocks and bonds in the old reorganized companies for the stocks and bonds of the Southern Company. On September 1, 1900, the Trust Company gave notice of its proposed sale on September 7, 1900, of the securities which the Belt Company had pledged to it to secure the payment of the latter's debt. On September 6, 1900, the Provident Company, the trustee in the mortgage of the Belt Company and in duty and in reality the agent of the Southern Company which held 89 per cent. of the bonds of the Belt Company and 97 per cent. of its stock, brought a suit to foreclose the mortgage, for the appointment of receivers of the Belt Company's property, and for an injunction against its sale or disposition. On September 6, 1900, the Belt Company appeared in that suit and consented to the appointment of receivers. On September 6, 1900, the Cambria Company, with the consent of the Belt Company, the agent of the Southern Company which held 97 per cent. of its stock, recovered a judgment and obtained a return of nulla bona to an execution against the Belt Company.

On September 6, 1900, the Cambria Company commenced the suit here in hand against the Belt Company and against the Trust Company to enjoin the latter company from selling its collaterals and applying their proceeds to the payment of the debt of the Belt Company, a suit which it founded on the averment, which has been adjudged untrue, that the Belt Company was not indebted to the Trust Company, and on other allegations so baseless that it has become clear that the Cambria Company had no cause of action against the Trust Company. On September 6, 1900, the Belt Company, the hand of the Southern Company, appeared in the Cambria suit, and on the same day the Trust Company was restrained by the court from selling its collaterals, and receivers of the property of the Belt Company were appointed in this suit. On November 5, 1900, the Trust Company answered and set up its claim against the Belt Company and the pledging of its collaterals. On December 3, 1900, the Cambria Company filed a replication to that answer. On that day the issue of the indebtedness of the Belt Company to the Trust Company was made in this suit, and that issue really existed then between the Trust Company and the Southern Company, for the Southern Company by its ownership of 97 per cent. of the Belt Company's stock controlled it and in all subsequent proceedings directed its course and is as much bound by its action as though it had been the Belt Company itself. This issue was referred to the special master, and it was not until May 21, 1910, after testimony had been taken for years and after a record of approximately 34,000 pages had been accumulated, that the Trust Company succeeded in obtaining an adjudication thereof, and that issue was first determined by the court below a few days later. It will be interesting to note a few of the proceedings which resulted in this delay. Before the Trust Company reached the decision of the master, more than 15 pleadings were filed in this case by other parties to this suit, and the Trust Company was compelled to file 6.

On October 20, 1900, the Trust Company filed a petition in the Prov-

ident Company's foreclosure suit for leave to be made a party and to plead therein, wherein it set forth its claim against the Belt Company, that the Southern Company would cause the Belt Company to waive all defenses and to consent to a foreclosure of the mortgage upon its property to the detriment of the Trust Company and the creditors of the Belt Company. On October 22, 1900, the Provident Company amended its bill and asked that the Trust Company be made a defendant, and the court so ordered. On November 5, 1900, the Trust Company answered the Provident Company's bill and in its answer set forth the debt of the Belt Company to it, the control of the Belt Company by the Southern Company, and its purpose to waive all defenses to and to consent to the foreclosure of the Belt Company's mortgage and the sale of its property for the purpose and with the effect of appropriating the equity of its unsecured creditors to itself. On September 12, 1901, and again on October 14, 1901, the Trust Company applied for leave to file its amended and supplemental answer, in which it set forth the debt of the Belt Company to it, the facts regarding the reorganization agreement, the organization of the Southern Company, its exchange of its stock for the stock of the Belt Company, and its purpose, by the control of the Belt Company and of its bonds and stock, to appropriate to itself the equity of the creditors of the Belt Company in its property by means of the foreclosure suit, and prayed that the bill of the Provident Company be dismissed, and for such further orders and decrees as it was entitled to receive. On October 19, 1901, the court ordered the application denied on condition that the Provident Company should file a stipulation to the effect that the decree of foreclosure to be rendered in its case should not bar the right of the Trust Company to plead and insist in any future litigation that the Southern Company was legally and equitably bound by reason of the method by which it would obtain the property of the Belt Company to pay the debt of the Belt Company to the Trust Company. On October 17, 1901, the Provident Company filed such a stipulation, and the court denied the Trust Company leave to file its amended answer. On October 19, 1901, the Trust Company presented to the court in the Provident Company suit a petition for leave to prepare and file a cross-bill setting forth the facts stated in its amended answer and praying for an adjudication of its claim against the Belt Company for the sale of its collaterals and for a provision in the decree of foreclosure that any purchaser of the Belt Company's property at the sale thereunder should take and hold it subject to the payment of the Trust Company's claim and to the payment of the claims of all the unsecured creditors of the Belt Company. On October 19, 1901, the court denied this application. On October 19, 1901, the Belt Company filed its answer whereby it admitted the averments of the Provident Company in its bill. On November 6, 1901, the court entered the decree of foreclosure and sale of the Belt Company which contained the express condition stipulated by the Provident Company that the decree should not bar the right of the Trust Company to recover of the Southern Company personally or out of the property of the Belt Company the amount of its claim against that Company. On November 20, 1901, the Trust Company and the Belt

Company and its receivers stipulated in the Cambria Company's suit that the accounting between the Trust Company and the Belt Company should be expedited and that a judgment should be entered in that suit against the party found to be the debtor. On December 31, 1901, the Southern Company bid in the Belt property at the Provident Company's foreclosure sale, and the master conveyed it to the Southern Company.

On February 27, 1905, the Southern Company filed an intervening petition in the Cambria Company's suit by which it sought to recover certain collaterals pledged by the Belt Company to the Trust Company to secure the Belt Company's debt and certain moneys which the Trust Company had collected. On March 7, 1905, the Trust Company filed its answer to this petition, wherein it denied the validity of the claim of the Southern Company, and alleged that by virtue of the proceedings which resulted in the foreclosure sale and conveyance of the Belt Company's property to the Southern Company that property remained bound, and the Southern Company became bound to pay the Trust Company's claim against the Belt Company. On May 1, 1905, the Southern Company filed an amended intervening petition seeking substantially the same relief on the same grounds. On May 25, 1905, the Trust Company answered it in substantially the same way as it answered the Southern Company's former petition, and the issues thus formed were, by order of the court, referred to the special master for hearing and report. Then followed objections and arguments and testimony, until on May 21, 1910, the master finally filed his report, and in a few days thereafter the court rendered its decree. The Trust Company, however, was not idle during this time, nor did it limit its endeavors to enforce its claim to the prosecution of it in the court below. On March 15, 1905, and on March 28, 1905, it commenced actions at law in a state court against the Southern Company for certain parts of its claim against the Belt Company. On July 3, 1905, the Southern Company filed a supplemental bill in the Provident Company's foreclosure suit to enjoin the Trust Company from prosecuting those actions. On August 29, 1905, the Circuit Court ordered the Trust Company enjoined from prosecuting it. On May 31, 1906, this court reversed that order. In May, 1907, the Southern Company made a motion in the state court to stay the proceedings in these actions at law, and in June, 1907, that motion was denied and the cases were set for trial on December 2, 1907. On November 16, 1907, the Southern Company filed another bill to enjoin the Trust Company from prosecuting those actions and the court below granted the injunction. On April 2, 1909, this court reversed that order.

What is the evidence of any laches of the Trust Company in these proceedings? It presented to one of the members of the committee its claim against the Belt Company for adjustment and settlement and was told that when the examination of the books were completed he would take up the matter whether anything could be done towards an equitable settlement of its claim, and there that matter rested until the Trust Company was enjoined from selling its collaterals in September, 1900. By a sale of some of its collaterals to the committee it collected

and applied the proceeds thereof to its claim against the Belt Company in June, 1900. It gave notice of its sale of its remaining collaterals on September 1, 1900, and was enjoined from proceeding in the baseless suit of the Cambria Company, a suit based on a judgment to which the Southern Company consented in the name of the Belt Company, and it is difficult to wink so hard as not to see that the Cambria suit was in reality the suit of the Southern Company. Twice in October, 1901, it set forth in answers to the Provident Company's suit its claim against the property of the Belt Company and against the Southern Company, and prayed the adjudication and payment thereof, to be met by a denial by the court doubtless secured by the objections of the Provident Company and by that company's stipulation that the decree should not foreclose, bar or affect the Trust Company's claim against the Southern Company, or the property of the Belt Company which it should acquire thereunder. On October 19, 1901, it applied for leave to plead this claim in a cross-bill in that suit and to pray for a decree that its claim should be paid out of the property of the Belt Company, to be met by like denial. In this way the Trust Company was prevented from obtaining a hearing on the merits and an adjudication of its claim in the foreclosure suit and subjected to the objection to an original bill which it might otherwise have brought against the Southern Company that it had no judgment against the Belt Company and no execution returned unsatisfied thereon. Therefore it pressed for that judgment. November 20, 1901, it joined the Belt Company and its receivers in a stipulation to expedite the trial of that issue and the entry of such a judgment, but new pleadings, tens of thousands of pages of testimony, delayed the result. When that result seemed nearer, and on February 27, 1905, the Southern Company intervened and claimed some of the Trust Company's collaterals, and on March 7, 1905, the Trust Company answered the intervening petition and again pleaded and pressed its claim against the Southern Company. On March 17, 1905, and March 28, 1905, apparently despairing of reaching an adjudication in this suit in equity, it brought actions at law against the Southern Company upon its claim, but was prevented from trying them by injunctions procured and other proceedings conducted by the Southern Company until April 2, 1909, when the last injunction against its proceeding in the state court was reversed by this court. Meanwhile the Trust Company had pressed the issues in this suit through the hearings, they had been submitted to the master, and on May 21, 1910, he found that the Belt Company was indebted to the Trust Company in 1900, and that the amount of that debt with interest to June 22, 1910, was \$639,658.86. There is much evidence of promptness, diligence, and persistence, and none of laches, on the part of the Trust Company in the printed record before us. Nor does it lie in the mouth of the Southern Company to make or urge a charge of laches here. By its use of 89 per cent. of the bonds of the Belt Company which the Provident Company was bound to represent in the foreclosure suit, and of 97 per cent. of the stock of the Belt Company, it controlled the action of each of those companies in that suit. By means of those companies it prevented the hearing and adjudication of

the Trust Company's claim upon its answers and upon its application to file a cross-bill in that suit. By the Belt Company's consent to a judgment against it in favor of the Cambria Company it laid the technical foundation of the Cambria Company's unwarranted suit which prevented the Trust Company from selling its collaterals, and held the issue of the Belt Company's indebtedness to it suspended for more than eight years. It prevented the trial of that issue in the actions which the Trust Company brought in the state courts in 1905 by injunctions it procured from the court below, and there is no equity in its claim that the Trust Company unduly delayed the presentation or the prosecution of its claim against it or against the property of the Belt Company.

But counsel argue that the Trust Company is equitably estopped from maintaining its claim by the fact that it was one of the depositors under the reorganization agreement, that it persuaded others to sign it, and that on July 26, 1900, it exchanged its \$76,972 par value of stock in the Belt Company and the stocks and bonds it held in the Gulf Company and the other reorganized companies for \$1,480,-909 par value of stock of the Southern Company. Let us see:

[13] The indispensable elements of an "estoppel in pais" are: (1) Intentional or reckless misrepresentation of a known and material fact inconsistent with the subsequent claim of him who makes the misrepresentation; (2) ignorance of the truth and absence of equal means of knowledge of it by the party who claims the estoppel; (3) action by the latter induced by the misrepresentation; and (4) injury to the latter if the truth is permitted to be proved. *Bigelow on Estoppel* (4th Ed.) p. 679; *Illinois Trust & Sav. Bank v. City of Arkansas City*, 76 Fed. 271, 293, 22 C. C. A. 171, 193, 34 L. R. A. 518; *Farmers' & Merchants' Bank v. Farwell*, 58 Fed. 633, 638, 639, 7 C. C. A. 391, 396, 397; *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 66, 67, 30 C. C. A. 532, 535, 536. The estoppel here probably lacks all, and it certainly lacks at least three, of these essential elements: (1) The requisite misrepresentation of any material fact which the Trust Company knew; (2) ignorance or absence of equal means of knowledge of that fact by the Southern Company or its stockholders and bondholders; and (3) injury to them if the truth is permitted to be proved. First, the reorganization agreement, as we have seen, disclosed a scheme whereby the property of the Belt Company might be honestly and lawfully vested in the Southern Company by offering, and if the offer was accepted by paying, to the creditors of that company at least as much in value as the scheme offered to the stockholders of the Belt Company. The Trust Company presented its claim against the Belt Company to one of the committee and was told before it made its exchange that the indebtedness of the Belt Company was denied, but was under investigation, and that when that investigation was completed he would take up the claim and see if anything could be done about its settlement, and there the matter rested until after the exchange of stock was made. Meanwhile the Southern Company had the books of the Belt Company evidencing the state of the account between the Belt Company and the Trust Company in its possession. The trust

Company never made any representation that it had no claim against the Belt Company nor that it would not press it for payment by the committee, by the Belt Company and by the Southern Company, but it gave notice of its claim and requested its payment, and neither the committee nor the Southern Company ever declared before the Trust Company exchanged its stock and bonds that they would not settle or pay it if the Belt Company really owed it.

The legal presumption was, and the Trust Company had a right to rely thereon, that the scheme disclosed by the reorganization agreement would be executed in a just and lawful way and that its claim and the claims of all creditors of the Belt Company would be adjusted and settled by full or partial payment by the committee and neither its action as a depositor nor its activity to persuade others to accept the plan, nor its exchange of its stocks and bonds, constituted any representation that the plan would not be so executed, that the transfer of the property of the Belt Company to the Southern Company would be illegal and fraudulent as to creditors, nor any consent to or participation in such an execution of the agreement. That transfer had not then been made, the Southern Company held the stock of the Belt Company charged with the trust to secure for its creditors at least as much as it had paid to its stockholders, and there was no notice or presumption that it would violate its trust. The Trust Company made no misrepresentation by any of its acts or omissions of any known fact on which an estoppel in favor of the Southern Company can be based. Second, the reorganization agreement showed that under it the title in fee of the property of the Belt Company was to be transferred to the new company, the Southern Company, and brought under the lien of its mortgage by means of the exchange of the stock of the Belt Company for the stock of the Southern Company, and this disclosure and the law notified the Southern Company and every one who received any stocks or bonds of that company that the acquisition of that stock in that way and its pledge under the mortgage charged the Southern Company, its bondholders and its stockholders, with a trust to secure and distribute to the creditors of the Belt Company the value of their equity in the property of that company, and the answers of the Trust Company in the Provident Company's foreclosure suit, its application to file its cross-bill, and the paragraph in the decree of foreclosure which exempted the Trust Company from the effect of that decree, kept that notice flaming in the record, so that neither the Southern Company nor any of its bondholders or stockholders were without equal means of knowledge nor without notice under the law that the transfer of the property of the Belt Company to the Southern Company without offering to pay or paying anything to its creditors was a breach of trust, fraudulent and voidable as to them.

Moreover, although it is immaterial under the opinion in *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 502, 33 Sup. Ct. 554, 57 L. Ed. 931, whether they were notified of the Trust Company's claim or not, they all had notice of it by its presentation to one of the committee, by the Southern Company's possession of the books of the Belt Company as early as April 1, 1901, by the answers and the application to file the

cross-bill in the foreclosure suit, and by the terms of the decree therein. The committee, the Southern Company, its stockholders and bondholders, had at least equal means of knowledge and had notice under the law of the truth regarding all material things in this transaction to which the Trust Company's acts and omissions, and its exchange of stock and bonds relate. There were no innocent stockholders or bondholders of the Southern Company in or since this transaction. Third, neither the Southern Company nor its stockholders nor bondholders will suffer any injury by proof of the truth in this transaction and the granting to the Trust Company of the equitable relief to which it was entitled in 1901. They took to themselves by a breach of trust and a transfer fraudulent as to creditors by the foreclosure sale on December 31, 1901, an equity in the property of the Belt Company of a value in excess of the amount of the Trust Company's claim, then about \$360,000, which belonged to that company, and they have held and enjoyed it ever since. Each stockholder and bondholder has had, and still has, the benefit of his just proportion of that equity. If now the Southern Company is required to restore that equity or its value in 1901, with interest from that date, each stockholder and bondholder will lose the benefit of its just proportion of that equity which it wrongfully holds and nothing more. Nor will the Trust Company secure or retain any unjust share or advantage. While it will receive the value of that equity to which it as a creditor of the Belt Company was entitled in 1901 with interest, its stocks and bonds issued by the Southern Company will lose the benefit of that equity in the same proportion as will the stocks and bonds of others. The stocks and bonds of the Trust Company and of all the other holders of stocks and bonds in the Southern Company will be diminished in value in the exact proportion by which they were enhanced in value by the wrongful appropriation of the equity of the Trust Company in the property of the Belt Company which the Southern Company wrongfully took and holds, and the justice and equity to all which should have been done many years ago will now as nearly as practicable be administered.

This question of estoppel was ably and exhaustively argued. It has not failed to receive the study and meditation of each member of this court. But for the reasons which have now been stated, perhaps at too great length, this study and meditation have but confirmed the court in its former view, and its conclusion still remains that the Trust Company was not estopped either by its promotion of the reorganization agreement, its signature to it, its exchange of stock, or its alleged laches, from prosecuting its claim against the Southern Company to adequate relief.

In the course of their argument counsel have invoked the maxims that he who seeks equity must do equity and that he who seeks equity must come into court with clean hands, and have claimed that the Trust Company is entitled to no relief because it participated in the formation and execution of a fraudulent scheme. The answer has been given. The fraud and breach of trust which made the transfer voidable as to creditors were not committed nor disclosed until after the Trust Company's acts in the formation and execution of the plan

had been done. The presumption of law was, when it exchanged its stock, that the fraud and breach of trust were not being perpetrated and it did not participate in their perpetration. Its hands are not soiled, and if its claim is paid by the Southern Company it, and all the parties in interest in this transaction, will have done and received equity.

5. Counsel have argued the question whether the Trust Company or the Southern Company has the superior equity in the lands of the Central Company, but the court is not convinced that it was in error in the conclusion upon this subject which it announced in its former opinion at pages 824, 826, 827 and 828 of 201 Fed., page 121 of 120 C. C. A., and as, unless the court is in error on the questions which have already been discussed, that question is no longer material because the Southern Company may have no relief in that regard, unless it pays the claim of the Trust Company, the court refrains from another discussion of it.

[12] 6. Objection is made to the entry of a decree at this time in favor of the Trust Company for the payment of its claim by the Southern Company on the grounds that the Trust Company filed no cross-bill and made no specific prayer for such relief in its answer, and because the Southern Company should have an opportunity to offer evidence and to be heard upon the question whether or not the Trust Company is entitled to such relief. But the issues whether or not the property of the Belt Company taken by the Southern Company, whether or not the property of the Central Company by reason of the pledge of its stock, and whether or not the Southern Company itself, was liable to pay the debt of the Belt Company to the Trust Company, were all necessarily presented and litigated under the pleading and litigation of the controlling issue whether or not the Southern Company by its acquisition of the property of the Belt Company, its exchange of stock, and its foreclosure sale deprived the Trust Company of its equity in that property and exempted itself from liability. Opportunity was offered and embraced to present evidence to consider and argue these questions. The Southern Company received ample notice of the claim of the Trust Company that it and the property of the Belt Company which it acquired were liable to pay its claim against the Belt Company. In its petition for leave to file a cross-bill in the foreclosure suit in October, 1901, the Trust Company asserted its right to be paid out of the property of the Belt Company to be superior to that of the expected purchaser at the foreclosure sale of that property, and the liability of such purchaser to pay it and the right of the Trust Company to assert its claim against the property and the purchaser were expressly reserved by the decree. In its answer to the amended intervening petition of the Southern Company in this suit filed on May 20, 1905, it made a like averment which was denied by the replication of the Southern Company. A review of the facts disclosed by the master's report and of the pleadings and proceedings printed in the record before us has convinced that the indisputable facts and the law of this case are such that an opening of the case and the recep-

tion of further evidence would not change the result or benefit any party thereto.

The court has ample power to remand the case and permit the filing of a cross-bill or an amendment of the answer so as to pray for the specific relief to which the Trust Company is entitled. *Wiggins Ferry Co. v. Ohio & Mississippi Ry. Co.*, 142 U. S. 396, 413-416, 12 Sup. Ct. 188, 35 L. Ed. 1055; *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. Ed. 1141; *Clark v. Clark*, 62 N. H. 267, 272; *Trimble v. Wollman*, 71 Mo. App. 467, 484. But that would be a useless proceeding, and neither the law nor the rules and practice in equity require the performance of futile acts. An answer may be treated as a cross-bill, and the rights and remedies which the defendant has alleged in its answer and at the hearing has proved it is entitled to enforce may be maintained and enforced although its prayer is limited to a dismissal of the bill. *Bradford v. Union Bank of Tennessee*, 13 How. 57, 68, 69, 14 L. Ed. 49; *Walden v. Bodley*, 14 Pet. 156, 164, 10 L. Ed. 398; *Moran v. Hagerman*, 64 Fed. 499, 503, 504, 12 C. C. A. 239; *Wyatt v. Sweet*, 48 Mich. 539, 12 N. W. 692, 693, 13 N. W. 525. In *Walden v. Bodley*, 14 Pet. at page 164, 10 L. Ed. 398, the Supreme Court said on this subject:

"It would be a reproach to the administration of justice, if in this case the parties should be left, by the decision of this court, apparently, as remote from a final determination of it, as they were 40 years ago. It is true, the answer prays merely for a dissolution of the injunction, and that the bill may be dismissed. But the court have, by the bill, answer, and evidence, the equities of the parties before them; and, having jurisdiction of the main points, they may settle the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out in detail the means which the court should adopt in giving relief."

These rules and authorities and the principle of equity that a court of chancery which once acquires jurisdiction of the subject-matter and the parties to a controversy ought, if possible, to determine the entire matter and grant just relief to each party, the length of time this litigation has already been pursued, and the greater danger of injustice from its continuance than from its termination, have persuaded that the ends of justice will be best served by the entry of a decree in this case upon the issue of the mandate in favor of the Trust Company for the relief to which it is entitled.

7. Counsel for three of the stockholders of the Trust Company have been heard upon their petition that this court adjudge that certain of the litigation herein instituted by the Cambria Company, the Belt Company, and the Southern Company was commenced and prosecuted in bad faith, and that it direct the court below to find the amount of attorneys' fees, stenographers' fees, and expert accountants' fees necessarily incurred by the Trust Company in that litigation, and, after the entry of the main decree, to render a further decree in favor of the Trust Company and against the Southern Company for the aggregate of these amounts, or that this court direct the court below to insert in its decree an adjudication that it is rendered without prejudice to the right of the Trust Company to sue the Southern Compa-

ny for those sums, that this court also direct the court below to include in the costs herein the damages, costs, fees, and expenses incurred by the Trust Company in the injunction suit reported in *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620, and also to insert in the decree an adjudication that the decree shall not prejudice the right of the Trust Company to move for such damages, costs, fees, and expenses in the injunction suit reported in *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 146 Fed. 337, 76 C. C. A. 615. A deliberate consideration of this petition and of the exhaustive arguments of counsel have, however, persuaded that inasmuch as the questions suggested came for the first time into this suit at the rehearing in this court, as no evidence has been taken relative to them, and as the evidence upon the issues tried in this case was not brought to this court, it would be unwise and might be unjust to adjudicate the questions presented by the petition of these stockholders. Moreover, as this court cannot rightly determine the questions relating to the costs to be taxed at this time, as there are established rules of practice concerning them, and as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules, and practice in equity.

And the conclusion of the whole matter is that the decree below should be reversed and the district court should render a decree which should contain the first five paragraphs of the former decree, except that the proceeds of the sale of 99 first mortgage bonds and coupons of the Kansas City & Northern Connecting Railroad Company, amounting to \$40,001.25, referred to in paragraph 5 of the former decree, together with all interest which has accrued and shall accrue, has been and shall actually be earned on said sum, shall be applied as a credit at the time when the Trust Company shall receive said sum as its own, upon the amount which the Southern Company should pay to the Trust Company, as hereinafter provided, which future decree should also adjudge that the Southern Company is indebted to and should pay to the Trust Company the amount of the indebtedness of the Belt Company to the Trust Company, that is to say, the sum of \$639,658.86 and interest from the date of the former decree on \$473,723.59 at 6 per cent. per annum, on \$46,565.76 at 7 per cent. per annum, and on \$119,369.51 at 8 per cent. per annum, and the costs of this suit; that the Trust Company's right to and equity in the property of the Belt Company which was transferred to the Southern Company by means of the exchange of the stock of the Belt Company for the stock of the Southern Company and by the foreclosure proceedings, sale, and conveyance, and otherwise, was and is prior in time and superior in equity and right, to the extent necessary to pay that debt, to the right, title, and equity of the Southern Company therein; that by virtue of the indebtedness of the Belt Company to the Trust Company and the pledge to it of 1,120 shares of the stock of the Central Company, the equity and right of the Trust Company in the property of the Central Company described in the sixth paragraph of the former decree is superior, to the extent necessary to pay

that debt, to the right, title, claim, and equity of the Southern Company therein; that in case the Southern Company shall pay its debt to the Trust Company and the costs of this suit adjudged in this suit by a day to be named in the decree, then all the collateral security described in paragraph 5 of the former decree which has not then been disposed of, and all the proceeds of such security which has not then been disposed of or applied, shall be surrendered and delivered to the Southern Company; that in case the Southern Company fails to pay its debt to the Trust Company and the costs of this suit by a day to be named by the court in the decree, then the said property of the Central Company and the property of the Belt Company which was transferred to the Southern Company as aforesaid, and the collateral security then remaining in the possession of the Trust Company, or such part or all said property as it shall be necessary to sell in order to pay the debt and costs out of the proceeds of the sale or sales to which the Trust Company, in view of the pledge to it of only 1,120 shares of the stock of the Central Company and the possible equities of the Central Company's other stockholders and creditors, shall be equitably entitled, be sold by a master or receiver to be named by the court; that the proceeds of such sale or sales to which the Trust Company shall be equitably entitled be applied to the payment of the debt and of the costs after as well as before the decree until they are completely paid; and that the remainder of the proceeds, if any, be paid to the Southern Company or to such other party as may be equitably entitled thereto; that on the demand of the master the Southern Company, the Trust Company, the Central Company and its receiver, surrender and deliver to him, or to the purchaser or purchasers of any of this property as the master shall direct, such part or all of said property as he shall specify; and that, if an amount to which the Trust Company shall be equitably entitled sufficient to pay the debt with interest and the costs before and after the decree is not realized from the sales, then that the Trust Company have judgment and execution against the Southern Company for the remainder unpaid. The decree should adjudge that the Trust Company may recover its costs down to the entry of the decree of the Cambria Company as well as of the Southern Company, and the court may apportion those costs between them, but not as against the Trust Company, which should be permitted to pursue either or both of them until its costs are paid. The District Court should reserve in the decree full jurisdiction to render such further decrees and take such subsequent proceedings in the suit as equity and good conscience may require.

Let the decree be reversed, and let the cases be remanded to the District Court, with directions to render a decree for the Trust Company in accord with the views expressed in this opinion.

THOMAS B. WHITTED & CO. v. FAIRFIELD COTTON MILLS.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1913.)

No. 1160.

1. CONTRACTS (§ 29*)—FRAUDS, STATUTE OF (§ 159*)—MAKING OF CONTRACT—QUESTION FOR JURY.

A memorandum, shown to be a specification of machinery for defendant's cotton mill, designating certain items to be furnished by plaintiff with the aggregate price of the same marked thereon, with testimony that such items and price were agreed upon between the parties, and that the memorandum was then delivered by defendant to plaintiff as the basis for a formal contract to be drawn and signed later, together with letters subsequently written by defendant to plaintiff, expressly recognizing the existence of a contract with plaintiff for that particular work, and disclosing a knowledge on the part of defendant that plaintiff was proceeding to carry out such contract, *held* sufficient evidence to require the submission to the jury of the question whether a contract was made, and whether it was sufficiently evidenced under the statute of frauds although the formal writing was never executed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 141-143, 1824; Dec. Dig. § 29;* Frauds, Statute of, Cent. Dig. § 378; Dec. Dig. § 159.*]

2. CONTRACTS (§ 32*) — FORMAL REQUISITES — AGREEMENT TO BE REDUCED TO WRITING.

Although the parties to a verbal agreement, the terms of which are mutually understood and agreed upon, contemplate that it is to be reduced to writing and signed, yet, if the understanding is that this is simply to be done as a memorial of the agreement, it is binding notwithstanding it is never put to writing.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 159; Dec. Dig. § 32.*]

In Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia; Henry A. Middleton Smith, Judge.

Action at law by Thomas B. Whitted & Co. against the Fairfield Cotton Mills. Judgment for defendant, and plaintiff brings error. Reversed.

D. W. Robinson, of Columbia, S. C., for plaintiff in error.

W. D. Douglas, of Winnsboro, S. C. (J. E. McDonald, of Winnsboro, S. C., on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and KELLER and CONNOR, District Judges.

PRITCHARD, Circuit Judge. This is an action at law, instituted in the District Court of the United States for the Eastern District of South Carolina, by Thomas B. Whitted & Co., plaintiff in error (hereinafter designated as plaintiff) against the Fairfield Cotton Mills, defendant in error (hereinafter designated as defendant), to recover loss and damages alleged to have been sustained by the plaintiff by reason of the cancellation on October 7, 1909, of a contract alleged to have been made by the plaintiff with the defendant on the 29th day of May, 1909, to furnish and install certain portions of a steam power plant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff alleges that on the 29th day of May, 1909, the defendant entered into an agreement with the plaintiff to furnish and install a considerable portion of a new power plant for the defendant, consisting of boilers, pumps, feed-water heater, oiling system, and piping in accordance with plans and specifications, to be furnished for the price of \$9,533; that on the ——— day of September, 1909, subsequent modifications and additions were made, increasing the price to \$13,131. It is further alleged that, in pursuance of the contract awarded to it, plaintiff was proceeding to carry out the contract, and, with the knowledge and approval of the defendant, had ordered the manufacture and contracted for the purchase of various parts of this equipment which had to be especially built, and for which plaintiff incurred considerable financial liabilities.

Among other things the defendant in its answer denies the execution of the contract, but admits that the plaintiff, through his engineer, made sundry measurements, and secured all necessary data and information upon which to base a proposal for supplying the defendant with a steam plant. That thereafter, on or about May 29, 1909, plaintiff made a proposal for furnishing and installing for the defendant various portions of a power plant.

"That said proposal made by the plaintiff was written in longhand, which contained memorandum of additions and amendments made thereon in the office of Charles T. Main, consulting mill engineer of the defendant, and, together with all details and particulars of the contract or agreement, as understood and to be accepted by the defendant, were to be typewritten by the plaintiff or its representative, in due form, with all the necessary specifications, within a few days thereafter, and a copy thereof to be furnished and submitted to the defendant's consulting engineer, and also copy thereof to be furnished by the plaintiff to the defendant, and the same was to be duly signed and executed by the contracting parties so as to make a binding contract on both parties."

It is also averred by the defendant that it requested plaintiff to furnish the said proposal, typewritten in due form, subsequent to 29th day of May, 1909, but that the plaintiff failed to furnish the same until the 28th day of September, 1909; that the contract furnished at that time was greatly at variance with the terms and proposal which were to be accepted by the defendant as to the amount to be paid for the material to be furnished by the plaintiff, and that the defendant declined to accept the same, and that no contract in writing was ever executed by defendant.

At the trial of the case in the court below after the witness (Whitted) had testified, the court announced that it was of opinion that plaintiff was not entitled to recover, in that it had not shown that a contract existed as alleged in the pleadings, and also refused to hear any further testimony on the part of the plaintiff, and directed a verdict in favor of the defendant. Plaintiff excepted to the ruling of the court, and the case now comes here on writ of error.

[1] Assignments of errors Nos. 1, 2, 3, 4, 5, 7, and 8 are intended to raise the question as to whether the parties to this controversy entered into a contract on May 29, 1909, as alleged by the plaintiff. The proposal, which was submitted by the plaintiff, bears date of May 22d. Thomas B. Whitted was introduced as a witness in the court below,

on behalf of the plaintiff; he testified that he was president and principal stockholder of Thomas B. Whitted & Co. In referring to the proposal which was made to the defendant company, the witness said:

"Q. Did you enter into negotiations in April, 1909, with the Fairfield Cotton Mills through Mr. Elliott, with reference to a power plant? A. I did.

"Q. Now, in pursuance of these negotiations, what transpired on the 29th of May between you and the Fairfield Cotton Mills, and any consulting engineer if they had one? A. I was awarded a certain contract to furnish boilers, pipework, condenser, and water meter.

* * * * *
 "Q. Where did that take place [handing witness paper]? A. In the office of Charles T. Main, consulting engineer, Milk street, Boston.

"Q. Consulting engineer employed by whom? A. Fairfield Cotton Mills.

"Q. To make out their plans and drawings? A. Yes.

"Q. This is the paper that was made in that office, memorandum? A. Yes.

"Q. In whose writing? A. This paper was given me by Mr. Elliott, and I presume is in his writing; if not, why, it was presumably written— (Objected to by Mr. McDonald.)

"Q. Was it given to you there in the office? A. It was.

"Q. For what purpose?

"Mr. McDonald: We object.

"Court: He is testifying that he was in conference with Mr. Elliott and Mr. Main, Mr. Elliott, of the Cotton Mills, and Mr. Main being his employé for that purpose; if that paper was given to him by either of those people, he can put it in evidence.

"Mr. Robinson: We offer the paper in evidence.

"Mr. McDonald: We object, because it is not identified by any one, and it is not signed by any one to be charged, and we object to it on that ground. Our defense is that there was no contract between these parties in writing, and this paper is not signed by any one; we don't know who made the first two there.

"Mr. Robinson: The first two pages we don't insist upon; it is only the last.

"Court: If he testifies that that paper was handed to him by one authorized to do it by the defendant.

"Mr. McDonald: He says it was handed to him by some one in Mr. Main's office.

"Q. What was Mr. Elliott's relation to the Fairfield Cotton Mills? A. My understanding was that he was the president of it.

"Q. Did you meet him in Mr. Main's office by his appointment? A. I did.

"Q. Did you meet him there for the purpose of making a contract to install certain parts of a power plant?

* * * * *
 "Court: If you have a note stating the purpose you had up there, produce it.

"Witness: A note asking me to be at the office at two o'clock.

"Mr. McDonald: We object to that and move to strike it out.

"Court: If he does not produce it I will strike it out.

"Q. Have you a note written to you by Mr. Elliott making this appointment? A. I have.

"Q. Is that the paper you hold in your hand? A. It is.

"Q. Did you go to Mr. Main's office in pursuance of that invitation? A. I did.

"Q. Meet Mr. Elliott and Mr. Main? A. I did.

"Q. For what purpose? A. For the purpose of endeavoring to sell them machinery and install same.

"Q. To be installed where? A. At the plant of the Fairfield Cotton Mills, Winnsboro, S. C.

"Q. While you were there for that purpose was that memorandum given to you? A. It was.

"Court: By whom given to you? A. By Mr. Elliott in person.

"Q. And the figures down there were 9,533? A. Yes, sir.

"Q. At the top of the paper is an engine—Filer and Stowell at \$11,000; what did you have to do with furnishing the engine? A. Nothing.

"Q. That was not a part of your contract? A. No, sir.

"Q. Was that contract to your knowledge awarded to some one else at that time? A. Yes, sir.

"Q. For what purpose was that paper and memo. given to you?

"Mr. McDonald: We object to that; the paper will speak for itself.

"Court: Ask him what was said:

"Q. What was said at the time the memorandum was given to you by Mr. Elliott, or by Mr. Main, his consulting engineer, in his presence? A. Considerable time had been spent in discussing the question of price; it was getting late, Saturday evening, and finally Mr. Elliott and myself went into one of the offices of Mr. Main alone, and discussed this proposition in general, and the question of price was being discussed, and finally the price of \$9,533 was agreed upon, making certain omissions and deductions from the original figures submitted, and this memo. was given me as that portion of the work that was to do; it was the basis that I was to go home, prepare contract, prepare drawings and get ready for Mr. Main's O. K. and Mr. Elliott's signature.

"Q. When you went back had you prepared at that time drawings, specifications, and contract? A. I had."

Further on the witness testified as follows:

"Q. What parts of it, in a summary way, not in details? A. Boilers.

"Q. The short pencil memo. gives it, does it not? A. Yes, sir; that short form of contract.

"Q. This paper, Exhibit 2, shows, but not all of that paper was to be furnished by you, was it? A. No, sir, on this first in our proposal was machinery covered by this entire list, but only a certain portion of this in my list was awarded to me, and in addition it was on my list that there were certain things that were also awarded to me which were not called for in that proposal, but which I was to furnish; I was to furnish boilers specified in my proposal, the heater specified in my proposal, two different manufacture; a feed pump in my proposal I was to furnish an injector; oiling system, piping was not specified, but was stated by me verbally to be furnished; a flue condenser was to be furnished in lieu of surface condenser which my proposal called for.

"Q. Was this proposal of May 22d examined by Mr. Main and Mr. Elliott before you went to their office? Was it in his possession? A. I presume they were; they displayed a certain amount of familiarity with them when I was finally admitted for conference.

"Q. In pursuance of that, what other paper have you there? A. This is a copy of a proposal of May 22d of one that I left with Mr. Main's office, prepared by one of his assistants, Mr. Gumby, which were supposed to incorporate certain agreed to changes, and was his understanding of what Mr. Elliott had awarded me on the basis of the drafts, etc., and sent by him to me as his memo. of what he thought the understanding was."

It appears that in pursuance of the memorandum agreed upon by the parties as embodying the contract, plaintiff immediately began to do those things that were necessary for the performance of the same. The witness testifying as to this point, said:

"Q. What machinery drawings were required before you could proceed with your work, if any? A. The most important one was the engine foundation plan.

"Q. Who was furnishing the engine under the awards made at Mr. Main's office, under the first award made there on the 29th of May? A. Providence Engineering Company, Providence, R. I.

"Q. Was it necessary or not for you to have their plan before you could proceed with the rest? A. It was absolutely necessary.

"Q. Why? A. In order to determine the size of steam pipe that was necessary for conveying the steam to the engine; it was necessary to have the

length and width of the engine in order to locate it; it was necessary to have the size of the exhaust of the engine before the size of the opening that was necessary in the condenser could be determined, and it was necessary to know this size before any of the pipework could be ordered out or even drawn in the drafting room; it was necessary to know the high pressure cylinders in order to get that pipework out or even to get it on the draft board.

"Q. What steps did you take to get these specifications or drawings from the Providence Engineering Company? A. I wrote first, I believe—if I can refresh my memory—I have a memo. of that as to the date.

"Q. We can get the letters themselves; I wanted to shorten as much as possible. A. I wrote Mr. Charles T. Main, January 7, 1909, complaining that I had not received any drawings from the Providence Engineering Company.

"Q. Did you take it up with Mr. Elliott? A. I did.

"Q. When? A. January 21st.

"Q. Whose place was it to furnish these plans of the engine, or drawings? A. It was the business of the Providence Engineering Works to furnish them to both the mill and the Consulting Engineer, and for the mill to see that I got them.

"Q. Was it your duty to make any drawings and specifications or blueprints in connection with this contract? A. Yes, absolutely.

"Q. What drawings and specifications should you make? A. The drawings and specifications of the entire piping system and the agreement of all the machinery, the respective locations of the various parts of it, as regards the building.

"Q. Who was to put the foundation work down to this plant? A. The mill, the Fairfield Cotton Mill.

"Q. The mill itself? A. The mill itself.

"Q. By what information would they put that down? A. From drawings we would furnish them."

While the defendant denies the execution of the contract, yet, there is much in the correspondence offered in evidence which tends to show that plaintiff, immediately after the 29th day of May, proceeded to do those things that were necessary to the performance of the contract in good faith, and that defendant had full knowledge of the same.

The plaintiff offered testimony in support of its contention that the conduct of the defendant was such as to lead plaintiff to believe that the defendant recognized the memorandum of agreement as the contract, in pursuance of which this particular work was to be performed.

It is also insisted by plaintiff that its evidence tends to show that the defendant by its conduct caused the plaintiff to believe that it acquiesced in the memorandum of agreement as the contract in accordance with which the work was to be performed.

On the 4th day of June the president of the defendant company wrote the plaintiff company as follows:

"In the matter of dia. of boiler tubes for the new steam plant which you are to install for us, we have decided to use 3½ in. tubes after full consideration of the whole subject."

On August 5th, the consulting engineer employed by the defendant, whose duty it was to supervise the performance of this work, in a letter addressed to the plaintiff, among other things used the following expression:

"In regard to the contract which you have for the Fairfield Cotton Mills, will say that we have never received the plans of the piping which were to be provided before the contract was signed. Mr. Church of the Cooper-Corliss Engine Company, informs us this morning, that the plans had been sent you on

July 19, showing the details of the engine, and we presume that by this time you have been able to complete the layout of the piping."

The consulting engineer, in a letter addressed to the defendant, returning certain blueprints made by the Westinghouse Company, containing a number of suggestions as to changes, and asks the advice of Mr. Elliott, and also adds:

"You will note that Whitted has not yet placed the contract for this condenser, and that it will now be doubtful as to whether the condenser can be gotten to the job on time. We think it will be well to have Whitted place this order as soon as possible, and also to make such changes in the piping plans as will meet such of our suggestions as you think of value."

Thus it will be seen that this controversy involves the question as to whether that which transpired on the 29th day of May was sufficient to constitute a binding contract between the parties. It is fundamental that in order to constitute a contract there must be a meeting of the minds of the parties as to a definite proposition. In this instance the defendant was anxious to have certain equipment installed in its plant, and the evidence shows that the plaintiff was willing to perform this work, and as a preliminary step to the making of the contract made certain measurements, and did other things that were necessary to enable it to furnish an estimate as to the cost of the same, in order that the defendant might understand the amount and character of the work to be performed, and the price to be paid therefor. This estimate was incorporated in a proposal by the plaintiff to the defendant to perform the work in question according to specifications.

Exhibit 2.

Apparatus Decided on.

	1 Engine—Filer & Stowell, 18"x40"x48",	\$11,000
	1 Leblanc condenser \$5,	1,980
	4 H. R. T. 72" boilers 20 ft. tubes Erie City.	
Whitted.	1 Heater—closed—225 sq. ft. heating surface—straight tubes—Jacobs, Wainwright or Berryman.	
	1 Injector	
	1 Feed pump—Wheeler 7½x5'6"	
	1 Oiling system	
	Piping complete	
	Pipe covering complete	
	Cross connect between cylinders,	
	Damper regulator to be optional.	
	Oil separators to be omitted.	
	May 29, '09,	\$ 9,533

Exhibit 3.

Proposal of Thomas B. Whitted & Co. to Fairfield Cotton Mills, Winnsboro, S. C., dated May 11, 1910, containing proposal and specifications for furnishing and installing boilers, condenser, feed pumps and other machinery.
[Signed] Thomas B. Whitted & Company.

It is insisted by plaintiff that after a full and free conference the terms contained in Exhibit No. 2 were agreed to by the defendant, and the cost for the performance of said work was then and there made by the parties. It further appears that thereafter when the matter was submitted to the engineer for the defendant, he was of opinion that, in

addition to the agreement as to the work to be done and the material to be furnished, certain additional equipment should be put in the plant. Thus a new element was introduced into the transaction which had to be considered by the plaintiff in so far as the price to be paid therefor was concerned, and in order that we may have an intelligent conception as to what actually transpired on the 29th day of May, and subsequent thereto, it becomes necessary to refer to certain parts of the written and oral testimony offered in the court below.

In a letter dated August 26th, the consulting engineer of the defendant company, among other things, used the following language:

"Your plans do not show any blow-off piping at all. We presume of course that you understand that under your contract this is to be installed and that the omission was an oversight."

And on the 28th day of June, Mr. Elliott, president of the defendant company, after giving his views as to the kind of condenser that should be installed, concludes as follows:

"And we will conclude the matter as per written specifications in his [Main's] office on May 29th."

The testimony for the plaintiff, as well as the various exhibits that were filed, indicate that between May 29th and September 28th negotiations were had between plaintiff and defendant as to changes and modifications that were desired by the defendant, as well as specifications and drawings. In other words, the testimony tends to show that, in addition to the specifications of what is alleged to be the original contract, there were certain changes, additions, and modifications which the defendant sought to have included as an addition to the original agreement between the parties. As a result of the negotiations between the parties final specifications as to the changes that had been made at the instance of the defendant and its engineer were submitted in the form of a written contract in September, the price of which appeared to be extravagant to the defendant, and at its request the plaintiff furnished an itemized list of the extras and the cost of the same.

As late as September 28th, the president of the defendant company, in a letter in which he refers to the extras that were to be furnished, among other things, said:

"I am satisfied that a considerable number of the items which you have made out as extras must have been included in the original contract."

This statement tends to support the contention of the plaintiff that there was a contract entered into between the parties on the 29th day of May.

The plaintiff insists that on the 29th day of May it was mutually agreed between the parties that for the work to be done and the material to be furnished by the plaintiff, defendant was to pay the sum of \$9,533; that then and there, as a result of the agreement between the parties, the defendant prepared a memorandum, to wit, Exhibit 2, which, among other things, contains the following heading, "Apparatus decided upon," also in the right-hand marginal corner thereof is the statement, \$9,533. This memoranda was delivered by the defendant to the plaintiff, and Exhibit No. 3, which accompanies the same, re-

cites that the memoranda contained proposals and specifications for installing boilers, etc., and is signed by Thomas B. Whitted & Co., and that upon this definite proposition the minds of the parties met, and the contract to all intents and purposes became complete; that the agreement to reduce the contract to writing at a future day could, in no wise, affect the rights of the parties in so far as the agreement on the 29th day of May was concerned. It was but natural that the agreement, in so far as the details and specifications were concerned, should be reduced to writing, but if the parties at that time mutually agreed as to the work and amount of material to be furnished, and the defendant agreed to pay therefor a definite sum, to wit, the sum of \$9,533, then in that event the agreement became a binding contract upon the parties, and any negotiations the parties may have had thereafter as to the extras or additions could in no wise affect the rights of the parties under the agreement of that date.

[2] It has been held that, where parties enter into a verbal contract with the understanding that the same should be reduced to writing, and for some reason it was not reduced to writing and signed, such contract is binding upon the parties.

In the case of *Sanders v. Fruit Co.*, 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757, the Supreme Court of New York announces that rule to be as follows:

"A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is, in all respects, valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by another; that the terms of this contract were in all respects definitely understood and agreed upon; and that a part of the mutual understanding was that a written contract, embodying those terms, should be drawn and executed by the respective parties—this is an obligatory contract, which neither party is at liberty to refuse to perform."

In the case of *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, 38 Am. St. Rep. 460, Mr. Justice Holmes says:

"The considerations which we have put forward are not affected by the fact that the contract sued upon contemplated another more formal contract. That is merely an additional wheel in the machinery."

In the case of *Jenkins & Reynolds Co. v. Cement Co.*, 147 Fed. 641, 77 C. C. A. 625, the Circuit Court of Appeals for the Sixth Circuit in referring to this question, said:

"* * * Now it is well settled that, though the parties to a verbal agreement contemplate that it is to be reduced to writing and signed, yet if the understanding is that this is to be done simply as a memorial of the agreement, it is binding, notwithstanding it is never put to writing. In the case of *Pratt v. Railroad Co.*, 21 N. Y. 308, Judge Selden said: 'A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is to all respects as valid and obligatory, where no statutory objection interposes, as the written contract itself would be if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of the contract were in all respects definitely understood and agreed upon; and that a part of the mutual understanding was that a written contract embodying these terms should be drawn

and executed by the respective parties—this is an obligatory contract, which neither party is at liberty to refuse to perform.’

“And Judge Cofer in the case of *Bell v. Offutt*, 10 Bush. [Ky.] 632, said: ‘If two persons enter into a verbal agreement about a matter as to which an enforceable parol contract can be made, it would be no defense when one of them is sued for a breach of the contract that he understood it would not be obligatory unless reduced to writing; nor does a contemporaneous agreement to reduce a contract to writing make its validity depend upon its being actually reduced to writing and signed. The agreement to put in writing amounts to no more than an agreement by the parties to provide a particular kind of evidence of the terms of their contract’ and no more prevents its enforcement upon other legal evidence than an agreement that they would go to a named individual and state to him the terms of their contract would render the testimony of any other competent witness inadmissible to prove what the contract was.’

“* * * Here, according to Grey’s testimony, every possible detail of the contract was agreed upon. Nothing was left open to be thereafter determined, and a memorandum was made by him, and inspected and accepted as correct by Monohan, if not of the terms of the agreement, of the defendant’s proposition upon which the agreement was based. The evidence tends to show that the reduction of the agreement to writing was contemplated as a memorial thereof, and not as the conclusion of a contract. Point is made of the fact that in the letter of April 24th reference is made to the nonreceipt of a letter from Monaghan confirming the verbal agreement, and anxiety is expressed to have matters settled, so that it might know what to expect in the way of shipments. This is not inconsistent with the understanding having been that the reduction of the agreement to writing was for the purpose of having a memorial thereof. If such was the case, until it was reduced to writing matters would be unsettled, and cause for anxiety would exist. At any rate, it certainly cannot be said that all reasonable men would conclude that the meaning of the parties was that the agreement was not binding in law until it was put into writing. Just what the meaning and intention of the parties in regard to the agreement being put into writing was, was a question for the jury under proper instructions.”

It is insisted by defendant that the alleged contract was not in writing, and therefore prohibited by the statute of frauds of South Carolina. So much of the statute as is pertinent to this question is embraced in section 3738 of the Civil Code of South Carolina, 1912, as follows:

“No contract of the sale of any goods, wares or merchandise for the price of \$50.00 or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”

It is contended by plaintiff that Exhibit 2 within itself is sufficient to constitute a contract under the statute of frauds, and no form of signature to this paper was necessary. And, further, that if Exhibit 2 be insufficient, the correspondence, letters, and telegrams of the defendant, recognized and acting on it, are sufficient to bind it.

The letters written by defendant and its engineer to the plaintiff to which we have referred tend to show that the defendant recognized the fact that it had a contract with plaintiff for this particular work. This, taken in connection with Exhibit 2, forms the basis for plaintiff’s contention, and it involves a question of fact bearing upon the point as to whether this contract is prohibited by the statute of frauds of the state

of South Carolina, and, as such, should have been submitted to the jury for its determination.

In the case of *Ryan v. U. S.*, 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447, Justice Harlan, speaking for the Supreme Court, said:

"But the defendant insists that the alleged contract between him and the government was not valid or binding under the statute of frauds of Michigan, which provided that 'every contract for the leasing for a longer period than one year, or for the sale of any lands, or interest in lands, shall be void, unless the contract, or some note or memorandum thereof, be in writing and signed by the party by whom the lease or sale is to be made, or by some person by him lawfully authorized by writing.' Howell's Stat., § 6181. His contention is that the writings, including telegrams, which are relied upon to establish a valid, binding contract, do not, in themselves, show that the lands therein referred to are the lands in question, and therefore no written memorandum, such as the statute requires, was executed. In support of this view we are referred to *Gault v. Stormont*, 51 Mich. 636, 638 [17 N. W. 214]. In that case, the memorandum was only a receipt, given at Wyandotte, Mich., by the party selling, showing that he had received from the party proposing to buy 'the sum of \$75.00 as part of the principal of \$1,050 on sale of my house and two lots on corner of Superior and Second streets in this city.' This receipt was held to be insufficient to answer the requirements of the statute, for the reason that 'though it specified the purchase price, it failed to express the time or times of payment, and there is no known and recognized custom to fix what is thus left undetermined'; the court adding that 'a memorandum, to be sufficient under the statute, must be complete in itself, and leave nothing to rest in parol.' It will be observed that the memorandum in that case was not rejected as insufficient because of any want of fullness in the description of the premises, nor is there any intimation that such description (if the case had turned upon that point), might not have been aided by extrinsic parol evidence, identifying the premises intended to be sold. That case did not in any degree modify the decision in *Eggleston v. Wagner*, 46 Mich. 610, 618 [10 N. W. 37, 41], where the court said: 'A further objection is that the proposal did not sufficiently describe the real estate to satisfy the statute of frauds. The general principle is not questioned. The degree of certainty with which the premises must be denoted is defined in many books, and the cases are extremely numerous in which the subject has been illustrated. They are all harmonious. But they agree in this: That it is not essential that the description have such particulars and token of identification as to render a resort to extrinsic aid entirely needless when the writing comes to be applied to the subject-matter. The terms may be abstracted and of a general nature, but they must be sufficient to fit and comprehend the property which is the subject of the transaction; so that, with the assistance of external evidence, the description, without being contradicted or added to, can be connected with and applied to the very property intended and to the exclusion of all other property. The circumstances that in any case a conflict arises in the outside evidence cannot be allowed the force of proof that the written description is in itself insufficient to satisfy the statute.'

"Did the paper which passed between the parties, constituting the memorandum of the transaction, contain such a description of the lands in dispute as was sufficient, in connection with extrinsic evidence not contradictory of nor adding to the written description, to meet the requirements of the Michigan statute of frauds? We say 'the papers,' because the principle is well established that a complete contract, binding under the statute of frauds, may be gathered from letters, writings, and telegrams between the parties relating to the subject-matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract. *Beckwith v. Talbot*, 95 U. S. 289, 292 [24 L. Ed. 496]; *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Coles v. Trecothick*, 9 Ves. 234, 250; *Cave v. Hastings*, 7 Q. B. D. 125, 128; *Long v. Millar*, 4 C. P. D. 450, 456."

We are of the opinion that the memorandum, together with the letters that passed between the parties, should have been submitted to the jury in connection with the other evidence of the plaintiff bearing upon the question as to whether a valid contract was entered into between the parties on the 29th day of May.

In view of what we have said, it follows that the court below erred in refusing to submit these questions to the jury.

For the reasons hereinbefore stated, the judgment of the lower court is reversed.

Reversed.

HOCKING VALLEY RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 3, 1914.)

No. 2351.

1. CARRIERS (§ 38*)—OFFENSES—CARRIAGE AT LESS THAN TARIFF RATES.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3156), as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (U. S. Comp. St. Supp. 1911, p. 1292), provides that it shall be unlawful for any common carrier to charge, demand, collect, or receive a greater or less compensation for the transportation of property between points to which a joint rate is made than that specified in the schedule filed with the Interstate Commerce Commission. Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847, as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 587 (U. S. Comp. St. Supp. 1911, p. 1311), provides that the willful failure on the part of any carrier strictly to observe its tariff filed and published as required by that act and the Interstate Commerce Act shall be a misdemeanor. *Held* that, while carrying at a less or different rate than the tariff rate is not in terms declared an offense or penalized, it is punishable as a failure strictly to observe such tariff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 38.*]

2. CRIMINAL LAW (§ 1026*)—PLEA OF NOLO CONTENDERE—OPERATION AND EFFECT.

While a plea of nolo contendere is in some respects in the nature of a compromise between the state and the defendant, and while the defendant may not have under such plea all the advantages of exception and review that could be saved by a plea of not guilty or by standing mute, the defendant notwithstanding such plea may have the question whether the indictment charges an offense determined on writ of error, as this objection might be urged under a plea of guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2615-2618; Dec. Dig. § 1026.*]

3. CRIMINAL LAW (§ 1144*)—APPEAL—HARMLESS ERROR.

Where the sentence under a plea of nolo contendere was general and less than the maximum possible under three counts, and four of the counts in the indictment were good, it was immaterial whether the others were good or not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.*]

4. CARRIERS (§ 32*)—OFFENSES—UNLAWFUL "DISCRIMINATION."

The giving of several months' credit for the payment of freight charges to one shipper pursuant to a contract antedating the shipments, while

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

other shippers under the same circumstances were required to settle promptly after the end of each calendar month for freight shipped during that month and to give a bond that the freights would be paid, although legal interest was paid by the shipper given such credit, was a concession or discrimination in respect to transportation within Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847, as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 587 (U. S. Comp. St. Supp. 1911, p. 1311), providing that it shall be unlawful for any person to offer, grant, or give any rebate, concession, or discrimination in respect to the transportation of any property in interstate commerce whereby such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by the carrier, or whereby any other advantage is given or discrimination practiced, since "discrimination" in ordinary understanding and definition is the act of treating differently, and is the antithesis of advantage, and the extension of such credit is an extension of an advantage to such shipper involving a correlative discrimination in respect to those not so favored.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

For other definitions, see Words and Phrases, vol. 3, p. 2099.]

5. CARRIERS (§ 23*)—OFFENSES—UNLAWFUL DISCRIMINATION.

The provision of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847, as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 587 (U. S. Comp. St. Supp. 1911, p. 1311), that it shall be unlawful to give any concession or discrimination in respect to the interstate transportation of property whereby such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, cannot be restricted by the narrower language of Interstate Commerce Act Feb. 4, 1887, c. 104, §§ 2, 3, 24 Stat. 379, 380 (U. S. Comp. St. 1901, p. 3155), which prohibit "unjust" discrimination and the imposition of any "undue" or "unreasonable" prejudice or disadvantage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 57-59; Dec. Dig. § 23.*]

6. CARRIERS (§ 32*)—OFFENSES—UNLAWFUL DISCRIMINATION.

Under Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847, as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 587 (U. S. Comp. St. Supp. 1911, p. 1311), prohibiting the giving of any concession or discrimination in respect to interstate transportation of property whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, or whereby any other advantage is given or discrimination practiced, while differentiations between shippers so trifling in amount and inoperative in character as not to give one a real substantial advantage over another, might not be a forbidden discrimination, if the court can say as matter of law that the distinction made is or might be material and substantial, giving to the favored shipper a real advantage which others do not have, it is a forbidden discrimination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

7. CARRIERS (§ 32*)—OFFENSES—UNLAWFUL DISCRIMINATION.

Under such act the extension of long credit to one shipper, pursuant to a prior arrangement, while other shippers under similar circumstances are required to settle promptly, is unlawful, though such discrimination has not been forbidden by the Interstate Commerce Commission, since while it may sometimes be appropriate or necessary for the Commission by administrative ruling to determine what is discrimination, as where circumstances and conditions must be compared to see if they are sim-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ilar, such extension of credit is ipso facto a forbidden discrimination, and no ruling of the commission can make it lawful.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

8. CARRIERS (§ 32*)—OFFENSES—UNLAWFUL DISCRIMINATION.

Under such act, such extension of credit was unlawful, though such other shippers, not knowing of such privilege granted to the favored shipper, had not demanded that the same privilege be extended to them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

9. CARRIERS (§ 32*)—OFFENSES—UNLAWFUL DISCRIMINATION.

Where a carrier which had issued and published tariff rates through to destination and issued through bills of lading extended to one shipper credit for freight charges pursuant to a prior agreement, while other shippers under similar circumstances were not given such credit, it violated such act, although the favored shipper paid a part of such freight charges in cash, and although the amount paid may have equaled or exceeded the part of such freight charges to which such carrier was entitled, and the part for which credit was given was that earned by the connecting carriers; it not appearing that such carrier did not promptly account to its connecting carriers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

What constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations, see note to Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co., 94 C. C. A. 230.]

In Error to the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

The Hocking Valley Railway Company was convicted of offenses (194 Fed. 234), and it brings error. Affirmed.

J. H. Hoyt, of Cleveland, Ohio (Lawrence Maxwell, of Cincinnati, Ohio, Clarence Brown, of Toledo, Ohio, and John F. Wilson, of Columbus, Ohio, of counsel), for plaintiff in error.

U. G. Denman, U. S. Atty., and John S. Pratt, Asst. U. S. Atty., both of Toledo, Ohio.

Before KNAPPEN and DENISON, Circuit Judges, and COCHRAN, District Judge.

DENISON, Circuit Judge. The railway company was indicted for giving special concessions to the Sunday Creek Company, one of its coal shippers, in violation of the Interstate Commerce Act and the Elkins Act. After demurrers to all the counts had been overruled, and after certain counts of the indictment had been dismissed, there remained ten, and to each of these counts the defendant, by leave of the court, pleaded nolo contendere. The defendant was thereupon by the court found guilty upon each of these counts, a motion in arrest of judgment was overruled, and the defendant was fined \$42,000.

The railway company assigns as error that the indictment was factually insufficient, so that there was nothing to support the judgment.

[1] The whole question involved is whether the giving of credit by a railway company to a shipper, under the conditions and circum-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—47

stances here existing, constitutes a violation of section 6 of the Act of 1887 to regulate commerce, as amended June 29, 1906 (34 Stat. 586, 587), taken in connection with the Elkins Act of February 19, 1903, as amended June 29, 1906 (34 Stat. 587, 588). The specific portions thought applicable are those providing that the schedules giving tariff rates shall also state all privileges allowed which in any wise affect the tariff rate; that the carrier shall not collect or receive a greater or less or different compensation than the tariff rates, and shall not extend to any shipper any privilege in the transportation of property not specified in the tariff; that the willful failure by a carrier strictly to observe such tariff shall be a misdemeanor; and that it shall be unlawful for the carrier to give any concession or discrimination in respect to the transportation of property whereby it is transported at a less rate than that named in the tariff, or whereby any other advantage is given or discrimination is practiced, and that the carrier, giving such discrimination, is guilty of a misdemeanor. While carrying at a less or different rate is not in terms declared an offense or penalized, the same result follows from the fact that such carrying, willfully done, would be that failure "strictly to observe" such tariff which is expressly, by a later clause, made a misdemeanor. So we think it clear that a prosecution will lie for the offense of "carrying at a less or different rate." The two specific questions presented, then, by this record are whether extending to the shipper, who is to prepay his freight, such credit as was here given, is collecting a less or a different rate than the tariff, and whether such conduct amounts to granting a concession whereby any advantage is given or discrimination practiced.

[2] Before considering the sufficiency of the indictment, a preliminary question must be met: Was the plea of *nolo contendere* such a submission to the discretion and mercy of the court as to preclude the company from afterwards prosecuting error? An interesting discussion and review of the practice under this plea are found in the opinion of the Circuit Court of Appeals of the Seventh Circuit, in *Tucker v. United States*, 196 Fed. 260, 116 C. C. A. 62. This discussion seems to confirm the view that the plea is, in some respects, in the nature of a compromise between the state and the defendant, and that the latter may not have all the advantages of exception and review that could be saved to him by plea of not guilty or by standing mute; but it does not follow that the defendant, in such case, cannot prosecute error at all. In the instant case, the controlling question is not one of niceties in pleading or of refinement in construction or application; it is the broad general question of whether the acts described do or do not constitute an offense against the criminal law. If the railway company is right in its contentions, its plea could not be taken as a final admission of the offense, because no offense was charged; it could not be guilty of a crime, because no crime had been committed. It seems to be the settled rule that, even after explicit plea of guilty, defendant may urge, in the reviewing court, such an objection (*Carper v. Ohio*, 27 Ohio St. 572; *Com. v. Hinds*, 101 Mass. 209; 12 Cyc. 353, note 35); and we are satisfied that the plea of *nolo contendere* should not be construed as a waiver of a right which the plea of guilty does not

waive (*U. S. v. Hartwell*, 26 Fed. Cas. 196, 201, 3 Cliff. 221; *Com. v. Horton*, 9 Pick. [26 Mass.] 206; *Com. v. Grey*, 2 Gray [68 Mass.] 501, 61 Am. Dec. 476). We must therefore examine on their merits the questions presented.

The ten counts are divisible into three groups. Counts 4, 5, and 6 undertook, particularly, to allege the acceptance of a "less or different compensation" and the extension of a "privilege in regard to transportation" not specified in the tariffs on file. They cover, respectively, the shipments for the months of March, April, and May, 1909. The second group—counts 17, 18, 19, and 20—cover the respective shipments for the months of August, September, October, November, 1909, and allege discrimination during these months in favor of the Sunday Creek Company and against other coal shippers in like situation. The third group does not require separate consideration, because the counts of this group only allege individual instances of discrimination included within the monthly totals covered by the counts of the second group.

The sixth count will serve to illustrate the first group. It alleges that during May, 1909, the railway company received from the Sunday Creek Company and shipped 11 cars of coal destined to points on other roads and beyond the state line; that these were all treated as "prepaid freight," the total charges to destination being payable by the Sunday Creek Company to the railway company; that the total of freight charges to destination for such shipments, at tariff rates, was about \$600; that during the same period, and for prepaid freights on cars of coal destined to points within the state, the Sunday Creek Company incurred an obligation of \$24,600; that at the regular monthly accounting and settlement between the railway and the shipper, had on June 28, 1909, for the May shipments, the total indebtedness of \$25,200 was settled by paying the odd \$200 in cash and by giving the Sunday Creek Company's note at four months with 5 per cent. interest for \$25,000; that the railway company neither made any demand for, nor collected in cash, this \$25,000, but that the note therefor was given and received in accordance with an arrangement antedating the shipments; that the note was not paid but was renewed from time to time, interest being paid until April 1, 1910, when it was merged into three-year debenture bonds.

Count 17, which may be taken as typical of the second group, alleged facts similar to count 4, and, further, that other shippers, in all respects similarly situated, were required, at the time of the shipments, to give bond that the freights would be paid, and were also required to make payment in cash promptly after the monthly settlement.

[3] As to the first group—counts 4, 5, and 6—it is argued that a payment after four months, and with legal interest, is the same thing as cash, and that a solvent shipper who receives such credit does not thereby get a "less or different rate." It is further urged that the phrase "privilege in the transportation," used in section 6, refers to something which is directly connected with, or attendant upon, the physical transportation, and does not extend to the method of making freight payments. If there is merit in either of these contentions

(which we do not intend to intimate), they do not require decision now. The conviction was general, the sentence was general, and was less than the maximum possible under three counts; in other words, the sentence would be sufficiently supported by three counts. If therefore the four discrimination counts—17, 18, 19, and 20—are good, as we think they are, there is no reason to consider any others. *Claassen v. U. S.*, 142 U. S. 140, 146, 12 Sup. Ct. 169, 35 L. Ed. 966; *Hardesty v. U. S.* (C. C. A. 6) 168 Fed. 25, 26, 93 C. C. A. 417; *Bennett v. U. S.* (C. C. A. 6) 194 Fed. 630, 633, 114 C. C. A. 402.

[4] Upon the broad and underlying question whether it is such discrimination as is forbidden by the Elkins Act, in force in 1909, for the carrier to insist that shippers generally pay cash while it gives long credit to another similar shipper, and gives such credit pursuant to a previous contract—upon this broad question, we have no doubt. Such conduct, by its very terms, is discrimination. Shippers are not treated alike. Giving to one shipper four months' time in which to raise the the money, even if interest is added, while the same privilege is denied to others, is plainly a "concession or discrimination." It also must be considered a concession or discrimination "in respect to transportation"; it cannot be thought that these two words in this clause of the Elkins Act pertain only to a facility of transportation; they are used in immediate connection with "rebate," and so the clause must be intended to reach and affect the subject of freight payments. Whether, by this concession, it results that the property is "transported at a less rate than that named in the tariffs" is not important, because the statutory condemnation extends also to concessions "whereby any other advantage is given or discrimination is practiced." Such a discrimination might or might not be of pecuniary value to the freight payer. It is conceivable that a shipper, with sufficient working capital upon which he could not otherwise earn 5 per cent., would save money by paying cash; but it is clear that such a system of freight credits amounts to loaning money to the shipper, and is equivalent to providing for him working capital. To say that this cannot be considered a concession, or, when unfairly practiced, a discrimination, is, we think, to deny to these words their plain meaning. As Judge Killits, in his opinion below, well says:

"The first impression one gets from the statement of facts is that the Sunday Creek Company was substantially favored by the device in question, that it was given, by the defendant, a decided advantage over its fellows in business at Nelsonville; and further study of the situation tends in no wise to weaken that early feeling. 'Discrimination,' in ordinary understanding and definition, is the act of treating differently; it is the antithesis of advantage; one who enjoys an advantage over another at the hands of one with whom they have common dealing has his fellow within a corresponding discrimination; the positive measures the extent of the negative. * * * If extending credit for freight charges to one shipper while exacting cash payments from his competitor in the same and contemporaneous enterprises is not extending an advantage to such shipper which involves a correlative discrimination in respect to transportation against those not so favored, the court is wholly in error. * * * As we have before suggested, the impression comes quickly and abides tenaciously that such treatment is a decided advantage to the one so favored, that advantage which is as measurable and substantial as the inevitable discrimination which it creates against those who are compelled to compete in business on the basis of such partiality."

Not only is the conclusion that the described practice does constitute that discrimination against which this provision is directed the natural inference from the words of the statute, but the general purpose of the law and of the amendments here to be enforced, as repeatedly declared by the Supreme Court, indicates the same broad interpretation; if, indeed, there is in the word "discrimination" ambiguity to be construed. On this subject, the Supreme Court has said:

"The purpose of Congress was to cut up by the roots every form of discrimination, favoritism, and inequality." *L. & N. R. Co. v. Mottley*, 219 U. S. 467, 478, 31 Sup. Ct. 265, 269 (55 L. Ed. 297, 34 L. R. A. [N. S.] 671).

"The legislative department intended that all who obtain transportation on interstate lines shall be treated alike in the matter of rates, and that all who avail themselves of the services of the railway company * * * shall be on the plane of equality." *Chicago, I. & L. Ry. Co. v. U. S.*, 219 U. S. 486, 496, 31 Sup. Ct. 272, 274 (55 L. Ed. 305).

"The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike." *Armour Co. v. U. S.*, 209 U. S. 56, 72, 28 Sup. Ct. 428, 432 (52 L. Ed. 681). See, also, *Chicago & Alton v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, and *U. S. v. Union Stock Yards*, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226.

Against this natural and broad interpretation of the prohibition of "discrimination," defendant urges that the giving of credit for freights in the discretion of the carrier was a very common practice; that the practice had been judicially sustained and declared not to be discrimination; that the practice and these decisions must have been known to Congress when making amendments to the law; that no amendment was expressly directed against the practice; and hence that the word must still receive its judicially-established construction. This contention requires study of the decisions mentioned. They are three: The opinion of Judge Thayer, for the Eighth Circuit Court of Appeals, in *Little Rock Co. v. St. Louis Co.*, 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192; the opinion of the Fifth Circuit Court of Appeals, by Judge McCormick, in *Gulf Co. v. Miami Co.*, 86 Fed. 407, 30 C. C. A. 142, and Judge Sanborn's opinion (8th C. C. A., 168 Fed. 161, 94 C. C. A. 217, 21 L. R. A. [N. S.] 982, 16 Ann. Cas. 613), in *Gamble-Robinson Co. v. Chicago Co.*

The Little Rock Case was a civil action by one railroad against another, complaining because the defendant required plaintiff to prepay freight charges on the freight which it, as an initial carrier, delivered to defendant for further transportation, while defendant did not make the same requirement from the other connecting initial carriers. The common-law right of the carrier to demand cash payment or to give credit for freights was declared; and the case was seen to depend wholly on the provision in the third section of the act declaring that a carrier should not subject any particular person to any undue or unreasonable disadvantage. Judge Thayer expressly says that the statute permits one person to be "lawfully subjected to some disadvantage in comparison with others, provided it is not an undue or unreasonable disadvantage." It was then held that the exercise of this common-law right, which many times would be justified by ordinary business principles, could not be held to be, inherently, undue or unreasonable action.

Obviously, this holding cannot be applied to a statute which prohibits absolutely any disadvantage, without regard to its undue or unreasonable quality.

The Gulf-Miami Case presents, so far as this point is concerned, a situation like, but converse to, that of the Little Rock Case. Plaintiff was the connecting and continuing carrier and complained because defendants, initial carriers, delivered traffic to plaintiff's competitors without requiring payment of the freight then accrued, while insisting on such requirement against plaintiff. The substance of the decision is that the court could not, on the facts of that case, say that this conduct constituted the "unjust discrimination" prohibited by the then existing language of the Interstate Commerce Act. The case, however, mainly depends upon the lack of obligation on the part of the initial carriers to establish any through routes and joint rates by way of the plaintiff's line, as they had done by way of its competitors' lines, and the resulting lack of "like circumstances and conditions" attending plaintiff and its competitors.

The Gamble-Robinson Case was based upon transactions occurring on December 15, 1906. The Elkins Act and section 6 of the Interstate Commerce Act were, at that date, in the same form involved in the instant case; the so-called Hepburn Act having been approved June 29, 1906. Nevertheless, for some reason which the whole record would doubtless disclose, Judge Sanborn considered only section 4 of the act, directed against "undue or unreasonable preference or advantage," and, speaking of the Interstate Commerce Act, expressly says (168 Fed. 164, 94 C. C. A. 220, 21 L. R. A. [N. S.] 982, 16 Ann. Cas. 613):

"That act did not make all preferences, advantages, prejudices, or disadvantages unlawful, but those only which are 'undue and unreasonable.'"

And in that connection he refers (168 Fed. 165, 94 C. C. A. 221, 21 L. R. A. [N. S.] 982, 16 Ann. Cas. 613) to decisions of the Supreme Court as upholding practices which, "though clearly discriminatory, were not undue or unreasonable," and which, although creating "clear inequality and discrimination, did not give * * * an undue or unreasonable * * * disadvantage." The decision reached by a majority of the court in the Gamble-Robinson Case was that the refusal of credit there involved (while others, generally, were given credit) could not be said to be that "unjust discrimination" which alone was forbidden. From this decision, Judge Hook forcefully dissented; but, giving full force to the majority opinion, we cannot see its application to the Elkins Act; indeed, its implications are that under that statute the practices involved in the instant case would have been condemned.

[5] We do not overlook the contention that sections 2 and 3 of the Interstate Commerce Act still retain their reference to "unjust discrimination" and "undue or unreasonable prejudice or disadvantage" (though these sections must now be read in connection with section 6, as amended in 1906); but this does not detract from the inferences necessarily arising from the language of the Elkins Act. While this act related to interstate commerce, it was independent in form from the Interstate Commerce Act. It was "An act to further regulate commerce." It purported to cover, generally and perhaps exclusively, the

subject of penalties, and it cannot be restricted by narrower language allowed to remain without change in the act of 1887. The Elkins Act not only dropped the express words of limitation; it added a broad and sweeping "whereby" clause.

[6] Nor do we overlook the contention that the word "discrimination" inherently implies something unjust or unreasonable. In a certain sense, this is true, as is especially pointed out in Judge Kohlsaat's opinion in *U. S. v. Wells Fargo Co.* (C. C.) 161 Fed. 606, 610. That differentiation between shippers which was so trifling in amount and inoperative in character that it did not give one a real and substantial advantage over another, and, to that extent, indicate that it was unfair and undue, might not be within any fair definition of a penalized discrimination. This is all that the Supreme Court necessarily means in its reference to the purpose of the Elkins law to prevent "all acts of undue discrimination." *U. S. v. Wells Fargo Co.*, 212 U. S. 522, 531, 29 Sup. Ct. 315, 53 L. Ed. 635. By omitting the limiting words "undue and unreasonable," in its denouncement of discrimination, the Elkins Act has avoided the contention that such a limitation was too vague to be the basis of criminal prosecutions, in which, upon the same facts, one jury might acquit and another might convict. If the court can say, as matter of law, that the distinction made is or might be¹ material and substantial, giving to the favored one a real advantage, which others did not get, then it becomes the forbidden discrimination; if the facts do not justify this declaration, but the acts can, at most, have only negligible results or are on debatable ground, then it may well be that the principle referred to in *U. S. v. Brewer*, 139 U. S. 278, 288, 11 Sup. Ct. 538, 35 L. Ed. 190 (and see *Tozer v. U. S.* [Brewer, J.] 52 Fed. 917, and *L. & N. Ry. Co. v. Com.*, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457) would bar a prosecution. In many such cases, there will be individual circumstances, such as lack of pecuniary responsibility or the previous unsatisfactory conduct of the shipper (as in the *Gamble-Robinson Case*) which would prevent an arbitrary inference of real discrimination; for this cannot rightfully be predicated on mere difference. Unless the difference is found in the two cases in the same environments, it is not, necessarily, discrimination.

Our conclusion here is not affected by these queries as to just how far the thought of unreasonableness still inheres in the proper definition of "discrimination" under the Elkins Act. In the instant case, the four months' credit given to one favored shipper, and then extended for longer periods, was a material and substantial distinction. It was of that character which might permit the favored shipper to continue in business and drive all others out of business. It is obvious that if continued it might rapidly accumulate into a very large sum. It can-

¹ "The courts are not concerned with the question as to whether, in a particular case, there had been any discrimination against shippers or harm to other dealers. The statute is general and applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented." *D., L. & W. R. R. v. U. S.* (Dec. 1, 1913) 231 U. S. 363, 34 Sup. Ct. 65, 58 L. Ed. —.

not be thought so free from objectionable quality as not to be clearly within that general prohibition from which the express modification has been dropped. We do not say that all credit or forbearance is discrimination. A practice by which those shippers or consignees who had established their financial credit and satisfactory business habits were suffered to delay payment until convenient, but frequent, settlement periods, while others were required to pay cash on delivery, might not be, of itself, forbidden. Delays caused by inability to collect or an extension of time given as the best means of treating a past-due and doubtful freight account, might be justified. These thoughts do not reach a case where it was agreed before shipment that the favored shipper should have the incidental delays and forbearance customarily given to all shippers, and should then, in addition, receive a considerable further extension of credit while cash payment was then to be collected from all others.

Being thus satisfied of what we may call the *prima facie* wrongfulness of the practice here pursued, it remains to inquire whether any one of the special reasons urged by defendant why this prosecution will not lie is convincing.

Obviously, the situation disclosed by the indictment is inconsistent with the same kind of cash payment which may be exacted from consignees simultaneously with delivery. Where the shipper is to pay the freight, payment on delivery of the goods to the carrier would be payment in advance. The agreed transportation service might be long delayed or never performed. A great part of the charges is often made up, as in this instance, of amounts which the initial carrier is to pay over to connecting and delivering carriers, and these payments will naturally be delayed until convenient accounting periods. The present indictment recognizes this commercial situation by alleging:

"That in the practical operation of the business of shipping coal over the said the Hocking Valley Railway Company, and over other railroad lines doing a like and contemporaneous service in the coal regions of Ohio, there was of necessity and convenience a business plan and usage in dealing with what was and is known as 'prepaid freight' shipments, that is to say, with shipments on which the entire freight charges were to be charged by and paid to the initial carrier at shipping point and point of origin by the shipper and consignor, whereby the initial carrier extended credits to coal shippers, with monthly settlements, that is to say, the entire charges for all such 'prepaid freight' shipments for each calendar month would be charged to the respective shippers at point of origin of shipment, and that shortly after the end of such calendar month collection in legal money would be, by the initial carrier, made from the shipper, of the entire amount of such 'prepaid freight' charges for such month, which said 'prepaid freight' charges would include not only the amount due to and earned by the initial carrier as the charge for transportation over its own line, but would likewise, and in addition thereto, include the charges due all connecting carriers for transportation to points of destination of shipments; that such extending of credits from month to month was a practical business necessity and usage in the handling of coal shipments and in taking care of the accounts arising therefor; that the said business plan and usage of so extending credit did not include or allow the giving to any shipper by any such carrier of any further credit beyond that of allowing the charges for each respective calendar month to be paid shortly thereafter, and as soon as the accounting department of the railroad company could in the regular course of business, prepare such account."

[7] Based upon the fact thus conceded by the indictment that some measure of credit was, of necessity, given to all shippers, counsel for the carrier argue that not all credit is, in itself, wrong; that abuses in giving credit can only be reached by regulations and orders of the Interstate Commerce Commission; and that, until such regulation or order has been made and disobeyed, there can be no prosecution. They base this last conclusion upon *U. S. v. Pacific & Artic Co.*, 228 U. S. 87, 33 Sup. Ct. 443, 57 L. Ed. 742. There is language in this decision of the Supreme Court which, standing alone, might imply that a prosecution under the Elkins Act for discrimination will not lie until after the Interstate Commerce Commission has acted; but we do not think the opinion intends to lay down a general rule to that effect. The record in that case shows that the only discrimination charged consisted in the refusal to establish a through route and rate by way of one connecting carrier while this advantage was given to another connecting carrier. Another section of the act expressly commits to the discretion of the Interstate Commerce Commission to determine when through routes and rates should be established; and to hold that, in such case, the order of the Commission must precede a criminal prosecution is wholly in keeping with the analogous holdings regarding civil actions. *Texas Co. v. Abilene Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Robinson v. B. & O. R. R.*, 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288; *Pa. R. R. v. International Co.*, 230 U. S. 184, 196, 33 Sup. Ct. 893, 57 L. Ed. 1446; *Mitchell Co. v. Pa. R. R.*, 230 U. S. 247, 257, 33 Sup. Ct. 916, 57 L. Ed. 1472. The principle of these cases seems to be that, when the practice involved is forbidden by the very words of the law, the appropriate action may be predicated on the practice, but that either where other sections of the act indicate or where the uncertain character of the prohibition requires definitive action by the Commission, then such action is a prerequisite. It may sometimes be appropriate or even necessary for the Commission, by administrative ruling, to determine what is or is not discrimination. This will generally be so where circumstances and conditions must be compared to see if they are "like." It may well be that the Commission could and should regulate the practices referred to in the above-quoted extract from the indictment, and declare to what extent such practices might rightly be considered the equivalent of cash payment; but, discrimination once defined, no ruling of the Commission can make it lawful. It is forbidden by the words of the statute. When we reach the conclusion which we have already expressed that the discriminatory extension of credit here involved was, ipso facto, the forbidden discrimination, we necessarily declare that the question is vitally different from that decided in *U. S. v. Pacific & Arctic Ry.*

[8] Criticism is also made upon the sufficiency of the allegations that other shippers were not as well treated, and it is pointed out that the indictment does not show that any other shipper asked or was refused similar credit. This is true. No such demand or refusal is alleged; but the indictment does show that at the same time eight other named companies were engaged in the same vicinity in mining and shipping coal over the same railway under conditions similar to, and

substantially like, those of the Sunday Creek Company, that from each of said other shippers the railway company demanded and collected, in legal money, shortly after the close of the month and at the time of the settlement of the business of the month, the entire amount of freight charges accrued during that month for prepaid freight from each of these shippers, and that, from each of such other shippers, the railway company demanded and obtained a bond with surety guaranteeing the payment of the prepaid freight charges to accrue from month to month, but did not require any such bond from the Sunday Creek Company. These statements must be taken in connection with the already mentioned allegation that this four months' further credit was given in pursuance of an arrangement and understanding had and existing before and at the time of such shipments.²

We see no occasion for any more express allegation that other shippers were not given credit; from the others, prompt cash payments were "demanded and collected." Certainly, giving such favor to one shipper, pursuant to previously existing contract, and demanding and collecting prompt payment from others, is discrimination. It cannot be necessary that the others should have known of the partiality and should have demanded equal treatment. Such concessions are naturally not made generally known.

[9] It is further said that the amount of cash collected on a monthly settlement (e. g., \$182) was, or may have been, as much as all the Hocking Valley part of the interstate hauls involved; in other words, that so much of the prepaid interstate freight as entered into the four months' notes, represented, not the rates and charges of the Hocking Valley for its transportation services, but the amounts which had been or were to be paid to the connecting and delivering carriers. We assume that the indictment, for lack of definite statement, may be open to this construction; but this assumption does not make it bad. The Hocking Valley was the initial carrier, it issued and published tariff rates through to destination and issued through bills of lading. It cannot be material, in such case, whether the concession or discrimination practiced by the initial carrier with reference to prepaid freight concerns the earnings on its part of the through run or on some other part thereof. In making the through rate and in collecting or accounting for the prepaid freight, it was the active agent. There is no suggestion in this indictment to affect the natural presumption that the initial carrier billing this freight as prepaid promptly accounted therefor to its connections.

² The allegation, more precisely stated, is that the total prepaid freight for the month was \$30,182, of which \$274 only was for interstate traffic; that the carrier received \$182 in money and took the shipper's note for \$30,000 payable in four months at five per cent. interest, without any effort being made on the part of the carrier to enforce the payment in money of the entire amount of its charges or to so enforce the payment in money of any amount in excess of the \$182 paid, "but that said amount was so taken and accepted in pursuance, etc." This statement that this amount was so taken fairly refers to the whole transaction, and means that the cash and the note were so taken in pursuance, etc., or in substantial effect that this credit was given in pursuance, etc.

Considering, as we do, only the discrimination counts, we are not concerned with the controversy whether the notes should be considered as having been taken in satisfaction and payment of the existing indebtedness—that is, practically in the place of cash and in payment for the freight bills—or whether they should be treated as collateral to the continuing and undischarged indebtedness. If this controversy has any substance, it must be in the construction of section 6. When we are considering a discrimination which consisted in giving to one and in not giving to another a four months' credit, and when the credit so given was not recalled or canceled, but was in fact continued for the whole period (and much longer), it is quite immaterial whether the carrier had the legal right during the four months' period to disregard the credit arrangement and demand immediate payment. Whatever its right, it did not do so, and the discrimination continued in its active and operative effect.

We have not considered the assignments of error in their order, or mentioned all of the points urged in argument against the judgment; but those not mentioned do not seem to us as forceful as these we have discussed.

The judgment is affirmed.

SUNDAY CREEK CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 3, 1914.)

No. 2353.

In Error to the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

The Sunday Creek Company was convicted of soliciting and accepting discriminatory rates from a railroad company (194 Fed. 252), and it brings error. Affirmed.

W. O. Henderson, of Columbus, Ohio, for plaintiff in error.

U. G. Denman, U. S. Atty., and John S. Pratt, Asst. U. S. Atty., both of Toledo, Ohio.

Before KNAPPEN and DENISON, Circuit Judges, and COCHRAN, District Judge.

DENISON, Circuit Judge. The Sunday Creek Company was indicted for soliciting and accepting the same rates and discrimination from the Hocking Valley Railway Company for giving which the latter company was indicted in case No. 2351 (210 Fed. 735, 127 C. C. A. 285), decided herewith. The fine imposed, \$20,000, was the amount authorized on one count. The questions raised are substantially the same as those considered and disposed of in No. 2351, and, for the reasons there stated, the judgment in this case is affirmed.

COUNTS v. COLUMBUS BUGGY CO. et al.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1913.)

No. 1,164.

BANKRUPTCY (§ 91*)—PERSONS SUBJECT—"PERSON ENGAGED IN FARMING."

Defendant cultivated about 630 acres of cotton, 50 acres in corn, 50 acres in oats, and 35 acres in peavine hay, operating 25 to 35 plows. He owned 350 acres of land which he cultivated, had invested in farming \$40,000, and visited his farm, during the preparation and cultivation of the crops three or four times a week and sometimes every day. He had a cotton gin on his place and produced on his farm an average of a half bale of cotton to an acre. In order to assist his son in business, he became his partner in the sale of buggies and wagons, but paid little or no attention to this and received no profits therefrom. He was also a partner of C. in buying and selling mules, but this occupied him only during the months of January and February, and in this business he contributed no capital and was not liable for any of its obligations, but received during two of the four years in which he so engaged \$4,500 for his services. *Held*, that defendant was chiefly "engaged in farming" as a matter of law, and was not therefore subject to adjudication as an involuntary bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137-139; Dec. Dig. § 91.*]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Petition by the Columbus Buggy Company and others for an adjudication of bankruptcy against D. H. Counts and D. H. Counts, Jr., as copartners doing business as D. H. Counts & Son, and against D. H. Counts individually. From a decree adjudging D. H. Counts, individually, an involuntary bankrupt, he appeals. Reversed, with instructions to dismiss.

W. R. Richey, of Laurens, S. C. (F. B. Grier, of Greenwood, S. C., and Richey & Richey, of Laurens, S. C., on the brief), for appellant.

E. M. Blythe, of Greenville, S. C. (McCullough, Martin & Blythe, of Greenville, S. C., and John M. Cannon, of Laurens, S. C., on the brief), for appellees.

Before PRITCHARD, Circuit Judge, and CONNOR, District Judge.

PRITCHARD, Circuit Judge. Appellees as petitioning creditors, on the 2d day of March, 1912, filed their petition in the District Court of South Carolina, against D. H. Counts, and D. H. Counts, Jr., as copartners, doing business as D. H. Counts & Son, and against D. H. Counts individually, asking that the partnership be adjudged a bankrupt, and that D. H. Counts individually be also adjudged a bankrupt.

The petition, among other things, alleges: That D. H. Counts and D. H. Counts, Jr., and D. H. Counts, individually, were, at the times mentioned in the petition, principally engaged in the mercantile business at Laurens, S. C. The partnership is alleged to be insolvent, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

D. H. Counts, individually, is alleged to be insolvent. That the partnership of the said D. H. Counts, individually, had committed acts of bankruptcy by making certain preferential payments within four months of the date of the filing of the petition. The only act of bankruptcy alleged against D. H. Counts is the payment of a note given for the purchase price of certain fertilizer to be used, and which was used on his farm in Laurens county.

The partnership of D. H. Counts & Son filed an answer to the petition, putting in issue all of the material allegations thereof.

D. H. Counts, individually, filed a separate answer to the petition, putting in issue all of the material allegations of the petition, and in addition thereto by way of further answer alleged that he was then, and for years past had been, engaged chiefly in farming and tillage of the soil, and under the bankruptcy law immune from involuntary bankruptcy, and further that he was a wage-earner working for wages, salary, or hire, at a rate of compensation not exceeding \$1,500 per year, and therefore immune from involuntary bankruptcy.

A jury trial was at first demanded on the issues raised by the pleadings, but afterwards, in order to expedite the hearing, the demand for a trial by jury was withdrawn and all questions referred by the court below to a referee, requiring that he take the testimony and report the same, together with his conclusions of law and fact, to the court.

The referee, after holding several references and taking the testimony offered, on the 15th day of May, 1912, filed a report, whereby he held that the petition should be dismissed both as to the partnership of D. H. Counts & Son and as to D. H. Counts, individually.

On petition for review, the court overruled the report of the referee and recommitted the case for further testimony.

The referee, after taking certain additional testimony under this order, made another report on October 26, 1912, wherein, among other things, he said:

"That D. H. Counts, individually, had not established his defense as being chiefly engaged in farming. That the testimony, however, showed beyond question that he was a large farmer, and that his operations as a farmer would stamp him as such anywhere in the South. That the testimony also showed that he was a partner in the mule business with a Mr. Cowan, and a partner in the business of D. H. Counts & Son, dealers in vehicles, and that it would be difficult to state whether he was involved more in farming than in these two other lines of business. That most of his time was given to farming."

These were the findings of fact, and as a matter of law the referee reached the conclusion that the defense had not been made out, and recommended that D. H. Counts be adjudged a bankrupt.

D. H. Counts, individually, filed a petition to review the report of the referee, and, upon considering the petition, the lower court affirmed the report of the referee, and entered a decree, adjudging D. H. Counts a bankrupt. The court further held that no act of bankruptcy was proven as against the firm of D. H. Counts & Son, and dismissed the petition as to them.

The appellant excepted to the decree adjudging him an involuntary bankrupt, and the case comes here on appeal.

It is insisted that appellant, at the time of the filing of the petition, was chiefly engaged in farming, and, as such, he is not subject to the provisions of the bankruptcy act.

The appellant, while on the witness stand, testified as follows as to the business in which he was engaged:

That for the past four or five years he had been chiefly engaged in farming. That he was engaged in the mule business with Mr. Cowan, who furnished the money with which to run the business, and that he got one-half the profits. That he incurred no liability at all in this business, and that he got nothing out of the mule business until the costs of running the same had been paid, and that Mr. Cowan was individually liable for the debts of the concern. That four years ago he received \$3,000 for his services, and three years ago he received nothing. That the year before he got \$1,500, and that last year he got nothing.

That he was engaged in the buggy business as a member of the firm of D. H. Counts & Son, but got no profits whatever from that business. That the business was run by his son, D. H. Counts, Jr., who received all the profits. That he had nothing to do with the management of the business, and that he was connected with this firm for about a year and a half.

That he had invested in farming about \$40,000; cultivated about 630 acres of cotton, 50 acres in corn, 50 acres in oats, and 35 acres in peavine hay. That he employed about 34 mules, and for the last four years had been running from 25 to 35 plows. That he owned 350 acres of the land which he cultivated. That he visited his farm during the preparation and cultivation of the crop three or four times a week, and sometimes every day. That during the gathering and ginning season he would go three or four times a week. He had a gin on his place, which is run by a 50 H. P. engine. That he had a sufficient quantity of tools, etc., to run a 30 to 35 horse farm. That he gave to the mule business about two months in the year. That he produced on his farm an average of a bale of cotton to two acres, and that his average production was about 350 bales. That he had been engaged more or less in farming all his life.

The referee seemed to be of opinion that inasmuch as the appellant was a member of two firms he was not entitled to the immunity afforded one chiefly engaged in farming. This is clearly a misconception of the law. The real question involved herein is as to whether the appellant was chiefly engaged in farming.

In the case of *American A. C. Co. v. Brinkley*, 194 Fed. 411, 114 C. C. A. 373, this court, in discussing this phase of the question, said:

"There is only one question in the case: Was he at the time he committed the alleged act of bankruptcy chiefly engaged in farming? If he was not, it is admitted that an adjudication must be made. On this issue the court below decided in favor of the debtor. The creditors ask us to reverse that ruling.

"The debtor was carrying on three country stores. By himself, or in partnership with others, he tilled five farms. He was a member of four distinct partnerships. Each of these cultivated a separate farm. In the con-

duct of one farm he had no associate. There is no question that his mercantile business far exceeded in importance the agricultural operations conducted by him individually. This proceeding is against him as an individual. No one of the firms of which he was a member is a party to it. The creditors say that the so-called entity theory requires that, in determining whether the debtor was engaged chiefly in farming, we must exclude from consideration anything he did in connection with any of the partnerships. We cannot assent to this contention. Whether a debtor is or is not chiefly engaged in farming or tilling the soil is a question of fact, to be determined in each case in which it is sought to have him individually adjudicated. In passing upon that question, all the debtor's activities and pursuits must be considered as a whole. No part of them may be ignored merely because they concern themselves with the affairs of copartnerships of which he was a member. Doubtless a firm may be adjudicated an involuntary bankrupt when it is engaged in a nonexempt business, in spite of the fact that the principal occupation of some of its partners protects them from individual adjudication. *Dickas v. Barnes*, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654."

The fact that he was engaged in other enterprises could in no wise affect his status under the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) as a farmer, unless it should appear that he was chiefly engaged in business other than that of farming.

The evidence shows that appellant cultivated 630 acres of cotton, 50 acres of corn, 50 acres of oats, and 35 acres in peavine, and that he operated 25 to 35 plows. It further appears that he spent from three to four days of every week on his farm looking after the cultivation of the same. It also appears that he only spent about two months in the year in the mule business, to wit, the months of January and February. It further appears that at the time of the commission of the alleged act of bankruptcy appellant was not only chiefly engaged in farming, but, according to the evidence, was wholly engaged in farming. In determining this question, we must ascertain as to whether, at the time of the commission of the alleged act of bankruptcy, appellant was chiefly engaged in farming.

The petition avers that the alleged payments upon which it is based were made between November and December, 1911; the only direct testimony we have on this question being that of the appellant, and it is uncontradicted. The testimony shows that at that season of the year appellant was not engaged in the mule business as Cowan & Counts, and that he was only engaged in that business during the first part of the year, and also appears that for the year 1911 he received nothing for the services he rendered this firm, and no profits were received from the business of D. H. Counts & Son.

In the case of *Flickinger v. First National Bank*, 145 Fed. 162, 76 C. C. A. 132, it appears that the alleged bankrupt was actively engaged in the business of the Flickinger Wheel Company, a manufacturing corporation, employing a great number of men; that he was a stockholder, director, and president and general manager of that concern; that he also owned and cultivated a farm; that there was a house on his farm which was occupied by him and frequently by his family when he visited it for the purpose of giving directions for the cultivation and management of his farm; that he went there once or twice a week, and telephoned orders when he was otherwise

engaged; that he bought what was used on the farm and sold all of its products; that in January, 1904, the wheel company went into the hands of a receiver; on May 3, 1904, he made a general assignment for the benefit of his creditors; that the petition in bankruptcy was filed in September, 1904; that down to the time he made his assignment he made occasional visits to his farm, and gave directions regarding its management. The petitioner alleged that he had no business other than farming after the company went into the hands of a receiver, and that he had the sole and exclusive management of the farm. In that case, as in this instance, the statement of the alleged bankrupt was not contradicted. Judge Severens, of the Circuit Court of Appeals for the Sixth Circuit, said:

"It is difficult to see how, after he made a general assignment on May 3, 1904, which, of course, conveyed his farm, he could properly be said to be chiefly engaged in farming. Four months passed before the petition in bankruptcy was filed. We think it could not be held that he was engaged in farming when the petition was filed. The farm was sold on July 17, 1904, by the assignee, who at that time was in control of it. We think the fair conclusion from the facts shown would be that prior to the time when the business of the wheel company went into the hands of the receiver (January, 1904) Flickinger was engaged in two kinds of business—manufacturing and farming—of which the former was the chief, that after that time he was not engaged in that business; and that farming became his chief, in fact his only, occupation, and continued such until his assignment in May, 1904.

"The decisive question would therefore seem to be whether section 4b refers to the time when an act of bankruptcy is committed for the purpose of determining the occupation, as some of the courts in bankruptcy have held, or to the time of filing the creditors' petition, which seems to be the natural meaning of the words employed. It was held in *Re Luckhardt* (D. C.) 101 Fed. 807, and in *re Mackey* (D. C.) 110 Fed. 355, that the time referred to by this exemption in the act is the time when the act was done which was the ground of the adjudication. This construction was adopted, because it was thought necessary in order to defeat attempts which bankrupts might make to escape the consequences of their acts by running under the shelter of an excepted occupation. If the language used is fairly susceptible of this interpretation, the argument from inconvenience would justify the proposed construction. * * * If the language used is fairly susceptible * * * of *In re Pilger* (D. C.) 118 Fed. 206, before Judge Seaman, who expressed doubt about it, but passed it by, holding that it was unnecessary to decide it in that case. In the case entitled *In re Matson* (D. C.) 123 Fed. 743, Judge Archbald, in deciding whether the respondent should be adjudged bankrupt, referred the question of occupation to the time when he was passing upon it; but we do not know whether the question was debated before him or not. Judge Brown, in construing the words in section 4b, which include certain corporations and exclude others from the operation of the law, said: 'These words must be interpreted in the sense in which they are commonly used and received, and not in any strained or unnatural sense, for the purpose of including or of excluding particular corporations.' In *re N. Y. & W. Water Co.* (D. C.) 98 Fed. 711, 713.

"A majority of the court is inclined to think that the statute should be regarded as having reference to the conditions existing at the time when the act of bankruptcy is committed. Upon this construction, the facts would require a finding that the respondent was within the exception."

In other words, it would not avail appellant to show that prior to the time of the commission of the alleged act of bankruptcy he was chiefly engaged in farming, nor would it avail him to show that subsequent to that date he was engaged in farming. The matter must

be determined solely as respects the time of the commission of the alleged act of bankruptcy. As we view the matter, the evidence in this case is overwhelming to the effect that the appellant, at the time of the commission of the alleged act of bankruptcy, was chiefly engaged in farming.

It not infrequently happens that a farmer who, after having educated his son, is under the impression that on account of the training he has acquired he is better equipped to engage in some kind of business than to work on the farm (which in many instances is a fatal mistake), and, in order to encourage his son, either furnishes him money or joins with him in a nominal way in order that he may have an opportunity to display his ability as a business man, and the latter is precisely what happened on this occasion.

The appellant testified, among other things as to the partnership:

"We run a buggy business as D. H. Counts & Son, but I do not get any profit from that.

"Q. How is that? A. It is run by D. H. Counts, Jr.

"Q. Who were to get the profits of that business? A. D. H. Counts, Jr.

"Q. What active part did you have to do with that business? A. Nothing to do with it one way or the other. He would ask my advice as to who to sell, and who not to sell.

"Q. Who did the buying? A. D. H. Counts, Jr.

"Q. He did the buying and selling and was to receive all profits, if any? A. Yes, sir.

"Q. How long have you been engaged in that business with D. H. Counts, Jr., running it? A. I don't remember exactly. Henry went away and came back, and when he came back we opened up the buggy business.

"Q. Was it some time prior to the first of last year, or about the first of last year? A. I rather think it was about the first of 1911. It has been about a year or a year and a half."

Thus it will be seen that the father was only a nominal member of the firm, and that he drew nothing from the same.

The referee, in referring to this phase of the question, said:

"It would be difficult from the testimony to state whether or not D. H. Counts was involved more in farming than in these other businesses. It is probable that most of his time is given to the pursuit of agricultural—certainly a great deal of it."

This makes it quite clear that there was no finding of fact upon the main question, to wit, as to whether the appellant was chiefly engaged in farming.

In the case of *Dickas v. Barnes*, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654, the court adjudged a partnership a bankrupt, but at the same time refused to adjudge some of the partners bankrupts, owing to the fact that one of them was a wage-earner, and one was a tiller of soil. This case is cited in the case of *American Agricultural Co. v. Brinkley*, *supra*. In other words, the courts have held that one cannot be deprived of his legal exemptions by virtue of the fact that he may be a member of a firm engaged in a business that is not exempt. So, in this instance, the fact that the appellant was a member of the firm of D. H. Counts & Son, and also engaged in the other enterprises, could not deprive him of the exemption contained in the bankruptcy act for those who were chiefly engaged in

farming, provided, as in this instance, it should appear that the alleged bankrupt was chiefly engaged in farming.

In view of the evidence, we are impelled to the conclusion that at the time of the commission of the alleged act of bankruptcy appellant was chiefly engaged in farming, and, such being the case, we are of the opinion that the lower court was in error in adjudging appellant to be a bankrupt.

For the reasons stated, the decree of the lower court is reversed, with instructions to dismiss the petition upon which this proceeding is based.

Reversed.

In re SHERWOODS, Inc.

(Circuit Court of Appeals, Second Circuit. December 9, 1913.)

No. 44.

1. BANKRUPTCY (§ 255*)—LANDLORD AND TENANT—CONTRACTUAL RELATIONS—TERMINATION.

Bankruptcy of a tenant does not terminate the contractual relations existing between it and its landlord, but the tenant remains liable, and the obligation to pay rent is not discharged as to the future unless the trustee elects to retain the lease as an asset.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 352; Dec. Dig. § 255.*]

2. BANKRUPTCY (§ 318*)—CLAIMS—RENT.

On bankruptcy of a tenant, rent accrued prior to the filing of the bankruptcy petition may be proved as any other debt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.*]

3. BANKRUPTCY (§ 255*)—LANDLORD AND TENANT—TERMINATION OF LEASE—ELECTION BY TRUSTEE.

By the bankruptcy of a tenant in the absence of an express provision in the lease to the contrary, the term is not ended, but the leasehold interest passes to the trustee if he elects to accept it within a reasonable time, and if in the meantime he occupies the premises he is liable for reasonable rent during such period; not necessarily for the rent stipulated in the lease, though such rent may be accepted as the reasonable value of the use and occupation in the absence of a clear showing of unreasonableness.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 352; Dec. Dig. § 255.*]

4. BANKRUPTCY (§ 114*)—RECEIVERS—AUTHORITY—ASSIGNMENT OF LEASE.

Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), provides that the trustee shall be vested by operation of law with title of the bankrupt as of the date of the adjudication, and section 2, cl. 3, declares that in cases of necessity for preservation of estates a receiver may be appointed to take charge of the property of the bankrupt, etc., and clause 7 empowers the court to cause the assets of the bankrupt to be collected, reduced to money, and distributed. General Order in Bankruptcy No. 18, cl. 3 (89 Fed. viii, 32 C. C. A. xx), declares that on petition by a bankrupt's creditor, receiver, or trustee alleging that a part or all of the bankrupt's estate is perishable, the court may order the same sold with or without notice to creditors. *Held*, that the court under such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

provisions has full power to authorize a bankrupt's receiver to make an assignment of a leasehold belonging to the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164-166; Dec. Dig. § 114.*]

5. LANDLORD AND TENANT (§ 148*)—LEASE—CONSTRUCTION—TAXES—LIABILITY.

Where a lease, containing a covenant requiring the lessee to pay taxes that should be assessed according to law during the term within two months after the taxes become a lien on the demised premises, and if they should not be so paid the amount should be added to and become a part of the next month's rent after such default, the lessee as between itself and an assignee of the lease became liable for taxes from the date they became a lien, though they were not payable under the covenant until after the assignment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 520-532; Dec. Dig. § 148.*]

6. BANKRUPTCY (§ 318*)—CLAIMS—LANDLORD AND TENANT—TAXES—TENANT'S LIABILITY.

Where a bankrupt tenant was required to pay taxes on demised premises, which should become a lien thereon, and make payment within two months after the taxes became a lien, taxes which were assessed and which became a lien prior to the bankruptcy were "due and owing" at the time of bankruptcy, though not payable under the covenant until after the adjudication, and were therefore provable as claims against a bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.*]

7. LANDLORD AND TENANT (§ 148*)—LIENS—ASSIGNMENT—COVENANT TO PAY TAXES.

Covenants in a lease requiring the lessee to pay taxes run with the land, and on the assignment of the lease the assignee becomes liable to the landlord for all taxes which may thereafter become due and payable under the terms of the lease while the assignee continues in possession of the premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 520-532; Dec. Dig. § 148.*]

8. LANDLORD AND TENANT (§ 208*)—LEASE—SURRENDER—EXECUTION OF NEW LEASE.

Where, after an assignment of a lease by the receiver of a bankrupt lessee, the lessor with the assignee's acquiescence made a new lease of the premises to a third person, such new lease operated as a surrender of the old one by operation of law, the effect of which was to relieve the tenant from further liabilities for accruing rent but did not discharge him from liability for rent and taxes previously accruing.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 737; Dec. Dig. § 208.*]

9. LANDLORD AND TENANT (§ 184*)—RENT—DEPOSIT.

Where a lease of business property obligated the lessee to pay rent and taxes, and at the time the lease was executed the lessee deposited with the lessor \$2,500 to be held as security for the faithful performance of the covenants, it being provided that in case the premises became vacant during the term, or in the event of a violation of any of the covenants, the sum deposited should be retained by the lessor as and for liquidated damages and not as a penalty, the deposit was properly construed as one of indemnity for such loss as should arise from breach of the covenants.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 743-750; Dec. Dig. § 184.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

10. BANKRUPTCY (§ 155*)—BANKRUPT'S PROPERTY—RIGHTS OF TRUSTEE.

A bankrupt's trustee takes the property of the estate subject to all rights and equities existing in favor of third persons against the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 155.*]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of the bankruptcy proceedings of Sherwoods, Incorporated. From an order allowing certain claims of the Berghoff Brewing Association under a lease to the bankrupt, Frederick M. Leonard, as trustee, appeals and petitions to revise. Affirmed.

Hastings & Gleason, of New York City (Merwyn Mackenzie, of New York City, of counsel), for petitioner.

Richard B. Aldcroftt, Jr., of New York City, for respondent.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The Berghoff Brewing Association granted to Sherwoods, Incorporated, a written lease for a term of years beginning February 1, 1912, at a monthly rent of \$875 per month. A petition in bankruptcy was filed against the lessee on April 27, 1912, and a receiver was appointed on that day who took possession of the premises and occupied the same until June 26, 1912. Prior to the time when the receiver went into possession, the lessee had occupied, but failed to pay the rent due on March 1st, as well as that due on April 1st. Rent was payable in advance on the 1st day of each month. While the rent for the month of April was by the terms of the lease due April 1st for the entire month, the court below only charged the lessee with a proportionate part of the rent down to April 26, 1912, when the lessee ceased to occupy. The contract was a New York contract, the lease having been executed there, and the premises were situated there. The New York Code provides for an apportionment of rents in the case of the death of a person or on "the determination of his or her interest." N. Y. Code Civ. Proc. § 2720.

[1] The decisions in this country are not in accord upon the question whether an adjudication in bankruptcy terminates all the contractual relations of the bankrupt so that the relation of landlord and tenant is severed. Some of the District Courts have held that it has such an effect. In *re* Jefferson, 93 Fed. 948; *Bray v. Cobb*, 100 Fed. 270. This is not the view this court has taken of the law. We have held that the tenant remains liable and the obligation to pay rent is not discharged as to the future unless the trustee elects to retain the lease as an asset. In *re* Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270. This we understand is the construction which the English courts have placed upon the bankruptcy act of their country and the doctrine is supported by the weight of authority as concerns our Bankruptcy Act.

[2] There can be no doubt but that rent which has accrued prior to the date of filing the petition in bankruptcy may be proved like any other debt. In *re* Arnstein (D. C.) 101 Fed. 706; *Remington on Bank-*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ruptcy, § 654; Tiffany on Landlord & Tenant, vol. 1, pp. 94, 95. It is not necessary to determine whether the apportionment made of the rent in this case was based on a correct principle, as the trustee was not prejudiced thereby in the matter upon which he now asks us to pass.

[3] It is well settled that upon the bankruptcy of the tenant, provided this does not by the express terms of the lease terminate the tenancy, the leasehold interest passes to the trustee in bankruptcy if he elects to accept it. He has a reasonable time within which the lease may be accepted. If in the meanwhile he occupies the premises, he is liable for merely the reasonable rent while so occupying, and not for the rent stipulated in the lease itself. Nevertheless the rent so stipulated should be accepted as the reasonable worth of the use and occupation, in the absence of clear showing of unreasonableness. Remington on Bankruptcy, § 2135, note 57, p. 549.

[4] On June 26, 1912, the receiver, pursuant to an order of the District Court, executed and delivered to one Ogilvie an assignment of the lease. It is asserted that the court could not empower the receiver to make the assignment. The reason assigned is based on the provisions of the Bankruptcy Act. Section 70 of the act provides that:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt."

Section 2, subd. 3, grants power to—

"appoint receivers * * * in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of the bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified."

This contention that the receiver could not be authorized to assign is unsound. After the receiver takes possession it may be necessary that certain kinds of property should be sold for the very purpose of preserving it or its value. In our opinion the court has full power in such cases to order a sale and that such power is implied by clause 3 of section 2 of the act as well as by clause 7 of that section empowering the court to "cause the assets of bankrupts to be collected, reduced to money and distributed." In re Becker (D. C.) 98 Fed. 407; Loveland on Bankruptcy, 213. Moreover, authority to order a sale is expressly given to the court by General Order in Bankruptcy No. 18, cl. 3 (89 Fed. viii, 32 C. C. A. xx), which provides as follows:

"3. Upon petition by a bankrupt, creditor, receiver, or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court."

[5] The lease contained a provision making it the duty of the lessee to pay taxes. It provided that the lessee, its successors or assigns, should pay all taxes and assessments "which shall or may be assessed, charged or imposed according to law * * * during the term" and pay the same within "two months after any such * * * taxes or

assessments shall become a lien upon the same demised premises, * * * and if any such taxes or assessments shall not be so paid, the amount thereof shall be added to and become a part of the month's rent becoming due and payable upon the next rent day after such default," etc. The contention of the trustee is that inasmuch as by the terms of the lease the lessee was not obliged to pay the taxes until two months after they became a lien upon the premises, and as they did not become a lien until May 1st and were therefore not payable until July 1st there were no taxes for which the bankrupt was liable on June 26th, the date of the assignment to Ogilvie, and that the assignee became liable for them on July 1st, but that the taxes were subsequently released by the landlord by virtue of the new lease which he subsequently made of the premises.

[6] The fact is that the tax for 1912 had been assessed on the premises prior to the bankruptcy of the lessee, and his liability to pay the same was fixed by his covenant to pay the taxes assessed during the term, and the obligation which rested on him to make the payment was one "due and owing" at the time of the bankruptcy, although the tax was not payable until after adjudication. While taxes are not in a strict sense debts, they are so regarded in the Bankruptcy Act, and they are "legally due and owing" on the day they are assessed, even though they may not be payable until after adjudication. In *re Flynn* (D. C.) 134 Fed. 145; In *re Fisher & Co.* (D. C.) 148 Fed. 907. So in the state courts covenants on the part of a lessee to pay taxes assessed during the term have been held to impose on the lessee the duty of paying the taxes so assessed although under the law they were not payable until the term had expired. In *Craig v. Summers*, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236 (1891), the lessee covenanted to pay "all rates, taxes, levies, or assessments on said premises during the continuance of the lease." The court held him liable for taxes and assessments "duly levied, charged and confirmed" upon the property during the term, although payable thereafter. And see to the same general effect *Richardson v. Gordon*, 188 Mass. 279, 74 N. E. 344; *Blythe v. Gately*, 51 Cal. 236; *Ogden v. Getty*, 100 App. Div. 430, 91 N. Y. Supp. 664; *Vorse v. Des Moines Marble Co.*, 104 Iowa, 541, 73 N. W. 1064. In *McManus v. Shoe & Clothing Co.*, 60 Mo. App. 216 (1895), the covenant was "to pay all general and special taxes on said lot and building during the existence of the term." The question was whether this was intended to apply to all taxes assessed during the term, or to taxes which became payable during the term. The court held that it applied to taxes assessed during the term and not to taxes assessed prior to that date and which became payable during the term.

[7] It is true that covenants to pay taxes run with the land and upon an assignment of the lease by a lessee an assignee becomes liable to the landlord for all taxes which may thereafter become due and payable under the terms of the lease while the assignee continues in possession of the premises. *Ellis v. Bradbury*, 75 Cal. 234, 17 Pac. 3; *Fontaine v. Schulenburg, etc., Lumber Co.*, 109 Mo. 55, 18 S. W. 1147, 32 Am. St. Rep. 648; *Abrahams v. Tappe*, 60 Md. 317; *Trask v. Graham*, 47 Minn. 571, 50 N. W. 917; *State v. Martin*, 14 Lea (Tenn.)

92, 52 Am. Rep. 167. But where before an assignment takes place the tax has already been assessed and the liability of the lessee has been incurred under the covenant to pay taxes assessed during the term, it is not our understanding that an assignment of a lease relieves the assignor from the liability which he has already incurred even though the tax may not be payable until a time subsequent to the assignment. We do not believe, therefore, that the assignment by the receiver to Ogilvie released the bankrupt from his liability to the lessor for the tax previously assessed.

As the taxes were assessed prior to the bankruptcy and therefore constituted a debt and were provable against the bankrupt's estate, although payable at a period subsequent to the bankruptcy, it is evident that the subsequent assignment of the lease did not shift the liability from the bankrupt's estate to the assignee. And inasmuch as the liability to pay the tax was imposed on the lessee at the date of the assessment and without regard to the date of payment, it is not evident why the entire tax as assessed and not merely a part of it proportioned to the period of occupancy, might not have been charged against the lessee's estate. The liability becomes absolute at the time the assessment is made and does not depend upon the lessee's occupancy but upon the fact that it was assessed during the term. But the court below apportioned the tax exactly as it apportioned the rent. The theory upon which this was done is not disclosed. In *Gedge v. Shoenberger*, 83 Ky. 91, the court regarded an agreement to pay taxes as an agreement to pay them as part of the rent, regarding it as a necessary implication. In *Hodgkins v. Price*, 137 Mass. 13, 19, the court thought taxes not a part of the rent under such a covenant to pay them and held it unnecessary to include them in a tender of rent to prevent a forfeiture. A covenant to pay rent and a covenant to pay taxes assessed during the term are quite distinct matters. But as the lessor, who was represented at the hearing, has not objected in this court to the apportionment made in the court below, and as no objection has been made to it by the trustee, we do not deem it necessary at this time to do more than to direct attention to it. The apportionment made, if permitted to stand, does not in any way prejudice the trustee in respect to the question upon which he has asked this court to pass.

[8] After assignment by the receiver to Ogilvie, the lessor with the acquiescence of the assignee, made a new lease of the premises to a third party. The making of the new lease by the lessor during the existence of an outstanding lease, the tenant under the original lease giving up his possession to the stranger, operates as a surrender by operation of law. *Drew v. Billings-Drew Co.*, 132 Mich. 65, 92 N. W. 774; *Commercial Hotel Co. v. Brill*, 123 Wis. 638, 101 N. W. 1101; *Bowen v. Haskell*, 53 Minn. 480, 55 N. W. 629; 24 Cyc. 1370; *Taylor on Landlord & Tenant*, § 512. The effect of the surrender is to relieve the tenant whose right to the possession is terminated from any further liabilities as to subsequently accruing rent. *Davis v. George*, 67 N. H. 393, 39 Atl. 979; *Miller v. Dennis*, 68 N. J. Law, 320, 53 Atl. 394; *Ireland v. U. S. Mortgage Co.*, 175 N. Y. 491, 67 N. E. 1083. It does not, however, discharge from liabilities already accrued. It

would relieve the tenant from liability for taxes assessed after the surrender, but not from taxes assessed prior to the surrender where he had covenanted to pay taxes assessed during the term. The claim that because of the execution of this new lease the lessor forgave the liability which had been previously incurred for taxes already assessed, is a proposition wholly untenable and does not release the lessee from payment of the taxes already due. *Kingsbury v. Westfall*, 61 N. Y. 356; *Taylor on Landlord & Tenant*, § 518.

[9] In accordance with the requirements of the lease and at the time of its execution, the lessee deposited with the lessor \$2,500 to be held as security for the faithful performance of the covenants. And it was provided that in case the premises became vacant during the term, or in the event of the violation of any of the covenants, this sum should be retained by the lessor "as and for liquidated damages and not as a penalty." In the event of the performance of all of the covenants by the lessee, its successors or assigns, the sum with interest at 4 per cent. was to be repaid to the lessee, its successors or assigns. The covenants for which this security was given involved not merely the payment of the rent and taxes, but also the making of repairs, assignment without consent, and certain other matters which need not be mentioned. It is well established that a stipulation in a contract that a certain sum shall be regarded as liquidated damages and not as a penalty, is not conclusive. The question whether it is to be regarded as the one or the other is a question of law and one quite independent of the agreement of the parties to call it the one or the other. We think this deposit must be regarded as one of indemnity for such loss as should arise from a breach of covenants. See *Chaude v. Shepard*, 122 N. Y. 397, 25 N. E. 358. It was so treated in the court below and we discover no error in so regarding it.

[10] The deposit was made with the lessor within four months of the filing of the petition in bankruptcy, but no suggestion was made that it constituted an illegal preference under section 5128 of the Revised Statutes of the United States, and no doubt it was not open to that objection. It is also true that the bankruptcy of the lessee did not deprive the lessor of his right to retain the security. The trustee takes the bankrupt's property subject to all rights and equities existing in favor of third persons against the bankrupt. *In re Swift* (D. C.) 108 Fed. 212; *In re Hanna* (D. C.) 105 Fed. 587; *In re Mullen* (D. C.) 101 Fed. 413; 5 Cyc. 341.

The right of the lessee in the money which he had deposited with the lessor was to receive back with accumulated interest from the lessor upon the termination of the lease so much of the deposit as was not needed to make good the defaults upon the covenants, and upon the bankruptcy of the lessee, this right passed to the trustee. As the lessor had failed to pay the rent due on March 1st and on April 1st, the court below recognized the right of the lessor to charge against the fund on deposit, the sum of \$1,643.33 for rent due from the lessee down to April 26th, the date of filing the petition in bankruptcy. But after making this deduction there was still left in the lessor's hands a balance of \$856.67. The court also allowed the lessor to retain \$830.65

additional; this being the proportionate share of the taxes during the period of the receiver's occupancy. This sum added to the allowance for rent aggregated \$2,473.98 and left a balance of \$26.02 which, with accrued interest, made \$48.34. And as it appeared that the rent payable in advance on July 1st was not paid, the court recognized the lessor's right to apply this balance of \$48.34 to that payment—thus appropriating the entire fund of \$2,500.

But the trustee disputes the right of the court to allow the lessor to charge against the security fund the sum allowed for taxes during the receiver's occupancy, \$830.65. He claims a right to have that sum set off against a like amount due from him to the lessor for the use and occupation of the premises while the receiver was in possession. But for reasons already stated the liability for the taxes was a proper charge against the deposit; was not affected by the assignment; not forgiven by the lessor. The trustee has not been prejudiced and the lessor has a right to charge against the fund all the sums authorized by the court.

The order is affirmed.

SMITH v. ATLANTIC COAST LINE R. CO.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1913.)

No. 1169.

1. LIMITATION OF ACTIONS (§ 127*)—EMPLOYERS' LIABILITY ACT—AMENDMENT OF COMPLAINT.

Where the complaint, in an action by an employé against a railroad company to recover for a personal injury, commenced within two years after the injury occurred, alleged the facts and stated a cause of action of which the court had jurisdiction, an amendment, made after the expiration of such two years, alleging that defendant was engaged in interstate commerce, and that plaintiff was employed in such commerce at the time of his injury, so as to bring the case within Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), does not introduce a new cause of action, but only affects the defenses which may be made, and the action is not barred by the two years' limitation contained in section 6 of the act.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

2. MASTER AND SERVANT (§ 228*)—ACTION UNDER EMPLOYERS' LIABILITY ACT—DEFENSES—CONTRIBUTORY NEGLIGENCE.

Under Employers' Liability Act April 22, 1908, c. 149, § 3, 35 Stat. 66 (U. S. Comp. St. Supp. 1911, p. 1323), providing that "no employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employé contributed to the injury or death of such employé," a railroad company which fails to provide its cars with couplers conforming to the standard prescribed by Safety Appliance Act March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), is chargeable with negligence per se, and, if one of its employés in the discharge of his duty is injured in attempting to make a coupling with a defective coupler, it is not a defense to an action for such injury

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the plaintiff was negligent unless his negligence was the sole cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

3. MASTER AND SERVANT (§ 289*)—ACTION FOR INJURY TO SERVANT—EMPLOYERS' LIABILITY ACT—QUESTIONS FOR JURY.

Evidence considered, in an action against a railroad company for injury to an employé, based on Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), and held sufficient to require the submission of the case to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

On Cross-Writs of Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia; Henry A. Middleton Smith, Judge.

Action at law by Keen D. Smith against the Atlantic Coast Line Railroad Company. Judgment for defendant, and both parties bring error. Reversed.

W. F. Stevenson and C. L. Prince, both of Cheraw, S. C. (James W. Johnson, of Marion, S. C., on the brief), for Keen D. Smith.

P. A. Willcox, of Florence, S. C., and B. A. Hagood, of Charleston, S. C. (F. L. Willcox, of Florence, S. C., on the brief), for Atlantic Coast Line R. Co.

Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

CONNOR, District Judge. Plaintiff is a citizen of South Carolina. Defendant is a Virginia corporation. The writ was issued March 8, 1910. In the original complaint plaintiff alleged: That on December 4, 1908, he was injured while in the employment of defendant railroad company, at Florence, S. C. That, while acting as yard conductor, under the order of Mr. Thorne, the yardmaster, his superior in authority, he was endeavoring to make a coupling of two freight cars; the coupler of one being "out of order." That, while so engaged, it became necessary, by reason of the defective condition of the coupler, to use his foot. That, in making the coupling, his foot was caught between the couplers and injured. He sues for damages, for the injury thus sustained. Defendant, in addition to a general denial of the material allegations in the complaint, relied upon the affirmative defenses of contributory negligence and assumption of risk. Pending the trial, the court permitted plaintiff to amend his complaint by alleging "that the train, upon which plaintiff was employed when the injury occurred, was engaged in interstate commerce." In the amended complaint, filed June 15, 1912, plaintiff, repeating the facts set out in his original complaint, alleged: That, at the time he sustained the injury, defendant "was the owner and operator of one or more lines of railroad, passing through the city of Florence, in the county of Florence and district aforesaid, and is employed in interstate commerce." That the train, upon which he was injured, by reason of the defective condition of the coupler, "was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

called and known as the 'Wilmington Extra,' which was a train engaged in interstate commerce, running between Florence, S. C., and Wilmington, N. C." Defendant answered denying the essential allegations and averring that the injury sustained by plaintiff was caused by his gross negligence, and further that, by the terms of the act of Congress, commonly known as the "Employers' Liability Act," approved April 22, 1908, no action shall be maintained under that act unless commenced within two years from the date the cause of action accrued, and that, although the cause of action alleged in the complaint, accrued, if at all, on the 4th day of December, 1908, plaintiff did not bring an action, under the act in question, until the 15th day of June, 1912, and the defendant pleads section 6 of the Employers' Liability Act, above mentioned, in bar of this action.

At the conclusion of the evidence, defendant requested the court to instruct the jury to render a verdict for the defendant for that plaintiff's alleged cause of action, as set out in his amended complaint, was barred by the statute of limitations. The motion was refused, and defendant excepted and, upon its application for a writ of error, assigned such refusal as error. Upon the trial the plaintiff, in his own behalf, testified that on December 8, 1908, he was in the employment of defendant as yard conductor; had been in such employment about 2 or 2½ years; that he was ordered by the yardmaster, his superior, whose orders he was required to obey, to go down to the long yard and take the "Wilmington Extra"—a freight train, up to the long new yard—that this train runs from Florence, S. C., to Wilmington, N. C.—he coupled it up and sent the switchman to the rear and to hold off the brakes, went down to the front end himself, and coupled up, started out; after he got started and had gone some 15 or 20 car lengths, the check clerk came to him and said there was a car that did not belong on there. It was the duty of the check clerk to check up cars, giving numbers and initials, carrying them to the yard officer, the conductor, to see that no cars were there which did not belong there, and notify the man who was working the cars. He asked witness to throw the car out, said it went to Rocky Mount, that he threw it out, and came back to make the coupling. The rear and front ends of the train were uncoupled, about the middle. He described, by the use of a diagram, not in the record, where he was standing to make the coupling, the position and movement of the cars to be coupled, saying:

"Just as the cars came together, I saw one of the side plates under the drawhead was loose and dropped down a little, and that caused the bumper to turn a little to one side. It would not couple just like it was, and I did not have time to stop the engine to push it, and Mr. Thorne (the yardmaster?) ordered me to hurry out, that the conductor was checking up, and to get it out as quick as I could, and I pushed my foot against it to keep it from injuring the car any more."

He is asked, "What usually happens when they come back together without coupling?"

He answered, "Well, sometimes they would not couple, and then again they break, make a worse coupling"—that one was tilted to one side and would not couple in that shape. "I put my foot and shoved it into its place, so it would couple. My foot got caught between them. It crushed it all to pieces."

The nut had gone off an inch or two at the top, down to the bottom. That plate had dropped down. The purpose of the plate was to hold the drawhead. Had no means furnished to put it in place, so it would couple, without going in between the cars. Was instructed by Mr. Thorne to be in a hurry and get the train out. "He was my superior." He says that he saw no other way to straighten the bumper out before the cars came together; was not in a position to stop the engine before the cars came together; had hold of the grabirons when he pushed the bumper; the defect was in the plate which holds the drawhead up; the car was coming back; the knuckle was open. He further said: If the coupler had been in the ordinary position, as it was intended to work, they would match. This would not match because one was pushed too far to one side. It ought to work in the center. Saw the trouble when car was about 2½ feet from the other car. He says that he occasionally put his foot between cars to make coupling; had no rule book; never read any rule about coupling; put his foot in "to hurry the trains out." Mr. Thorne said there was a freight below; was trying to obey orders; one was a Janney coupler, the other, Town. The Janney does not couple automatically; bumper would not match; could see this. There was other testimony, both corroborative and contradictory. At the conclusion of the evidence, upon defendant's motion, the court directed a verdict for defendant. In granting the motion, the learned judge said:

"The plaintiff is entitled to the benefit of the act of 1908 under this complaint, and, as such, he is entitled to the benefit of the act of 1893, which is very strictly enforced; they are acts passed for the purpose of lessening the chances of injuries to employes, and they are, and very properly, very strictly enforced against the employers. I think that, when the employes understand that they have the benefit of this act, they are not themselves to recklessly ignore them and expose themselves to danger, which those acts were intended to free them from, etc."

Defendant sued out a cross-writ of error for the refusal of the court to instruct the jury that plaintiffs alleged cause of action was barred by the statute of limitations. The two writs were argued together.

[1] It will be convenient to dispose of the defendant's assignment of error first, as it is based upon a plea in bar and, if sustained, renders it unnecessary to consider plaintiff's writ of error. The learned judge, after taking into consideration defendant's motion, announced his conclusion, with his reasons therefor set out in the transcript. He was of the opinion that the amendment did not introduce a new cause of action; that the facts upon which plaintiff's cause of action were based were set out in the original complaint, the amendment simply alleging the interstate character of defendant's business and of the train upon which he was employed when he sustained the injury. We do not deem it necessary to say more than that we concur in the reasoning and conclusion reached by the learned judge below. The original complaint stated a cause of action. The District Court had jurisdiction by reason of the diversity of citizenship. To this cause of action, as stated in the complaint, defendant was entitled to interpose certain affirmative defenses. When, by the amendment,

the fact was developed that defendant was engaged in interstate commerce, and that the injury was sustained by plaintiff while employed on an interstate train of cars, defendant, by virtue of the federal statute, was deprived of these defenses. As said by Judge Smith:

"The statute does not deal with the cause of action, so far as negligence is concerned, at all, but with the defenses that may be allowed and the measure of the recovery."

The exception to the refusal to grant defendant's motion for an instruction that plaintiff's cause of action was barred by the statute of limitations cannot be sustained.

[2] Passing to a consideration of the plaintiff's assignment of error, a more serious question is presented. As the case is presented upon the record, it may be assumed that the bumper on one of the cars, to which plaintiff was directed to make a coupling, or rather to which it was necessary that a coupling should be made for the purpose of executing the order given him by the yardmaster, was in a defective condition; that it would not couple automatically; that, in order to make the coupling, it was necessary either that he should go between the cars or resort to some other means of making it. This condition of the car was violative of the provisions of the Safety Appliance Act (27 Stat. L. 531; 6 Fed. Stat. Anno. 752), which imposed the positive duty upon defendant to provide at all times, when used, in interstate commerce, its cars with automatic couplers—or couplers which would couple cars automatically, by impact. That this is a positive statutory corporate duty is well settled by abundant authority. This was recognized by the learned judge below. *C., B. & Q. Ry. Co. v. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582, where the decided cases are reviewed. By the provisions of the Employers' Liability Act (35 Stat. L. 66; Fed. Stat. Anno. [Supplement 1909] 584) § 3, contributory negligence, as a bar to an action by the employé, is abolished; it is relevant only on the question of damages. The section contains the proviso:

"That no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé."

A similar provision is found in section 4, relating to the defense of assumption of risk. It being shown that the coupler was defective, that is, did not conform to the statutory standard of efficiency and that, in endeavoring to make a coupling, the employé is injured, the sole question, left open, is whether such defective condition contributed to the injury; that is, whether the negligent conduct of the employé was the sole cause of the injury, or the violation of duty by the carrier was "in whole or in part" or a contributive cause thereof. It follows that, before the court may, in such cases, give a peremptory instruction for the defendant, or take the case from the jury, the evidence, taken in the light most favorable to the plaintiff, must exclude the conclusion that the violation of the Safety Appliance Act contributed to the injury. If the defective condition of the

coupler, and the act of the employé, although negligent, co-operated to bring about the result, the latter is entitled to recover. The common-law principle controlling the right to recover, that is, that in the negligent act of the defendant must be found the proximate cause, or *causa causans* of the injury, is abrogated quoad cases coming within the statute, and liability is made to depend upon the question whether such negligent act contributed "in whole or in part" to the injury. This interpretation of the statute is adopted by the Circuit Court of Appeals for the Seventh Circuit in *Grand Trunk West. Ry. Co. v. Lindsay*, 201 Fed. 836, on page 844, 120 C. C. A. 166, on page 174. On the rehearing it is said:

"If under the Employers' Liability Act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted in 'whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—the defendant is free from liability under this act."

In the opinion on the original hearing, Judge Sanborn says:

"Plaintiff did not assume the risk caused by the defective coupler. Merely going between the cars, therefore, was not negligence, if he used ordinary care in doing so. * * * It was negligence per se, for defendant to use the car having the defective coupler, even though the shoving of the cars together was accidental. * * * On the other hand, it was not negligent for plaintiff to attempt to use the defective coupler, because the statute expressly provides that he should not assume the risk by continuing to work after he knew the appliance was defective."

The facts in this record are, in several essential respects, so far as the legal duties and liabilities are concerned, similar to those in *Chicago, etc., Ry. Co. v. Brown*, 185 Fed. 80, 107 C. C. A. 300, affirmed 229 U. S. 317, 33 Sup. Ct. 840, 57 L. Ed. 1204. There, it was the duty of the employé to uncouple cars; by reason of a defect in some part of the coupler, plaintiff was unable to do so in the usual way. He reached for the coupling pin on an adjacent coupler, his foot slipped, and it was shoved into an unlocked guard rail and injured. The District Judge instructed the jury that, in the conditions described, plaintiff was not chargeable with contributory negligence, that is, failure to exercise ordinary care for his own safety, by the mere fact of going in between the cars to effect the uncoupling; he is required, before he can recover, to exercise ordinary care after he goes between the cars and while he is there endeavoring to effect an uncoupling, that is, the separation of the cars. In *Gilbert v. B. & N. R. Railroad*, 128 Fed. 529, 63 C. C. A. 27, after defining the statutory duty imposed upon railroad companies to provide their cars with automatic couplers, the judge, writing the opinion, says:

"The devolution of this duty upon the carriers necessarily imposed upon their servants the correlative duty of using the equipment thus furnished to them, and of refraining from going between the ends of the cars to couple or uncouple them unless compelled to do so by necessity."

In *Brown's Case*, *supra*, Grosscup, Judge, referring to this language, says:

"Upon the last sentence of this excerpt, the plaintiff in error particularly relies. In our judgment, 'the necessity' existed in the case under consideration; for in large yards, where safety appliances refuse to work, to let the cars go uncoupled, under the circumstances disclosed here, might result in blocking the operation of the whole road. * * * If there be contributory negligence at all, it depends, not upon his assuming the risk under the circumstances disclosed, but upon the degree of care with which he acts while in the performance of the work under the assumed risk."

It would seem that it was the purpose of Congress, as indicated in the language used in this statute, to provide that, if the carrier fails to provide its cars with couplers which conform to the prescribed standard, it is guilty of negligence per se; that if one of its employés, in the discharge of his duty, is injured, in attempting to make a coupling with such defective coupler, when the necessity for doing so exists, he may recover unless it appears that he was negligent in the manner of doing so, and that such negligence was the sole cause of the injury; or, to state the proposition from another viewpoint, in such case the carrier is liable if the defective coupler contributed to the injury. That is the sole question to be decided in such cases.

[3] The learned judge below was of the opinion that, upon plaintiff's evidence, or rather upon the whole evidence, taken most favorably for plaintiff, his act, in trying to make the coupling with his foot, was the sole cause of his injury. The exception presents this single question. Plaintiff was acting within the scope and sphere of his duty; he was obeying the order of his superior; he saw the moving car being backed towards the standing car to which it was necessary to be coupled, to take the train out of the yard; he was told to hurry it out. In this condition he saw that, by reason of the defective condition of the bumper, the coupling would not be made automatically; that either there would be failure to couple, or an injury done to the coupler. He did not have time, after seeing this condition, to signal the engine to stop, and undertook to make the coupling by putting his foot against the bumper, pressing it into a position which would result in making the coupling. Assuming that this was negligent, yet the question remains open whether this negligent act was the sole cause of the injury, or whether the defective condition of the bumper on the coupler contributed to the injury. If the jury should find that the fact of using his foot, under the conditions described, was not negligent, and that, in the manner in which he used it—that is, applied his foot—he was not wanting in ordinary care, he would be entitled to recover.

We are of the opinion that, upon the whole evidence, these questions were for the jury. While there is very much in the evidence to sustain the conclusion reached by the judge, we think that it was not so clear as to be resolved into a question of law. It was a question for the jury. There was much testimony which, if true, contradicted plaintiff, in respect to the condition of the coupler and otherwise. The learned judge did not pass upon the weight of the evidence. Upon the record, as presented to this court, we are of

the opinion that plaintiff was entitled to have his case submitted to the jury. For the reasons herein given, the plaintiff's exception is sustained.

The judgment is reversed, and a new trial directed.
Reversed.

DAVIS et al. v. HANOVER SAVINGS FUND SOCIETY et al.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1913.)

No. 1162.

1. CORPORATIONS (§ 474*)—RIGHTS OF BONDHOLDERS.

Bankrupt corporation issued negotiable bonds secured by mortgage on its property, and delivered the same to its treasurer, who also owned the most of its stock, to be used by him as he deemed best to reimburse himself for advances made by him to the company. The greater part of the money advanced was furnished by claimant banks, and the treasurer gave his personal notes therefor, secured by a pledge of bonds as collateral. That bankrupt was indebted for the advances in a sum exceeding the amount of the bonds, and that the treasurer was then its only creditor, was clearly established. *Held*, that claimants were bona fide holders of the bonds for value, and were not affected by any equities which may have existed in favor of bankrupt against the treasurer growing out of other matters.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1854; Dec. Dig. § 474.*]

2. BANKRUPTCY (§ 184*)—LIENS—EFFECT OF STATE RECORDING STATUTE.

Code W. Va. 1906, § 3103 (chapter 74, § 5), which provides that a mortgage or deed of trust "shall be void as to creditors * * * until and except from the time that it is duly admitted to record," as construed by the highest court of the state, does not make an unrecorded mortgage void as to general creditors but only as to such as have secured liens, and a trust deed executed by a bankrupt corporation, if otherwise valid, is not rendered invalid as against the trustee by the fact that it was not recorded until within four months prior to the bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

3. BANKRUPTCY (§ 177*)—PREFERENCES—MORTGAGE RECORDED WITHIN FOUR-MONTH PERIOD.

A transfer made by a bankrupt is to be judged, in determining the question whether or not it constitutes a preference under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1506), as of the time when it was made and not of the time of its registration.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 177.*]

4. CORPORATIONS (§ 477*)—MORTGAGES—EFFECT OF DELAY IN RECORDING—FRAUD.

The mere failure to record a mortgage is not a fraud upon creditors as matter of law, and that the trustee in a corporation mortgage securing bonds neglected to see that it was promptly recorded cannot estop bona fide holders of the bonds from asserting the lien after it is recorded.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1857-1863, 1865-1869; Dec. Dig. § 477.*]

5. CORPORATIONS (§ 473*)—BONDS—LIENS—UNRECORDED MORTGAGE—DECLARATIONS OF BANKRUPT.

The declaration of an officer of a bankrupt corporation that its property was unincumbered, when in fact it had an outstanding issue of bonds secured by an unrecorded mortgage, cannot affect the rights of the bondholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842-1853, 1855; Dec. Dig. § 473.*]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Martinsburg, in Bankruptcy; Alston G. Dayton, Judge.

In the matter of Charles Town Light & Power Company, bankrupt. From an order allowing the claims of the Hanover Savings Fund Society, the People's Bank of Hanover, and John R. Bittinger, bondholders, against the proceeds of the mortgaged property, Amelia Davis, trustee, and others, appeal. Affirmed.

Geo. M. Beltzhoover, Jr., of Shepherdstown, W. Va., and A. Moore, Jr., of Berryville, Va., for appellants.

Forrest W. Brown, of Charlestown, W. Va., and Charles Markell, of Baltimore, Md., for appellees.

Before PRITCHARD, Circuit Judge, and KELLER and CONNOR, District Judges.

CONNOR, District Judge. [1] The procedure in this case conforms with that approved in *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008. Appellees, Hanover Savings Fund Society, People's Bank of Hanover, and John R. Bittinger, at the first meeting of the creditors of the Charles Town Light & Power Company, in bankruptcy, filed proof of their claims, consisting of 18 coupon bonds, executed by the bankrupt company, with coupons attached, bearing date November 18, 1904. They alleged that the payment of said bonds was secured by a mortgage or deed in trust to Paul Winebrenner, constituting a first lien on the property of the bankrupt, and asked that an order be made directing the payment of said bonds from the proceeds of the sale thereof. To this claim the trustee, and certain creditors, filed objections; for that:

"(1) The banks have no provable claim against the bankrupt because: (a) The bankrupt was not, on November 18, 1904, indebted to Ehrehart, from whom they received the bonds. (b) Ehrehart had no authority to pledge the bonds as collateral for his personal indebtedness.

"(2) If the banks have provable claims, they are not entitled to priority over the unsecured creditors because: (a) The mortgage, securing the bonds, constitutes a voidable preference; and (b) the mortgage was fraudulently withheld from record, and is therefore void as security.

"(3) That by their negligence and laches the banks have estopped themselves from asserting their claims, or, if allowed to assert them, they should be postponed in payment of the debts, to all other creditors." In re Charles Town L. & P. Co. (D. C.) 199 Fed. 846.

The referee heard the evidence and argument of counsel for the respective parties, overruled the objections, and upon petition for review certified the record, together with his conclusions, to the judge of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—49

the district. He accompanied his certificate with an opinion setting forth his conclusions both of law and fact. The judge sustained his conclusions in both respects and the trustee appealed to this court. We concur in the opinion of Judge Dayton that:

"By the very complete and able opinion filed by the referee, it is clearly shown that the evidence, upon which he bases his finding, was very carefully considered by him."

We also concur with the judge, in affirming the finding of the referee, that the bankrupt was indebted to Ehrehart on November 18, 1904, for sums of money which he had advanced to it. The bankrupt corporation was organized during the year 1901—the capital stock was subscribed by Charles E. Ehrehart, who transferred a small number of shares to his associates. In payment for the stock, he conveyed to the company the plant, etc., for which it issued to him stock for \$19,000 and the obligation of the company for \$16,000. The property may have been taken at an excessive valuation—probably it was—that contention is irrelevant to any question raised, or which could be raised, upon this record. The company was chartered and organized pursuant to the statutes of West Virginia. If the corporation has any cause of action against Ehrehart for unpaid stock, it must be prosecuted in an action appropriate for that purpose; the question cannot be litigated here. After the company was incorporated and became a "going concern," Ehrehart, as its largest stockholder and substantial owner, made advancements to it, largely through the claimant banks. On November 18, 1904, a large amount was due Ehrehart from the company, the larger part of which he owed the banks, on account of these advancements. The findings of fact, in both respects, is supported by the evidence, in respect to which there does not appear to be any contradiction. On November 18, 1904, the board of directors of the company adopted a resolution authorizing and directing the issue of 18 coupon bonds of \$1,000 each, running 20 years and, for the purpose of securing the payment of the interest semiannually, and the principal of said bonds when matured, the president and secretary were authorized to execute a mortgage, or deed in trust, to Paul Winebrenner, trustee, conveying all of the property then owned, or which should thereafter be acquired, by said company. At a meeting of the stockholders, held on the said 18th day of November, 1904, at which the holders of all of the capital stock of said company were present, either in person or by proxy, the resolution of the board of directors was submitted, together with the form of the mortgage, and the same was "ratified, confirmed, and approved." The foregoing appears on the records of the company.

The referee found, as a fact, and his finding was approved by the judge, from oral evidence that, at the same meeting a resolution was adopted, authorizing Ehrehart, who was treasurer of the company, to negotiate, or use, the bonds as he deemed best to reimburse himself for the money he had expended for the company. At this time the amount due Ehrehart from the company was about \$20,000. While, as said by the referee, the records of the company were loosely kept, he finds the foregoing facts from the evidence before him. The bonds and

mortgage were executed, in proper form, by the president and secretary. The mortgage was duly probated and delivered to the trustee, who duly certified the bonds. He handed the mortgage to Ehrehart, with the direction that he cause it to be recorded in the proper office in the county wherein the property was situate. The trustee resided in the borough of Hanover, York county, Pa. Ehrehart neglected to have the mortgage recorded until November 6, 1909. Neither the trustee nor the banks had knowledge or information of his failure to have the mortgage recorded until a few days prior to the date of its registration, when they directed that it be recorded at once. On November 18, 1904, Ehrehart—

“was the practical owner of the plant, and its only creditor. He and his associate stockholders, in the course of the operation of the plant, at various times prior to November 18, 1904, had borrowed sums of money upon their individual credit from the Hanover Saving Fund and the People's Bank of Hanover, aggregating \$12,816.79, which had been furnished to, and expended by, the bankrupt, in such operations and improvements. Between November 18, 1904, and March 30, 1905, additional loans were made by these two banks to Ehrehart and by him used for the same purposes, of some \$3,363.69—making a sum total of \$16,450.48 so loaned by them.”

Ehrehart took up the individual obligations of himself and associates, and gave to the banks his individual note and, as collateral security therefor, deposited with said banks 16 of said bonds, according to the amounts due each bank. The remaining two bonds were sold to J. R. Bittinger. Subsequent to these transactions, and prior to the registration of the mortgage, the company became indebted to other creditors, all of whom have proven their debts. The company was adjudged an involuntary bankrupt on March 13, 1911, upon petition filed March 3, 1910. 183 Fed. 160; 184 Fed. 986, 106 C. C. A. 488.

The foregoing is relevant to the questions of law presented upon the appeal. The validity of the bonds, as outstanding obligations against the estate of the bankrupt, and the indebtedness for which they were deposited as collateral security, being established, it would seem to follow, without serious controversy, that the banks are holders for value. It appears that Ehrehart has, since the transactions between the banks and himself, been adjudged bankrupt. The infirmity in the bonds, suggested by the trustee and objecting creditors, is that, by reason of matters connected with the organization of the bankrupt, the corporation had claims or causes of action against Ehrehart. There is no suggestion that the banks had any notice of these matters, and, if they had, we do not perceive how they could be considered or disposed of in this proceeding. The bonds were duly executed and, as found by the court, placed in the hands of the treasurer for the specific purpose to which they were applied. It is inconceivable that either Ehrehart or the other stockholders intended, by anything done in connection with the issue or disposition of the bonds, to defraud the corporation, for the conclusive reason that the property, for all practical purposes, belonged to Ehrehart, and he was its only creditor. The bonds were negotiable, and upon the facts found the banks took them for value. *Railroad v. Natl. Bank*, 102 U. S. 14, 26 L. Ed. 61.

We are thus brought to the question regarding the validity of the

lien claimed by the banks. The answer to this question is dependent upon the validity of the mortgage to Winebrenner, trustee. The debts, of the objecting creditors, were contracted subsequent to the execution of the bonds and mortgage and to the transfer to the banks, but prior to the registration of the mortgage, November 6, 1909.

[2] Eliminating, at this point, the suggestion that the failure to record the mortgage was a fraud on creditors whose debts were contracted subsequent to its execution, or that such failure works an estoppel on the banks to assert the lien, the question is presented whether, at the date upon which the company was adjudged bankrupt, or the petition was filed, the mortgage was a valid lien under the statutes of the state of West Virginia. Section 67a of the Bankrupt Act provides that:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

The validity of the mortgage, therefore, must be ascertained by an examination of the statute and decisions of the Supreme Court of West Virginia. *Holt v. Crucible Steel Company*, 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756. The West Virginia statute (section 3103), provides that a deed of trust—

"shall be void as to creditors * * * until and except from the time that it is duly admitted to record."

As said by Mr. Justice Van Devanter in *Holt v. Crucible Steel Co.*, supra: "The effect to be given to the unrecorded chattel mortgage must be determined by the recording law of the state; and it is also apparent that the question arising under that law, turns upon who are included in the term 'creditors' in the state statute." In *Gilbert v. Peppers*, 65 W. Va. 355, page 364, 64 S. E. 361, page 365 (36 L. R. A. [N. S.] 1181), referring to the registration act of the state, it is said that the statute does not contemplate general creditors.

"As to them it is valid, whether recorded or not. A mere personal debt bears no relation to the property of the debtor, since it does not constitute a lien thereon. Before a creditor can claim any legal right in respect to the property of his debtor, or any interest therein, in law or equity, he must, by some means, acquire a lien thereon, as by an attachment or reduction of his debt to judgment."

The mortgage was duly admitted to record on November 6, 1909—this completed the title of the trustee, as to all persons except purchasers and creditors—that is, creditors who had theretofore acquired a lien on the property. Less than four months elapsed from the filing of the petition and the registration of the mortgage. For the purpose of adjudication, the registration of the mortgage within four months before the filing of the petition was an act of bankruptcy—that is, a preference as of that date. Section 60b. The title of the trustee vests as of the date of the adjudication (section 70), with the right, however, to institute any suit for the purpose of avoiding any transfer by the bankrupt which any creditor of such bankrupt might have avoided. He takes title, however, subject to all valid liens, claims, and equities, or, as is frequently said, "stands in the shoes of the bank-

rupt." At the date of the filing of the petition and of the adjudication of the company, Winebrenner, trustee, held a mortgage, or deed in trust, duly recorded, and valid as against the creditors of the bankrupt, and therefore as against the trustee in bankruptcy. In *Holt v. Crucible Steel Co.*, supra, the claimant asserted a lien against the property, by virtue of an unrecorded mortgage. The creditors had not secured liens. The court held, affirming the judgment of the Circuit Court of Appeals, which followed the decision of the Supreme Court of Kentucky, the state in which the property was situate, that the unrecorded mortgage constituted a valid lien as against creditors who had not acquired a lien. The opinion of Judge Severens, 174 Fed. 127, 98 C. C. A. 101, makes the matter very clear. In *re Doran*, 154 Fed. 467, 83 C. C. A. 265, the mortgage was filed for registration prior to the filing of the petition in bankruptcy, although "held from record for several months, during which time a large part of the indebtedness [of the bankrupt] was incurred." It was held to be a valid lien. In *re Rutland-Perry Co.* (D. C.) 205 Fed. 200. Appellants rely upon *Moore v. Tearney*, 62 W. Va. 72, 57 S. E. 263. An examination of the opinion in that case discovers that the conveyance by the debtor was attacked for fraud, that is, that it was made with intent to defraud creditors. There was evidence tending to show that it was withheld from registration by concert between the parties—to the deed. In such cases, withholding the deed from registration is always regarded as a circumstance tending to show that it was executed with a fraudulent intent. The court is, however, careful to say that:

"It has always been held in this state that the creditors mentioned in said section 3103 only included such creditors as had a lien or hold upon the land so conveyed and not general creditors."

[3] The case is cited in *Gilbert v. Peppers*, supra, and, in no sense, conflicts therewith. Unless, therefore, for some other reason, the banks are precluded or estopped from asserting the lien of the mortgage, the ruling of the court below is manifestly correct. It is claimed, however, that the execution of the mortgage was a voidable preference. It was not a preference at the time of its execution, because the bankrupt owed no debts other than those to Ehrehart, and it was to provide for their payment that the bonds were issued. In *Debus v. Yates* (D. C.) 193 Fed. 429, Judge Cochran, in a very elaborate and well-considered opinion, held that, since Amendment of 1903, § 60a:

"The transfer was to be judged, in determining the question whether or not it constituted a voidable preference, as of the time when it was made and not at the time of its registration, and that, unless when it was made the debtor was insolvent and actually intended a preference, and the creditor then had reasonable cause to believe it was so intended, it is not voidable."

Adopting this decision as a correct construction of the section 60a, as amended by the act of February 5, 1903, there is no basis for the suggestion that the mortgage was a voidable preference. The amendment of 1910 makes a radical change in the law in this respect. The mortgage in controversy here, however, was recorded on November 6, 1909, and does not come within the provisions of that amendment. There is a saving clause in the act of 1910, preventing its application

to cases pending when it went into effect, June 25, 1910. Collier on Bankruptcy (9th Ed.) 1359. The petition was filed here March 3, 1910. The reasoning and citation of authorities in *Debus v. Yates*, supra, impresses us as they did the learned judge below. While not strictly analogous, it is in line with the decisions in *Re Sturtevant*, 188 Fed. 196, 110 C. C. A. 68, and *Re Klein*, 197 Fed. 241, 116 C. C. A. 603, in which it is cited with approval. We do not think, tested by either standard, the execution of the mortgage was a voidable preference.

[4] It is insisted, however, that if for neither of these reasons the claim should be rejected as a lien, it should be declared invalid because either made or withheld from registration with intent to defraud creditors, in violation of the statute of West Virginia. This contention may be made by the trustee, under the provisions of section 70e of the Bankrupt Act, and for that purpose he is given the rights of a lien creditor. We concur with the referee that this—

"proceeding is not an attack on the deed, but as to its relevancy and sufficiency as proof to sustain the status of the claimant's debt as a priority."

[5] For manifest reasons the questions which would be raised, and of necessity be decided, in such an action should not be tried in this proceeding. The question of the intent with which the deed was made, or withheld from record, would be a proper issue for trial by a jury. Merely failing to record a mortgage is not a fraud upon creditors, as a matter of law. *Bean v. Orr*, 182 Fed. 599, 105 C. C. A. 137. The evidence fails to show any agreement between the trustee, the banks, and the bankrupt, or *Ehrehart*, to withhold it from registration. The failure on the part of the trustee to record the mortgage cannot operate to estop the banks, holding the bonds, from asserting the lien after it is recorded, nor does the declaration of an officer of the bankrupt that there is no incumbrance on the property, affect the rights of the holders of the bonds. There is no suggestion that the banks had any notice, or knowledge, of such declaration. As is well said by the learned judge below:

"It would be a very dangerous doctrine to establish that an individual or corporation, by its representative could, after creating a debt of this kind, estop its recovery by denying its existence."

We have given to the record, and the very full briefs of counsel, a careful consideration. Although, by reason of the failure or neglect of *Ehrehart* to record the mortgage before other debts were contracted, a hardship is wrought, it is one of the incidents of business and commercial life, which cannot be dealt with in this proceeding. The objections and the evidence relied upon to sustain them have been carefully considered by the referee and the learned judge below; we concur in their conclusions.

Affirmed.

ALDERSON et al. v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Fourth Circuit. December 2, 1913.)

No. 1182.

1. SALES (§ 273*)—CONSTRUCTION OF CONTRACT—IMPLIED WARRANTY OF FITNESS FOR PURPOSE INTENDED.

Where plaintiff contracted to manufacture and install in a building for defendants an electric power and lighting plant, the machinery and parts of which were particularly specified and described, and the same was furnished and installed in accordance with the specifications, there was no implied warranty that the plant should be suitable for the particular building in which it was placed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 772-776; Dec. Dig. § 273.*]

2. SALES (§ 267*)—IMPLIED WARRANTY—EFFECT OF EXPRESS WARRANTY.

Where a written contract of sale contains an express warranty, any further warranty by implication in respect to the same subject-matter is excluded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 760, 761; Dec. Dig. § 267.*]

3. SALES (§ 277*)—WARRANTIES—CONSTRUCTION OF CONTRACT.

A warranty in a contract to furnish and install electrical machinery in a building that "the turbine and generator connected therewith will run continuously at its normal rated capacity without undue heating, undue noise or vibration," held to relate only to the operation of the machinery itself, and not to the effect of its operation on the building.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 780, 782, 795, 796; Dec. Dig. § 277.*]

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action at law by the General Electric Company against Charles M. Alderson and Samuel Stephenson. Judgment for plaintiff, and defendants bring error. Affirmed.

T. S. Clark, of Charleston, W. Va. (J. Howard Hundley, of Charleston, W. Va., and Enslow, Fitzpatrick, Alderson & Baker, of Huntington, W. Va., and Chilton, MacCorkle & Chilton, of Charleston, W. Va., on the brief), for plaintiffs in error.

Robert S. Spilman, of Charleston, W. Va., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. This is an action in assumpsit tried to a jury, and the writ of error is from a judgment entered on a verdict directed by the court in favor of the defendant in error, a New York corporation, hereinafter called the plaintiff. The material facts, about which there is no dispute, may be summarized as follows:

The plaintiffs in error, hereinafter called defendants, are the owners of a large office building in the city of Charleston, W. Va., which they erected in the years 1910 and 1911. Their agent and representa-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tive in that enterprise was one W. H. St. Clair, whom they employed as superintendent of construction and who is described as a contracting engineer. The local manager of plaintiff at Charleston was Mr. C. K. West. In September, 1910, when the building in question was approaching the stage for installing a light and power plant, West received a letter from plaintiff's office in Cincinnati, stating that St. Clair had called upon them, after examining a plant in the Provident Bank Building in that city, and requested them to prepare a proposal on equipment; and it was suggested that some one take the matter up with him at Charleston. West accordingly sought an interview with St. Clair and they met on the 8th of October. St. Clair referred to his trip to Cincinnati and the plant he had there examined, described with some particularity the machinery and apparatus which he desired to procure for defendants' building, and repeated the request that plaintiff submit figures for furnishing the same. West thereupon communicated with the main office of plaintiff as to the time within which deliveries could be made, because St. Clair wanted the work hurried, and a proposal was soon after prepared which was submitted to St. Clair on the 24th of October. West testified at the trial that this proposal covered the exact machinery and equipment which St. Clair said he wanted, including the type, sizes, etc., of the more important articles, and was in short an offer to furnish and install the complete line of apparatus and appliances which St. Clair desired to purchase. His testimony on this point is positive and undisputed. St. Clair was not called as a witness.

On the 26th of October West met St. Clair and both defendants at the office of defendant Alderson. Some modification of the terms of payment was agreed to, and then Stephenson, for himself and Alderson, signed a written acceptance of the proposal. The stipulated price was \$13,472, of which one half was to be paid on final shipment and the other half 30 days after the installation was completed and the apparatus accepted. The first payment was in fact made according to agreement.

The proposal which thus became a binding contract is a carefully drawn and elaborate document which covers about a dozen pages of the printed record. In form and substance it is an offer to furnish to defendants for their office building certain enumerated articles or items of electrical machinery, appliances, etc., for it begins with the statement that the plaintiff "proposes to furnish apparatus as herein described, subject to the following conditions and specifications." The next few paragraphs are general provisions of no apparent bearing upon the questions now presented, though it is observed that in one of them the defendants agree "to pay extra for * * * any work performed or apparatus or material furnished in addition to that herein specified." Then follow numerous specifications classified by appropriate headings, under each of which are grouped the items belonging to that particular class. Under the heading, "Specifications for Steam Turbines and Alternating Current Generators," the machines and apparatus indicated are described, in technical terms for the most part, with such apparent exactness as to show unmistakably what the

plaintiff undertook to furnish. Then comes the guaranty upon which defendants rely, and which reads as follows:

"The company guarantees that the turbine and generator connected therewith will run continuously at its normal rated capacity without undue heating, undue noise or vibration."

The remaining portions of the proposal contain nothing which appears to be material to the pending controversy.

Upon the execution of the contract the plaintiff proceeded to manufacture and ship the various articles specified and described in the proposal and to place the same properly connected in the building in question. The installation was completed some time in April, 1911, and accepted in writing on the 27th of that month. This acceptance, however, expressly stated that it should not be construed as a waiver of plaintiff's guaranties.

By the terms of the contract the balance of the purchase price became due on the 27th of May, but was not paid at maturity. It appears that defendants were delayed in securing a loan for which they were negotiating and gave this as an excuse for not meeting their obligation. In the months following repeated efforts to secure payment were made by the plaintiff. The defendants were personally solicited from time to time and several letters were written to them by plaintiff's counsel at the home office in Schenectady, N. Y., the last of which, under date of November 8, 1911, informed them that the claim would be referred "to our local attorneys at Charleston." Up to about this time apparently no complaint had been made to plaintiff that its contract had not been performed in full accordance with its terms, or that the apparatus furnished was not working to the satisfaction of defendants. As may here be stated, the plaintiff contends that the facts just referred to constitute a waiver of any breach of its contract which may be claimed by defendants, whether in respect of the guaranty in question or otherwise.

Just when the unpaid account of plaintiff was placed in the hands of its Charleston attorneys is not shown, but the record discloses that this suit was commenced in the early part of May, 1912. The defendants pleaded the general issue and also filed a notice of recoupment.

On the trial of the action the defendants offered to prove in substance, by the defendant Stephenson, that, when the contract with plaintiff was executed, its agent, West, represented that the machinery named in the proposal would make a complete power plant, and when installed in the building would be a suitable and proper plant for an office building, and would be of the proper character to place in their building and suitable for furnishing light and power therein, and that the contract was entered into because of and in reliance upon such representations.

The defendants also offered to prove by the same witness that the undue noise and vibration caused by the running of said machinery (that is, the turbines and generators connected therewith), at their normal rated capacity, are such as to render the building undesirable for offices, and that defendants will be compelled to take out this ma-

chinery and put in other power, as the apparatus in question is wholly unfit for the purpose of furnishing light and power for said building.

Upon plaintiff's objection both offers were refused and the evidence excluded.

Stephenson had already testified that they declined to pay the account in suit when sufficient funds were obtained therefor, which appears to have been along in December, because their tenants were complaining, and had been for some time, of the noise produced by this machinery and the vibration of the building caused by its operation. The effects described by him, as he himself observed them, and as they must be assumed for the purposes of this case, were such as to be seriously objectionable to occupants of the building and materially diminish its rentable value. Aside from this, there is no claim that the apparatus furnished did not conform in all respects to the specifications in the contract or was otherwise faulty or inadequate. It was simply noisy when running and affected the building to the extent of a noticeable tremor. Indeed, counsel for defendants frankly conceded in his brief that they "did not and do not contend that the machinery is not as good machinery of the kind as is manufactured, or that it will not perform its work as efficiently as any other machinery, or that it is not first-class in any other respect, except that the noise and vibration caused by its operation make it unsuitable and undesirable for use in an office building."

The ruling of the trial court upon the offer of proofs above stated was based upon a construction of the contract in question, including the guaranty, which made the offered evidence inapplicable to the issues presented. It was held, however, that, if the defendants could show "that this machinery produced more heating, noise, or vibration than other properly constructed and properly installed machinery of the same type," such evidence might be introduced. This was made even more explicit by the further statement of the court that any evidence would be admitted which "will show or tend to show that the machinery installed under this contract produced undue heating, noise, or vibration as measured by the amount of heat, noise, and vibration developed by properly constructed and properly installed machinery of the same class." Upon failure of the defendants to produce evidence of that character, and virtual disavowal of their ability to do so, the court held in effect that no defense to the cause of action had been established, and a verdict for the plaintiff was accordingly directed.

The formal assignments of error are reduced by defendants' counsel to three propositions:

- (1) That the plaintiff by its contract undertook to furnish a complete electrical power plant suitable for generating and supplying electric current for operating elevators, furnishing light, and other purposes in the office building of defendants, and that there was an implied warranty that such power plant should be suitable for the office building in question.

- (2) That the warranty contained in the contract, relating to "undue heat, undue noise or vibration," was a warranty with reference to the

uses of the power plant in the office building in which it was to be installed.

(3) That the language of the warranty relating to "vibration" means "without any vibration," and accordingly if any vibration occurred there was a breach of the warranty.

[1] The first of these contentions is discussed at length in the brief of defendants' counsel, and was fully and forcibly presented in oral argument. It would be unprofitable, in our judgment, to review the numerous cases to which we are referred, or to analyze decisions in which so many aspects of the subject have been considered. Upon the record in this case, we are constrained to reject the contention for reasons that appear to us convincing.

In the first place the contract in question, as we read it, is essentially a contract for the manufacture and sale of the articles therein specified and described, and it is well settled that such a contract carries no warranty by implication. This principle has been long established. It is laid down by text-writers of unquestioned repute and affirmed by repeated decisions of courts of last resort. For example, in Benjamin on Sales (volume 2, § 987 [3 Eng. Ed.]) it is stated as follows:

"Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined, and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer."

In Mechem on Sales (volume 2, §. 1349) the principle is formulated in this language:

"If, therefore, a known, described, and defined article is agreed upon, and that known, described, or defined article is furnished, there is no implied warranty of fitness, even though the seller is the manufacturer and the buyer disclosed to him the purpose for which the article was purchased."

Among the leading cases on this question is *Seitz v. Brewers' Refrigerating Machine Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837, in which Mr. Chief Justice Fuller, speaking for the court, says:

"Failing in respect of the alleged express warranty, plaintiff in error contends, secondly, that there was an implied warranty, arising from the nature of the transaction; that the machine should be reasonably fit to accomplish certain results, to effect which he insists the purchase was made. * * *

"The rule invoked is that where a manufacturer contracts to supply an article which he manufactures, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment of the manufacturer, the law implies a promise or undertaking on his part that the article so manufactured and sold by him for a specific purpose, and to be used in a particular way, is reasonably fit and proper for the purpose for which he professes to make it, and for which it is known to be required; but it is also the rule, as expressed in the text-books and sustained by authority, that where a known, described, and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described, and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. [Citing a number of cases.]

"In the case at bar the machine purchased was specifically designated in the contract, and the machine so designated was delivered, put up, and put in operation in the brewery. The only implication in regard to it was that it

would perform the work the described machine was made to do, and it is not contended that there was any failure in such performance."

In *Davis Calyx Drill Co. v. Mallory*, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973, it is held that whilst an implied warranty that an article will be fit for a particular purpose may be inferred in a contract to make or furnish it to accomplish that purpose, because the accomplishment of the purpose is then the essence of the contract, yet "no such warranty arises out of a contract to make or supply a specific, described, or definite article, although the manufacturer or dealer knows that the vendee buys it to accomplish a specific purpose, because the essence of this contract is the furnishing of the specific article, and not the accomplishment of the purpose."

Without multiplying citations it will suffice to mention a recent decision of the Supreme Court of West Virginia (*Erie Iron Works v. Miller Supply Co.*, 68 W. Va. 519, 70 S. E. 125), in which it is said:

"The prevailing rule is that, even though the seller is informed of the purpose for which a specific article, known, defined, and described, is ordered and furnished, there is no implied warranty of fitness for the particular purpose."

It is scarcely necessary to observe, for the rule has long been familiar, that parol evidence is not admissible to show a verbal warranty or representations made by the vendor previous to the making of a written contract of sale.

That the contract in question belongs in the class to which the above-quoted cases refer appears not only from its form and contents but also from the circumstances which preceded its execution. As will be noticed, the guaranty of plaintiff is confined to the steam turbines and generators, and as to these the specifications are so exact and complete that there could be no doubt or misunderstanding as to the "known, described, and defined" articles which plaintiff undertook to supply. Nor is any claim now made that the turbines and generators actually installed do not, in type, quality, and capacity, precisely and fully comply with the specifications. In short, the plaintiff has furnished exactly what it agreed to furnish.

It may be accepted as a fact, as Stephenson offered to testify, that the defendants themselves were wholly unfamiliar with electric plants of this character, and therefore had no knowledge of the effect of operating such machinery as they were buying in the office building in question. But they were chargeable, in our opinion, with the knowledge of their representative, St. Clair, and he apparently assumed to be experienced and to know just what he wanted. West testified that St. Clair asked him to submit figures on certain machinery and apparatus, including specified turbines and generators, switchboard and transformers, "outlining exactly what he wanted, so we could figure on it," and that the proposal submitted "covered the exact machinery that he wanted figures upon; that is the sizes and type and all." St. Clair was not called as a witness, and the testimony of West stands without contradiction. In the light of these facts and the authorities cited it seems clear to us that the contract in suit should be held to be a contract for the manufacture and sale of specific articles, and therefore not one upon which an implied warranty can be predicated.

[2] In the second place, and even more decisive upon the facts in this case, is the doctrine that an express warranty in the written agreement excludes an implied warranty concerning the same subject-matter. A guaranty set forth in the contract is the denial of a guaranty by implication. This principle is stated by Mechem as follows:

"Where the parties have expressly agreed upon a warranty, the law must, in the absence of fraud or mistake, conclusively presume that they have included in their express agreement whatever of warranty is to prevail between them respecting the matter to which it refers. An express warranty of quality, for example, must therefore exclude an implied warranty of quality." 2 Mech. on Sales, § 1259; 2 Benj. on Sales, § 1002.

"An express warranty of quality excludes any implied warranty that the articles sold were merchantable or fit for their intended use." *De Witt v. Berry*, 134 U. S. 312, 10 Sup. Ct. 536, 33 L. Ed. 896.

"An express warranty of one of the qualities of a machine or article excludes implied warranties of other qualities of the article of a similar nature." *Reynolds v. General Electric Co.*, 141 Fed. 551, 73 C. C. A. 23.

Indeed, the principle is so firmly established and so generally recognized as not to need the aid of argument or further citation. And it applies distinctly to this controversy, for here the warranty expressed in the contract covers the same subject-matter as the implied warranty for which the defendants contend. The written agreement of the parties contains a definite guaranty regarding certain machines included in the apparatus purchased, and that guaranty measures and limits the plaintiff's obligation in the respects here considered. For these reasons it must be held that there was no implied warranty that the machinery in question would be suitable for the uses of the building in which it was to be installed.

[3] We come, then, to consider the true meaning and intent of the guaranty actually expressed in this contract, "that the turbine and generator connected therewith will run continuously at its normal rated capacity without undue heating, undue noise or vibration." The learned judge presiding at the trial held in effect that this guaranty relates only to the performance or behavior of the particular machinery as such, and not to the effect of its operation upon the building in which it was placed; and we see no reason for serious doubt as to the correctness of that ruling. Indeed, the conclusion above stated, that the contract in question is essentially a contract for the manufacture and sale of specified articles, virtually involves a restricted construction of the guaranty. If, as we are constrained to hold, the plaintiff undertook merely to furnish certain "known, described, and defined" apparatus, it could hardly be expected to guarantee more than the mechanical excellence of the apparatus furnished and its efficient performance of the work which might properly be required of such apparatus. Bearing in mind also that the defendants erected this building according to their own plans, that they selected the location of and constructed the foundation for the machinery to be installed, and that, in short, they controlled the adjustment of this and allied machinery to the building itself, as well as other matters affecting the transmission of noise and vibration, it seems reasonable to conclude that the guaranty of plaintiff relates to the subjective qualities of the machinery specified and not to its suitability for the uses of defend-

ants' building. And this construction is supported by the express terms of the guaranty. Obviously "undue heating" has reference only to the effect of operation upon the apparatus itself, and it appears to us not doubtful that the phrase "undue noise or vibration" is equally restricted in meaning and application. That the adjective "undue" in the latter phrase qualifies vibration as well as noise seems too plain to justify discussion. The conclusion follows that no breach of the plaintiff's warranty has been established. It may be assumed that the defendants fully believed they were contracting for a power plant suited in all respects to the requirements of their building, but, if a mistake was made in that regard, it is one for which the plaintiff is not legally responsible.

The view we take of the contract in suit and the rights of the parties thereunder makes it unnecessary to consider the question of waiver raised by the plaintiff.

We find no error in the record, and the judgment is therefore affirmed.

PENNSYLVANIA CASUALTY CO. v. WHITEWAY et al.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914.)

No. 2297.

1. APPEAL AND ERROR (§§ 209, 1001*) — REVIEW — VERDICT — PROCEEDINGS IN TRIAL COURT.

A jury's verdict is not subject to review unless there is an entire absence of substantial evidence to sustain it, and there has been a request for a peremptory instruction and an exception taken to the ruling of a trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1290-1298, 1300, 1303, 3922, 3928-3934; Dec. Dig. §§ 209, 1001.*]

2. APPEAL AND ERROR (§ 209*)—FINDINGS BY COURT—REVIEW.

Where an action at law is tried to the court and a jury is waived, the court's general finding stands as the verdict of a jury and may not be reviewed unless the lack of evidence to sustain the finding has been suggested by a ruling thereon or a motion for judgment, or some motion to present to the court the issue of law so involved before the close of the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1290-1298, 1300, 1303; Dec. Dig. § 209.*]

3. EVIDENCE (§ 450*) — PAROL EVIDENCE — ACCIDENT POLICY — PREMIUM PAYMENTS—EFFECT.

Where, in an action on an accident policy for the amount paid in satisfaction of a judgment for injuries to one of plaintiffs' employes, defendant claimed that the employe was not covered by the policy because he was a common laborer and not a "steel man," and it appeared that the policy, while intended to cover all employes, classified them by certain designations, and that defendant's auditor, on inspecting plaintiff's pay roll, demanded and received an additional premium payment, a question, asking one of the plaintiffs what employes' compensation was included in such payments, was admissible and not objectionable as tending to vary the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 450.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. EVIDENCE (§ 553*)—HYPOTHETICAL QUESTIONS.

Where a witness testified that he would class a man who worked about a building in process of construction as a utility man and did all kinds of manual labor as a common laborer and not as a steel man, the court did not err in permitting the witness to ask a hypothetical question hypothesizing the different acts of the servant connected with the building, and asking whether the witness would say that such a man was working in the capacity of a "steel man" or as a common laborer.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.*]

Facts which must be included in hypothetical questions, see note to *McIntyre v. Modern Woodmen of America*, 121 C. C. A. 10.]

In Error to the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action by A. S. Whiteway and another, doing business as A. S. Whiteway & Co., against the Pennsylvania Casualty Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

The plaintiff in error executed to the defendants in error a policy of accident insurance, whereby it agreed to indemnify the assured against loss by reason of liability for damages on account of bodily injuries to their employes while conducting certain building operations, and to defend, in the name and on the behalf of the assured, all suits that might be brought at any time on account of such injuries, and to pay all costs and expenses connected therewith, and the judgment, within limitations expressed in the policy. While the policy was in force, one J. C. Irwin, an employe of the defendants in error, was accidentally injured, and he thereafter brought an action against the defendants in error to recover therefor. The assured requested the plaintiff in error to defend the action in their name, and on their behalf, and the plaintiff in error refused to do so. The action resulted in a verdict in favor of Irwin in the sum of \$7,500. The defendants in error, in satisfaction of the judgment, paid the sum of \$5,000. Thereafter they commenced the present action to recover the said sum, together with their attorney's fees and costs incurred in the prior action.

The pivotal question in the court below was whether Irwin was a steel man, and covered by the terms of the policy under that classification. The complaint alleged that he was a steel man. The answer denied the allegation, and alleged that he was a common laborer. The policy insured the employes under a schedule naming masons, bricklayers, carpenters, plasterers, painters, steel men, electric wiring and sheet metal workers. There was no express mention of common laborers in the policy. Evidence was taken upon the question whether or not Irwin was a common laborer or a steelman. He testified that he was working at steelwork or anything they had to do, "steelwork, brickwork, concrete, or anything they told me to do." One of the defendants in error testified that Irwin was on the pay roll under the schedule of steel men. He was paid at \$2.50 a day. There was testimony, on the other hand, that the work at which he was engaged was not that of a steel man, but that of a common laborer. A jury trial was waived. The court made no special findings, but upon consideration of the testimony entered a judgment for the defendants in error for the sum of \$5,000 and the attorney's fees and costs of the prior action.

Martin & Cameron, of Boise, Idaho, for plaintiff in error.

Alfred A. Fraser, of Boise, Idaho, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2]
The burden of the argument of counsel for the plaintiff in error is that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the evidence overwhelmingly established the fact that Irwin was not a steel man, as he was classified in the policy, and as alleged in the complaint, but was a common laborer, and it ignores the effect of the judgment of the court below, which must be taken as conclusively establishing the contrary, for there was no motion in the court below for a ruling or judgment on that question at the close of the trial, nor does any assignment of error challenge the finding of the court on the evidence. When an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable unless a request has been made for a peremptory instruction, and an exception taken to the ruling of the court. When a jury is waived, and the cause is tried by the court, the general finding of the court for one or the other of the parties stands as the verdict of a jury, and may not be reviewed in an appellate court unless the lack of evidence to sustain the finding has been suggested by a request for a ruling thereon, or a motion for judgment, or some motion to present to the court the issue of law so involved, before the close of the trial. *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; *Wilson v. Merchants' Loan & Trust Co.*, 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 113; *Boardman v. Toffey*, 117 U. S. 271, 6 Sup. Ct. 734, 29 L. Ed. 898; *Barnard v. Randle*, 110 Fed. 906, 49 C. C. A. 177; *United States Fidelity & G. Co. v. Board of Com'rs*, 145 Fed. 144, 76 C. C. A. 114; *Felker v. First Nat. Bank*, 196 Fed. 200, 116 C. C. A. 32; *Bell v. Union Pac. R. Co.*, 194 Fed. 366, 114 C. C. A. 326. There was no such request or motion made in the case in hand, and the judgment of the court below is therefore conclusive of the facts determined thereby.

[3] We find no error in the assignment that the court permitted one of the defendants in error to answer the following question:

"Q. These payments you made, \$90.10, and this further payment of \$34.80, what employes' compensation was included in these payments?"

To which the witness answered:

"The premiums was paid upon the entire pay roll, everybody enumerated in the different schedules. And I would like to state here that when these schedules were prepared, they were prepared by the company and not by Whiteway & Lee. Mr. Sheppard, the agent of the company, when he came soliciting the work, he made these schedules, and I asked him, I said, 'Now, Mr. Sheppard, you state brick masons as a schedule. What does that include? Does that include simply the brick men who are laying brick, or does it include everybody connected with that branch of the work—the hod carriers, the mortar mixers, and the scaffold handlers?' And he said, 'Yes, it includes everybody.'"

To the answer an exception was taken on the ground that it might tend to vary the written contract. At the time when the \$90.10 were paid, that sum was estimated to be the amount payable as the premium, but the policy reserved to the insurer the right to inspect the pay rolls and to demand further premiums in accordance therewith. The policy covered (section 4) "all such injuries sustained at the locations described in the declarations, by all employes of the assured, whose entire compensation is included in the estimated compensation as shown in statement three of the declarations. * * * All such injuries

sustained by drivers and their helpers, lumpers, stevedores, loaders, material handlers, timekeepers, pay clerks, and messengers, whose entire compensation is included in the estimated compensation upon which the premium for this policy is computed, wherever they may be in the service of the assured in connection with the business operations described in the declarations," and one of the conditions of the policy was that "the premium is based upon the entire compensation earned during the policy period by all employes of the assured, not herein elsewhere specifically excluded, engaged in connection with the operations described in and covered by this policy," and statement 5 of the declarations states that the enumeration in the declarations includes all persons in the service of the assured, in connection with the operations, to whom compensation of any nature is paid or allowed, excepting the members of the firm, drivers, and clerks, for the purpose of computing the premium on the policy. It was proved without objection that after the policy was issued, the auditor of the plaintiff in error inspected the pay roll of the assured, and upon the total amount thereof demanded and received the additional payment of \$34.80. The evidence to which the exception was taken was not open to objection on the ground that it tended to vary the written contract. Instead of contradicting or altering the terms of the written contract, it was in harmony therewith, as showing that the intention of the parties was to indemnify the assured against all losses by accident in the operation in which they were then engaged, and that the pay roll was made the basis for the premium rate, and that the occupations of the different workmen enumerated in the declarations were intended by both parties to the insurance contract to include all employes directly engaged in the work in hand. *Fidelity & Casualty Co. v. Phoenix Mfg. Co.*, 100 Fed. 604, 40 C. C. A. 614.

[4] Error is assigned to the rulings of the court in sustaining objections to the question propounded to the expert witnesses Hammond and Paradise, as follows:

"Where a firm of contractors was engaged in the construction of a certain building, a four-story brick building in Boise, and had in their employ a man, a machinist by trade, the nature of whose work consisted in moving steel, shoveling dirt, handling brick, wheeling concrete and in doing most everything there was to do around the building, and whose wages were \$2.50 per day, would you say that this man was working at that time for these contractors in the capacity of a steel man or in the capacity of a common laborer?"

But the record shows that the court did not exclude the testimony so offered, for Hammond answered, "I would class that kind of a man as a general utility man," and Paradise had already answered that he could not say what a steel man was in the building trade, but that he could answer about a structural steel man, and that a common laborer is a man "who works around a building as a general utility man, and does all kinds of menial labor." After he had so answered, there was no error in the refusal of the court to sustain an objection to the hypothetical question above quoted.

There are other assignments of error; but, as they are not discussed

in the brief of the plaintiff in error, and we find no merit in them, we deem it unnecessary to discuss them here.

The judgment is affirmed.

PENNSYLVANIA R. CO. v. HICKEY.

(Circuit Court of Appeals, Third Circuit. January 12, 1914.)

No. 1799.

1. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY.

A car heavily loaded with pig iron and having no brake was moved from where it stood on the "cripple" track in defendant's yards to another yard at a considerable distance and there left standing on an inclined track. A block was placed under a wheel, but in taking up the slack to uncouple the engine the jar, although not unusual, caused the car to override the block, and it ran down the grade and struck and killed plaintiff's intestate, who was a brakeman in the yard. The reason for moving it in its defective condition was not shown, but the movement was made by direction of the yardmaster, and the conductor in charge testified that he did not know the car had no brake. *Held*, that the proximate cause of the injury was the defective condition of the car, that the duty of controlling and safeguarding its movement was a primary duty of the master, which the defendant could not delegate, and that under the evidence whether it was negligent in causing such movement, and especially without advising the person in charge of the defective condition of the car, was a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 289*)—ACTION FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Deceased, with three others, was engaged in reeling a fire hose on the switch engine when the car approached. Two of the others, who were on either side of him, got off the track. The third climbed into the cab, and deceased was following him when he was struck. *Held*, that the question of his contributory negligence was properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

In Error to the District Court of the United States for the District of New Jersey; John Reilstab, Judge.

Action at law by Catherine Hickey, administratrix of John H. Hickey, deceased, against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Theodore Strong, of New Brunswick, N. J., for plaintiff in error.
Geo. S. Silzer, of New Brunswick, N. J., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. This writ of error is brought by the Pennsylvania Railroad Company, defendant below, to reverse a judgment recovered against it in the district court of the United States for the

district of New Jersey, by Catherine Hickey, widow and administratrix of John H. Hickey, deceased, in a suit for damages for the death of her husband, alleged to have been caused by the negligence of the defendant company.

The suit was removed from the circuit court of Middlesex county, New Jersey, to the United States District Court for the District of New Jersey, on the ground of diversity of citizenship, the defendant being a corporation of the state of Pennsylvania and the plaintiff a citizen and resident of the state of New Jersey.

As disclosed by the record, plaintiff's intestate, John H. Hickey, on November 25, 1907, was crushed to death in defendant's freight yard, at Waverly, New Jersey, between a locomotive engine, known as the "Oak Island" engine, and a runaway gondola car.

Deceased was employed by defendant and had been for about three months then past, and also on prior occasions, and at the time of the accident was a brakeman and member of the crew of the "Oak Island" engine, which seems to have been what is called a "yard" engine.

The engine had come up a few moments before the accident from what is known as the ash pit, where a fire drill had been engaged in by its crew, and stopped for the purpose of stretching the hose used in the drill across the main freight tracks to dry and reel it. The engine lay partly on the pit track or switch and partly on one of the main freight tracks, known as No. 10, across the frog that united the two tracks, thus blocking the latter track in part. The hose, 30 feet long, which was attached to the engine at the reel box under the cab, about 5½ feet from the ground, had all, except about 10 feet, been reeled in. Some time before, a gondola or platform car had been brought from what was known as the West Freight Yard of the defendant company, a considerable distance away from the East or Waverly Yard, where the Oak Island engine was employed and in which the tracks above referred to were situated. It had been taken off of a track in the West Yard, known as the Cripple Track, where crippled cars or cars needing repair are stored, by another engine and crew, and was about to be delivered to the crew of this Oak Island engine. When the car was brought by the engine onto the No. 10 track, it was stopped near the yardmaster's office, about 15 feet away from it, and at the top of what is known as the "hump" in that track, a moderate downward grade running from that point eastward toward the frog across which the Oak Island engine was lying, which was also headed in an easterly direction. The car, when it arrived at the "hump," was being pushed in that direction by the engine, which was west of it, so that there was nothing between the car on No. 10 track and the Oak Island engine lying across the junction of that track with the "pit track."

The car was entirely without brakes and presumably was on the cripple track, from which it was taken, for that reason. That was its condition when it stopped at the top of the hump, from which point it was to be allowed to descend by gravity down No. 10 track to the Oak Island engine and crew. It and the engine pushing it stood for a length of time not clearly indicated by the testimony. The conductor of this engine and crew having received orders from the No. 5, or yardmas-

ter's, office in the Waverly Yard to deliver this car to the Oak Island engine and its crew, ordered his own engine uncoupled. To do this, the engine had to be pushed slightly towards the car to loosen the pin, in order to allow the brakeman to withdraw it. Before this was done, the conductor ordered another brakeman to put the brake on the car, and the brakeman, already knowing or discovering that the car was without a brake, blocked or chocked it with a piece of wood 3"x4" in dimensions.

In making the uncoupling, the engine was pushed back, and in doing that, the impact caused the car to override the chock and to start down this No. 10 track towards the frog, over which the Oak Island engine was standing, some 386 feet away. There was evidence tending to show that one of the brakemen then jumped off of the car on which he was at the time, and that he and the other brakeman attempted to replace the block under the wheels as the car moved. This they did two or three times, at the same time shouting a warning to the four men grouped around the hose reel box under the cab of the Oak Island engine. The car, however, was heavily loaded with iron or steel billets, and the momentum being largely increased on that account, it overrode or knocked out of place the block each time it was placed under one of its wheels.

Brakeman Ader was nearest the oncoming car, with his back to it, winding the reel. Hickey, the deceased, was close beside him, facing the engine and holding the hose taut, as was necessary for the purpose of reeling it. Brakeman Fleming was about six inches further from the car than deceased, and the engineer, Hoesley, was nearest at hand. All who testified heard the warning. The engineer mounted the cab and crossed to the further side in an effort to get his engine out of the way, Ader and Fleming stepped back across No. 10 track, but the deceased, Hickey, with the hose in his right hand and holding it over his head, seized the grabiron on the engine with his left and started up the side of the cab after the engineer. A lift of six or seven feet would have accomplished his purpose, but he was too late and was caught between the oncoming car and engine and crushed so that he soon afterward died.

The plaintiff in her declaration alleges that the deceased came to his death by reason of the negligence of the defendant company, in permitting this loaded car to be moved on its tracks without a brake in the manner described.

After the conclusion of plaintiff's testimony, defendant moved for a nonsuit, on the ground that plaintiff had failed to show negligence on the part of the defendant. This motion was refused by the court and witnesses were called by the defendant. After the close of this testimony, counsel for plaintiff asked the court, on all the evidence, for binding instructions in favor of the plaintiff. This request was refused and the case was submitted to the jury with a charge from the court, and a verdict for \$7,500 was rendered in favor of the plaintiff.

The assignments of error are 31 in number, apparently covering every exception to the admission or rejection of evidence, or to other matters, requiring to be made at the moment without opportunity for

reflection or the exercise of judgment. We think, however, every substantial question has been raised by the first assignment of error, founded on the exception to the refusal of the court to direct a verdict on the whole evidence in favor of the defendant. This has made necessary a careful examination of all the evidence disclosed by the record. Such questions involve the following contentions on the part of the plaintiff:

(1) That no negligence on the part of the defendant company has been shown;

(2) That if there was, John H. Hickey, the deceased, was guilty of contributory negligence;

(3) That the proximate cause of decedent's death was the act or omission of a fellow servant, and not of the defendant;

(4) That the accident was one of the risks of his employment.

[1] The crucial question, of course, is that of the negligence of the defendant, and whether the evidence was sufficient to require that question to be submitted to the jury. It is undisputed that a brakeless car, heavily loaded, was permitted by the management of the defendant company to be moved over a considerable distance and many tracks, from defendant's West Yard to what is known as the East or Waverly Yard. There is no testimony tending to show for what purpose this movement was made, except that of McCollum, one of the brakemen of the crew that picked up this car, and one of plaintiff's two witnesses to the accident. This witness, on cross-examination by defendant's counsel, in answer to the question, "What do you mean by Oak Island?" said, "The Oak Island engine was going to pick it up and set it down in the main yard, because it had no brake on it." Whether this knowledge was acquired after the accident or at the time the car was picked up, does not appear. It was not responsive to the question asked, and no attempt was made by defendant's counsel to show for what purpose or why the car was being moved in this obviously unsafe condition. So far as the evidence goes, it may have been moved for any purpose irrelevant to its condition. It was a heavily loaded car, and the purpose for which it was moved was left to conjecture. No explanation is offered by defendant as to why such a car unequipped with brakes should be sent this long distance down to the "main track." No attempt was made to show that it was necessary, in order to equip this car with brakes, to remove it from the cripple track on which it stood.

It would seem, therefore, that if the car were moved, or permitted to be moved, by the authority of the defendant under the circumstances which the evidence tended to prove, it was moved at defendant's risk of the consequences, of which its brakeless condition was the proximate cause. It is not disputed that the car was moved by direction given by the yardmaster at the West Yard to the conductor of the engine and crew that performed that operation. The order was to take the car down to No. 5 office, located near the classification tracks of the Waverly Yard. The conductor testifies, however, that this order was changed, presumably by the yardmaster of the Waverly Yard, and he was ordered to give the car to the Oak Island engine "when it came

down to the pit." The car was accordingly brought to the hump on No. 10 track and the engine was detached, in order that the car might go down the incline from the hump by gravity. We have already seen what happened when the engine was being detached, and the lamentable consequences which ensued from the inability to stop the loaded car in its progress down the incline.

As to the point raised by the defendant, that the proximate cause of the accident was not the brakeless condition of the car, but the force with which the engine was allowed to strike the car when being detached therefrom, and thus cause it to override the block under one of its wheels, a few words only need be said. There was evidence tending to show that pushing the couplings of the car and engine together, so as to slacken the hold on the pin and thus allow it to be withdrawn, was the usual method by which an engine, under the circumstances here disclosed, would be detached from the car. There is also evidence tending to show that the jar given to the car on this occasion was not extraordinary or more than was to be expected, although it may have been more than was necessary for the purpose of uncoupling. As one of the witnesses said, it is hard to regulate the precise force with which the engine takes up the slack. The evidence also tended to show that if the car had been equipped with a brake, it would have held the car, notwithstanding the jar given by the engine, and the testimony is positive that the conductor who controlled the movement of this engine and crew, when he gave the order to uncouple the same, did order the brakeman, McCollum, "to put the brake on," for the purpose of holding the car from going down the grade. The conductor never knew that the car was without a brake until after the accident, though the brakeman, McCollum, says that he (McCollum) did know that fact and therefore, when ordered to put the brake on, put the chock under the wheel.

This evidence certainly tended to show, if it did not positively show, that the proximate cause of the accident was the brakeless condition of the car. It was the extraordinary absence of the brake—not the ordinary conduct of the engineer in uncoupling—that in a legal, as well as common sense, point of view was the proximate cause of the accident. As to the crucial question of the defendant's negligence, it is to be observed that in a large way the proper conduct of the business of this railroad, and of this yard in particular, was the personal business of the master, while the ordinary and detailed operation of the road was in a large degree in the hands of subordinates, for whose shortcomings, if selected with due care, the master is not responsible.

Prima facie, this car standing on the "cripple track" used for the storage of disabled cars, or cars unfitted for transportation service or for movement on the tracks, should not have been moved at all, or certainly not for the considerable distance that it was moved, until brakes had been supplied. It may have been necessary for this car to be moved, in order to have its brakes restored, but if that were so, it would not be an ordinary operation, but an extraordinary one to so move it. It was not an operation in the regular conduct of transportation on the lines of traffic or in the classification or drilling movements

of railroad yards. Such a movement would require special safeguards to attend it and knowledge on the part of those controlling its movement, of the object thereof and of the disabled condition of the car. No explanation at all, however, was offered by the defendant company, as to why this car was moved. The purpose in that respect was left to conjecture. If the car was to be moved to some convenient place for repair, it would be natural that that purpose would be disclosed and the condition of the car consequently revealed. But, even had the purpose been shown, the remarkable testimony of the conductor of the crew that removed it from the "cripple track," shows an utter absence of that precaution and care which the one authorizing or permitting the movement should have exercised. On cross-examination, the conductor testified as follows:

"I didn't know there was no brakes on this car. Q. When you got to the top of the hill, you found that there was no brake on the car? A. No, sir. Q. You told Mr. McCollum to put the brake on? A. Yes, sir; I didn't know there was no brake on this car until after the accident. * * * Q. At the time you told this man to put the brake on, was there any brake there to put on? A. I didn't know then. I found afterwards that there wasn't any brake. * * * He was backing up the car and I told him to put the brake on, and I walked around the engine to throw the switch off. * * * Q. What was the purpose of your ordering him to put the brake on at that time? A. To keep it from going down the grade."

So we have this situation, that this heavily loaded and brakeless car was ordered to be moved a considerable distance, across from the West to the East Yard of the defendant company, and there to be placed at the top of an incline, where it was to descend by gravity, for no disclosed purpose relating to its disabled condition, and without informing the conductor of the crew who had charge of the movement that the car *was* disabled or without brakes. Assuming that McCollum, the brakeman, had knowledge of the condition of the car at the time the movement began, which he does not state, he did not communicate the same to his conductor. This certainly tended to show negligence in the direction of the movement, and we have no difficulty in deciding that the duty of controlling and safeguarding such a movement was a primary duty of the master, in this case the defendant company. This duty could not be avoided by its delegation to a yardmaster.

The long and well settled rule, that a master is primarily responsible for the safety of the places in which, and the conditions under which, his employes are required to work, needs no discussion; nor its corollary, that the master owes to his employes the duty of using reasonable care in the maintenance of such safe places and conditions, and that such duty cannot be so delegated by the master as to avoid responsibility for its proper performance. These rules eliminate all consideration of the care, or want of care, of the servant, of whatever grade or station, by whom and through whom the master performs this primary duty.

We think that the defendant company in this case was under the primary obligation of a master, in relation to any movement of such a car as this for a long distance over the crowded tracks of its freight yard, to use reasonable care to see that the places and conditions in

which and under which its employés were required to work were not rendered unsafe thereby. If the movement itself were permissible, the duty of the master was still more exigent as to the manner and conditions under which the movement was made, in order that such movement might not be a menace and danger to its employés. In this respect, it was pertinent for the consideration of the jury, that no necessity was shown by the defendant for the movement at all of this loaded car without brakes, and especially that the one to whose control the movement was committed was not informed of the dangers entailed by such movement by the absence of brakes. Moreover, it appears that this disabled car, by direction of the defendant, was sent to its position on No. 10 track in order that it might be sent down the hump or incline without the necessary means to control its movement. We have no difficulty in deciding that there was sufficient evidence tending to show negligence on the part of the defendant to go to the jury.

What we have already said disposes of defendant's point as to the proximate cause of the accident. As to the contention that the accident was occasioned by the negligence of fellow servants, it is only necessary to say, in addition to what we have said, that in the view we have taken of the master's duty, the yardmaster's negligence, if any, cannot relieve the liability of the master. As we have already seen, there is no evidence that the engineer, in slackening up for the loosening of the pin, gave any greater impact to the car than might ordinarily happen in such cases, or that he was better informed than the conductor as to the brakeless condition of the car. Of course, the yardmaster might, in some situations, be the fellow servant of the decedent, within the meaning of the general fellow servant rule, so that, in the absence of statute law abrogating the rule, for injuries resulting from his negligence the master would not be responsible, the fellow servant's negligence in such cases being one of the risks that an employé assumes upon entering the service. The negligence of the master, however, is never assumed as a risk inherent in the employment, and the yardmaster in this case represented the master as to one of the primary duties imposed upon him by law.

[2] It is contended that, however this may be, the decedent himself was guilty of contributory negligence, and that therefore this suit cannot be maintained by his administratrix and widow. A careful examination of the testimony in this respect convinces us that the court was right in refusing to affirm, as a matter of law, this proposition. Of the four members of the crew collected around the reel box under the cab of the Oak Island engine, all escaped except the decedent, but that fact is not sufficient to convict the decedent of contributory negligence. He was standing between two of the men, and he alone was occupied with the hose. That he waited a little too long, before attempting to escape, seems evident—whether trying to save the hose or disincumber himself from it does not matter, in the view we take of his conduct. Having miscalculated the closeness of the oncoming car, he attempted to escape by following the engineer up the steps of the engine, and before he had succeeded in reaching the space between the engine and tender, he was caught and killed.

We think the defendant has no reason to complain of the charge of the court in this respect. It is as follows:

"Of course, when I say that a man is chargeable with the exercise of carefulness to avoid injury, I mean to say it is that ordinary care which reasonably prudent persons exercise in like circumstances. A man is not chargeable when confronted suddenly with danger with the exercise of that kind of judgment while making his movements with which he would be chargeable in the absence of danger. The personal element must always be considered in that connection. It is your duty to consider the situation in which this man found himself at that time, and all the facts in the case which bore upon him when he was called upon to act. He is not to be charged with negligence merely because he was killed, but he is chargeable with negligence if he did not exercise that judgment which an ordinarily prudent person in like situation, confronted with the same exercise of judgment, would have exercised. If he failed to exercise that judgment he is guilty of contributory negligence. The evidence is that he was standing facing this engine, that he was between two men, one on either side of him. Those two men crossed the track immediately to the back of the deceased, and got out of harm's way. The fourth man, as I have said, the engineer, stood further away from Hickey, or nearer to the car, and got out of harm's way by going up the steps and getting into the cab. Hickey was crushed while standing on the steps leading to this cab. It is said that he, instead of being influenced by personal safety, was interested simply to save the hose; that he held the hose in his right hand and was clinging to the cab with his left hand, standing on the step, and that he was endeavoring to safeguard property rather than himself. Of course, if this man so disregarded his danger as not to take such steps as a reasonably prudent, careful man would take under such circumstances, taking the chance of getting on the engine, saving the company's property and not himself, that would be contributory negligence and the plaintiff could not recover, because that negligence which is imputed to him is imputed to her, and she cannot recover here. You must put yourselves, gentlemen, as nearly as the evidence will permit you, in the same place. Here were these four men, including Hickey, and if you conclude that this man could have gotten away if he had exercised proper care, you must then decide in favor of the defendant."

We think in this case the question of contributory negligence was, as ordinarily, a question for the jury and not for the court. The charge as a whole was eminently fair to the defendant, as was the conduct of the trial as disclosed by the record. Many of the other assignments of error have been covered by what has been said in regard to this fundamental one; the remainder are either without merit or disclose no harmful error.

The judgment of the court below is therefore affirmed.

HALLOWELL v. COMMONS et al.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1914.)

No. 3923.

1. INDIANS (§ 13*)—LANDS—NATURE OF TITLE.

Under Act Aug. 7, 1882, c. 434, 22 Stat. 342, § 5, authorizing allotments of land to members of the Omaha Tribe of Indians, and section 6, providing that upon the approval of such allotments, the Secretary of the Interior shall cause patents to issue which shall be of the legal effect, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

declare that the United States will hold the land allotted for 25 years in trust for the sole use and benefit of the allottee, or, in case of his decease, of his heirs according to the laws of Nebraska, and that at the expiration of such period the United States will convey it by patent to such Indian, or his heirs, in fee discharged of the trust, by operation of the law and the preliminary patent the equitable interest subject to the restrictions contained in the statute, and possibly to the plenary power of Congress to enact legislation for the government of Indians, passed to the allottee, while the legal title was retained by the government for 25 years.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. § 13.*]

2. INDIANS (§ 18*)—DESCENT—JURISDICTION OF COURTS.

Act June 25, 1910, c. 431, 36 Stat. 855, providing that when any Indian to whom an allotment of land has been made dies before the expiration of the trust period without a will, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and that his decision thereon shall be final and conclusive does not violate Const. art. 3, § 1, vesting the judicial power of the United States in one Supreme Court and such inferior courts as Congress may, from time to time, ordain and establish, and section 2, providing that the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority; since, while the judicial power of the United States extends to cases in equity arising under the laws of the United States, the jurisdiction of a particular court created by Congress may be limited by Congress to a portion only of such judicial power, and that act, therefore, so far as it conflicts therewith, repealed Act Aug. 15, 1894, c. 290, 28 Stat. 305, providing that persons in whole or in part of Indian blood or descent entitled to an allotment, or claiming to be so entitled, or to have been unlawfully denied or excluded from any allotment or parcel of land, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper Circuit Court of the United States, and the amendatory act (Act Feb. 6, 1901, c. 217, 31 Stat. 760), authorizing the circuit courts to try and determine any such action, and providing that the judgment or decree of any such court in favor of any claimant shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allotted and approved by him.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 49; Dec. Dig. § 18.*]

3. INDIANS (§ 18*)—DESCENT—JURISDICTION OF COURTS.

If, notwithstanding Act June 25, 1910, c. 431, 36 Stat. 855, providing that when any Indian to whom an allotment has been made dies before the expiration of the trust period without a will, the Secretary of the Interior shall ascertain the legal heirs of such decedent, and that his decision thereon shall be final and conclusive, the courts will interpose and protect the equities and rights of persons to lands, where such rights are infringed because of erroneous procedure of the officers of the Land Department either upon the facts or upon the law, they would not determine who were the heirs of a deceased allottee, where the Secretary of the Interior had not as yet passed upon that question.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 49; Dec. Dig. § 18.*]

4. INDIANS (§ 18*)—LANDS—DESCENT—CHILDREN OF PLURAL MARRIAGES.

Congress not having prohibited plural marriages among tribal Indians, the children of polygamous marriages, made while the parties were members of an Indian tribe whose customs permitted polygamy, were lawful heirs of their father; the state laws regulating marriage not applying,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as members of an Indian tribe owe no allegiance to the state while in their tribal relation, and receive from the state no protection.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 18.*]

Appeal from the District Court of the United States for the District of Nebraska; W. H. Munger, Judge.

Suit by Simeon Hallowell against John M. Commons, as Acting Indian Agent, etc., and another. From a decree dismissing the bill, complainant appeals. Affirmed.

Hiram Chase, of Pender, Neb., for appellant.

A. W. Lane, Asst. U. S. Atty., of Omaha, Neb. (F. S. Howell, U. S. Atty., of Omaha, Neb., on the brief), for appellees.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. Simeon Hallowell brought suit in equity against John M. Commons as Acting Indian Agent and Superintendent and Special Disbursing Agent for the Omaha Tribe of Indians of Nebraska, and Sarah Hallowell Walker. The defendants demurred to the bill on the grounds that the complainant was not entitled to the relief prayed for, and that the bill of complaint was without equity. The demurrer was sustained, and, the complainant electing to stand on his bill, it was by the court dismissed, and Mr. Hallowell appeals.

It appears from the bill that Jacob Hallowell was a member of the Omaha Tribe of Indians, and was allotted 80 acres of land under section 5, 22 Stats. 341. On December 29, 1884, the United States issued to him the preliminary patent as provided in section 6 of the same act, which is as follows:

"Sec. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the state of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, that, the law of descent and partition in force in the said state shall apply thereto after patents therefor have been executed and delivered."

In 1885 Jacob Hallowell died. He left a widow who died in 1886. There were left surviving him a number of persons who claim, or may claim, to be Jacob Hallowell's "heirs according to the laws of the state of Nebraska." At the time of the death of Jacob Hallowell he left a then living half-sister, Megretae Clay, who died in December, 1906, and the heirs of a deceased half-brother, Benjamin Hallowell.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

When Megratae Clay died, she left, first, a grandson, Hiram Chase, 2d, now of Pender, Neb., who was the son of Hiram Chase, 1st, and his wife, the latter was the daughter of Megretae Clay, and second, a great granddaughter, Eileen Lawless, who was the daughter of Pauline Lawless, who was the daughter of Mrs. Hiram Chase, 1st, who was the daughter of the said Megretae Clay. Said Benjamin Hallowell, about 50 years ago, was married, and the appellant, Simeon Hallowell, is the sole fruit of such marriage. Thereafter, and prior to 1874, Benjamin Hallowell married an Omaha Indian, Mary Tyndall. There are no children surviving as the result of this marriage. In 1875, and while his wife, formerly Mary Tyndall was still living and still his wife, Benjamin Hallowell took a second plural and polygamous wife, Gradustawe Blackbird, an Omaha Indian woman, and she bore him one daughter on November 15, 1876, named Sarah Hallowell, now Sarah Hallowell Walker. It thus appears that this Sarah Hallowell Walker is the half-sister of the appellant. The appellant in his bill states that none of these parties, Sarah Hallowell Walker nor Hiram Chase, 2d, nor Eileen Lawless are entitled to participation in the rents of the said 80 acres. In his bill he prays:

(1) That it be decreed that under the terms of the sixth section of the act of Congress of August 7, 1882, 22 Stats. 341, the fee-simple estate of inheritance in and to the real estate herein described is retained by the United States of America but charged with an express trust of 25 years, without power of alienation for said beneficiaries.

(2) That it be decreed that the beneficiaries of said trust of 25 years are Jacob Hallowell, but in the event of his death during said trust of 25 years, then the residue and unexpired trust of 25 years inures and vests in the legal heirs according to the laws of Nebraska, of the said Jacob Hallowell, deceased, in the character of purchasers and grantees of the United States, by force and effect of the executory character of said trust of 25 years, and governed by the rules of law governing executory devises, uses, and trusts created in wills and deeds, and not by law applicable to inheritable freehold estates of inheritances.

(3) That it be decreed that Simeon Hallowell, the complainant, being the nearest kin and only nephew and heir at law of the said Jacob Hallowell, deceased, is the sole and only beneficiary of said residue and unexpired trust of 25 years, and entitled to lease the same and receive all the rents and profits of the same without hindrance from any person whomsoever under the Acts of Congress and the rules and regulations of the Interior Department providing for the leasing of Indian lands and allotments.

(4) That it be decreed that Hiram Chase of Pender, Neb., has only an expectant right in and to said trust of 25 years to take effect and enjoyment and possession in the event that said Simeon Hallowell should die during the existence of said trust of 25 years.

(5) That it be decreed that Eileen Lawless, of Oklahoma, has only an expectant right in and to said trust of 25 years, to take effect and enjoyment and possession in the event of the extinction of the nephews and grandnephews and grandnieces of the said Jacob Hallowell.

(6) That it be decreed that Sarah Hallowell Walker is not a legal

heir of the said Jacob Hallowell, and is not entitled to be a beneficiary of said trust of 25 years.

(7) That an injunction issue as against John M. Commons, as Indian Agent, Superintendent, and Special Disbursing Agent, and Sarah Hallowell Walker, from preventing the complainant Simeon Hallowell from making a lease of said premises alone, and not to prevent him from receipting for all rent of said premises as provided by the laws of Congress and the rules and regulations of the Interior Department, and for general equitable relief.

The bill does not make Hiram Chase, 2d, a party because it is alleged he makes no claim adverse to the complainant, and the said Hiram Chase brings this suit as solicitor for the complainant, and Eileen Lawless was not made a party because she was beyond the jurisdiction and processes of the court. It is stated in the brief for appellant that Eileen Lawless is now deceased.

Notwithstanding the rule in Shelley's Case it is first contended that the words "his heirs according to the laws of the state of Nebraska," as used in section 6, 22 Stats. 341, and as also used in the preliminary patent, are words of purchase and not of limitation of the estate. Appellant cites *Hall v. Russell*, 101 U. S. 503, 25 L. Ed. 829; *McCune v. Essig*, 199 U. S. 382, 26 Sup. Ct. 78, 50 L. Ed. 237, and *Cutting v. Cutting* (C. C.) 6 Fed. 259.

[1] By operation of the law and the preliminary patent the equitable interest in this land, subject to the restrictions contained in the statute, and possibly to the plenary power of Congress to enact legislation for the government of the Indians, passed and the government retained the legal title for 25 years.

The District Court found against the appellant on this question, and we are inclined to think it was correct, as the law and the preliminary patent vested in the grantee the equitable title, but reserved the legal title in the government; the case is unlike the cases cited, but in view of other questions in this case, it is unnecessary to decide that question.

[2] The first question to decide is whether the court below had any jurisdiction of this case.

On June 25, 1910, Congress passed a law:

"That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive." 36 Stats. 855.

It is contended this law was clearly in conflict with the provisions of the Constitution:

First. "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." Article 3, § 1.

Second. "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made or which shall be made under their authority." Article 3, § 2.

While it is true that the judicial power of the United States extends to all cases in equity arising under the laws of the United States, it

does not follow that the jurisdiction of any given court extends thereto. The Congress had power to confer such jurisdiction upon any court created by it. The original jurisdiction of the Supreme Court is defined by the Constitution by clause 2 of section 2 of article 3, and it is not pretended that such cases as this come within its provisions. It was entirely optional with Congress under section 1 of article 3 whether it would create any inferior courts at all. It has undoubted power to create such courts to exercise a portion only of the judicial power. For example, it has created the Court of Customs Appeals and the Commerce Court, and has had in contemplation the creation of a Court of Patent Appeals. Clearly these courts would not have jurisdiction of such cases as this. In other words, a thing may be within the judicial power of the United States, but not within the jurisdiction of any particular court created by Congress. It, therefore, becomes important to tell what was the original jurisdiction of the courts, state and national, over such cases as this before the legislation directly bearing on this case was enacted. The Supreme Court of the United States has said:

"As observed in the *Smith Case*, 194 U. S. 408 [24 Sup. Ct. 676, 48 L. Ed. 1039], prior to the passage of the act of 1894, 'the sole authority for settling disputes concerning allotments resided in the Secretary of the Interior.' This being settled, it follows that prior to the act of Congress of 1894 controversies necessarily involving a determination of the title, and incidentally of the right to the possession of Indian allotments while the same were held in trust by the United States, were not primarily cognizable by any court, either state or federal." *McKay v. Kalyton*, 204 U. S. 458, 468, 27 Sup. Ct. 346, 350 (51 L. Ed. 566).

In that situation Congress passed the law:

"That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto, in the proper Circuit Court of the United States." 28 Stats. 286, 305.

Under this statute or the amendatory act of February 6, 1901, 31 Stats. 760, the complainant might have claimed "to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress," but for the enactment of 36 Stats. 855, which took the jurisdiction away from the court which had existed since August 15, 1894, and vested it exclusively in the Secretary of the Interior. This act of June 25, 1910, was therefore, as applied to its subject-matter of lands, the legal title to which was in the government, valid, and repealed so much of the acts of 1894 and 1901 as conflicted therewith. *Parr v. Colfax*, 117 C. C. A. 48, 197 Fed. 302; *Pel-Ata-Yakot v. United States* (C. C.) 188 Fed. 387; *Bond v. United States* (C. C.) 181 Fed. 613.

[3] It is contended that:

"It is now definitely settled by a long list of cases that courts of justice will interpose and protect the equities and rights of persons to lands under the statutes, where such rights are infringed because of erroneous procedure

of the officers of the Land Department either upon the facts or upon the law."

[4] Aside from the fact that the act of June 25, 1910, provided that the decisions of the Secretary of the Interior shall be final and conclusive, which we think Congress had the power to do, as to lands the legal title to which the government held, it is not alleged in the bill that the Secretary of the Interior has as yet passed upon the question as to who are the heirs of Jacob Hallowell, according to the laws of the state of Nebraska, and the rule asserted would not give the courts any right to interfere until the matter had been passed upon by the Secretary of the Interior. This necessitates the affirmance of this case, but we may add that the government has never recognized any distinction as to the right of inheritance among the Indians between the children of the first wife and the children of a polygamous consort, where the Indians by their customs, while in a tribal state, permitted polygamy.

The United States Supreme Court has never directly passed upon this question. It was directly presented to that court in *Jones v. Meehan*, 175 U. S. 1, at page 26, 20 Sup. Ct. 1, at page 11 (44 L. Ed. 49). In that case it appears:

"On July 23 and 24, 1895, the defendant introduced testimony of Moose Dung the younger, and of other Indians, showing that his father had two wives, both living at the same time, and left six surviving descendants: Three children, (1) Moose Dung the younger, the eldest son by the first wife, (2) a daughter by the first wife, and (3) a daughter by the second wife; and three grandchildren, (4) a son of a deceased daughter by the first wife, (5) a daughter of a deceased daughter by the first wife, and (6) a son of a deceased son by the second wife."

The question was thus directly presented as to whether the children and grandchildren by the second wife were entitled to inherit. If the Supreme Court had thought the mere fact of their descent from the second wife defeated their claims, it could easily have said so. It apparently recognized their claims as heirs, but decided the case upon other grounds.

The Supreme Court of Michigan first had the question before it in *Compo v. Jackson Iron Co.*, 50 Mich. 578, 16 N. W. 295. Judge Cooley in his opinion did not announce the rule contended for by appellant. The court then consisted of Graves, Chief Justice, and of Cooley, Campbell, and Sherwood, Justices. Judge Cooley delivered the opinion of the court, Sherwood, Justice, concurred, and Graves, Chief Justice, concurred in the result, but not in the opinion, while Campbell, Justice, dissented.

In substantially the same case (*Kobogum v. Jackson Iron Co.*, 76 Mich. 498, 43 N. W. 602) the court unanimously sustained the right of inheritance of a child of a polygamous consort, holding that she could inherit from her father.

In *Ortley v. Ross et al.*, 78 Neb. 339, 110 N. W. 982, the opinion says:

"Now, it is contended by appellants that, as the alleged marriage between the father and mother of the plaintiff was polygamous, it was neither valid in the state of Minnesota, where the parties then resided, nor in the state of Nebraska, to which they subsequently removed. This contention would be

well founded if this marriage had taken place between citizens of the United States in any state of the Union. But a different rule prevails with reference to the marriages of Indians, who are members of a tribe recognized and treated with as such by the United States government; for it has always been the policy of the general government to permit the Indian tribes as such to regulate their own domestic affairs, and to control the intercourse between the sexes by their own customs and usages. Consequently, when a member of an Indian tribe becomes a citizen of the United States and subject to its laws, by taking lands in severalty under the provisions of a treaty, as in the case at bar, a liberal rule is applied in determining the legitimacy of any offspring that he may have begotten under the customs and usages of the tribe to which he formerly belonged. The rule so applied is that marriages valid by the law governing both parties when made must be treated as valid everywhere."

If this is not an announcement that the children of a polygamous marriage, made while the parties were members of an Indian tribe, and in accordance with the customs and usages of the tribe, are lawful heirs of the father we do not understand it.

While decisions are cited that monogamous marriages according to the Indian custom are valid, we do not understand that any of them involved the question of the validity of a polygamous marriage according to Indian custom. We are therefore of the opinion that Sarah Hallowell Walker was the lawful heir of Benjamin Hallowell under the laws of Nebraska, and entitled equally with appellant to share in any inheritance from Jacob Hallowell, deceased.

The right of Sarah Hallowell Walker to be considered an heir according to the laws of Nebraska is in no wise dependent upon her parents having been married according to the laws of Nebraska. This Indian tribe at the date of the marriage of the mother of Sarah Hallowell Walker and Benjamin Hallowell was a semi-independent power, and, though dwelling within the state of Nebraska, it could make no laws affecting the customs among these Indians, and least of all could any laws on marriage of Nebraska have any effect among the members of such Indian tribe. They owed no allegiance to the state while in their tribal relation, and received from the state no protection. *United States v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228.

Manifestly Nebraska laws had nothing to do with whether plural marriages should take place among them or not. Congress could have passed a law prohibiting plural marriages among tribal Indians if it saw fit, but it did not do so. They were left to be governed by their own tribal laws as to all social relations that might exist among them. The Indians were subject, while their tribal relations existed, to the laws only of Congress, and in the absence of such laws were left to be governed by their own laws and customs as to domestic and social practices including marriage, and whether they should practice monogamy or polygamy was left wholly to them. Under the laws of Nebraska we are inclined to think that Hiram Chase, 2d, and Eileen Lawless did not inherit any present interest in the equity in the land in question allotted to Jacob Hallowell. *Douglas v. Cameron*, 47 Neb. 358, 66 N. W. 430. But that was a question for the Secretary of the Interior to determine.

It follows this case must be affirmed.

HALLOWELL v. COMMONS et al.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1914.)

No. 3922.

Appeal from the District Court of the United States for the District of Nebraska; W. H. Munger, Judge.

Suit by Simeon Hallowell against John M. Commons, as Acting Indian Agent, etc., and another. From a decree dismissing the bill, complainant appeals. Affirmed.

Hiram Chase, of Pender, Neb., for appellant.

A. W. Lane, Asst. U. S. Atty., of Omaha, Neb. (F. S. Howell, U. S. Atty., of Omaha, Neb., on the brief), for appellees.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. This case involves substantially the same questions presented in the case of Simeon Hallowell, Appellant, v. John M. Commons, Acting Indian Agent, etc., et al. (No. 3923) 210 Fed. 793, 127 C. C. A. 343. In that case the property in controversy was the allotment to Jacob Hallowell, while in this it is the allotment to his brother, Benjamin Hallowell, the father of Simeon Hallowell and of Sarah Hallowell Walker. In this case Sarah Hallowell Walker claims as the direct heir of her father, while in the other case she claimed as a collateral heir of her uncle. It is claimed that she could not inherit at all from her uncle, but that her right to inherit from her father is dependent upon how far her father had recognized her as his child, and whether he had recognized her as provided by the laws of Nebraska with reference to inheritances.

The view entertained by this court as shown by its opinion in No. 3923 is adverse to appellant on this question, and covers all matters necessary to pass on here; and, under the rule laid down in the opinion in that case the decree of the District Court is affirmed.

A. D. HOWE MACH. CO. v. DAYTON, United States District Judge.

(Circuit Court of Appeals, Fourth Circuit. November 28, 1913.)

No. 1,223.

1. MANDAMUS (§ 58*)—RIGHT TO WRITE—ISSUANCE—COMPLIANCE WITH MANDATE.

The Circuit Court of Appeals has power by mandamus to compel the carrying out of its decree and mandate by the trial court, but such power will be exercised only when it appears that the court below has refused to perform a duty which is required by the mandate, and the petitioner is without adequate relief.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 121; Dec. Dig. § 58.*]

Enforcement of decree of appellate court by mandamus, see note to *Ex parte Chicago Title & Trust Co.*, 77 C. C. A. 409.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 210 F.—51

2. APPEAL AND ERROR (§ 1194*)—INTERLOCUTORY DECREE—REVIEW.

Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [U. S. Comp. St. Supp. 1911, p. 194]) § 129, provides that where on a hearing in equity in a District Court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken therefrom to the Circuit Court of Appeals, notwithstanding an appeal in such case, upon final decree, might be taken direct to the Supreme Court. *Held*, that where a decree was entered declaring complainant's patent valid and infringed by defendant, granting an interlocutory injunction, and directing a reference to a master for an accounting, it was interlocutory only, and an appeal therefrom brought up for review only the question of the validity and infringement of the patent and complainant's right to an injunction, and hence a mandate of affirmance could not be regarded as determining any matter connected with a reference to determination of damages, if any, to which complainant was entitled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4648-4656, 4660; Dec. Dig. § 1194.*]

Petition by the A. D. Howe Machine Company for writ of mandamus against Hon. Alston G. Dayton, United States District Judge for the Northern District of West Virginia, to compel alleged compliance with the original decree in a suit for infringement of patent after affirmance on appeal. Denied.

H. E. Dunlap, of Wheeling, W. Va., for petitioner.

R. J. McCarty, of Dayton, Ohio, for respondent.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

PRITCHARD, Circuit Judge. This is a petition for a writ of mandamus to compel the judge of the District Court for the Northern District of West Virginia to comply with the terms of the decree originally entered in the case of Coffield Motor Washer Co., Complainant, v. A. D. Howe Machine Co., Defendant. That suit was originally instituted in said district for an infringement of reissued letters patent No. 12,719. The matter was submitted on pleadings and proof on the 26th day of July, 1911, and a decree was entered declaring said letters patent valid and infringed by defendant, granting an interlocutory injunction, and also directing a reference to the master for an accounting; from which decree an appeal was taken to this court, wherein the lower court was affirmed on the 9th day of July, 1912 (197 Fed. 541, 117 C. C. A. 37).

It is contended by the petitioner that:

"On the 26th day of September, 1912, there was entered in this cause an order signed by said Alston G. Dayton, Judge, entitled an 'Amendment to Order of Reference,' which, without the authority of this court, whose mandate said decree now is, materially enlarged the mandate by extending its terms to include matters which, as your petitioner is informed and believes, cannot properly be inquired into and ascertained under said mandate, and which cannot be properly considered under the rules governing accountings to ascertain profits and damages as pointed out in the brief in support of this petition, filed herewith."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is further insisted that the matters called for by the amendment to said order of reference are not matters which can properly be taken into account by the master in assessing the profits and damages to which the complainant may be entitled, and that said amendments are not germane to said decree, and that if a reference is had thereunder that petitioner will be greatly inconvenienced and will suffer irreparable injury.

Petitioner prays that a mandamus issue directed to the district judge of said court to compel him to vacate the said order entered September 26, 1913, and to direct said district judge to instruct the master to proceed with the accounting under the terms of the order of reference contained in the mandate of this court.

[1] That this court has the power by mandamus, when the occasion so requires, to compel the enforcement of its decree and mandate, is well settled. However, in such cases this power will only be exercised when it is made to appear that the court below refuses to perform a duty which is required by the mandate of this court. The writ will be only granted when it appears that the petitioner is without adequate relief.

The Supreme Court of the United States, in *Re Blake et al.*, 175 U. S. 117, 20 Sup. Ct. 42, 44 L. Ed. 94, in referring to this question among other things said:

"The writ of mandamus cannot be issued to compel a judicial tribunal to decide a matter within its discretion in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction, nor be used to perform the office of an appeal or writ of error. And it only lies, as a general rule, where there is no other adequate remedy. As respects the federal courts, it is well settled that where the mandate leaves nothing to the judgment or discretion of the court below, and that court mistakes or misconstrues the decree or judgment of this court and does not give full effect to the mandate, its action may be controlled, either upon a new appeal or writ of error if involving a sufficient amount, or by writ of mandamus to execute the mandate of this court. *City Bank of Ft. Worth v. Hunter*, 152 U. S. 512 [14 Sup. Ct. 675, 38 L. Ed. 534]; *In re Sanford Fork & Tool Co.*, 160 U. S. 247 [16 Sup. Ct. 291, 40 L. Ed. 414]; *In re Potts*, 166 U. S. 263 [17 Sup. Ct. 520, 41 L. Ed. 994]."

[2] The appeal in the case upon which this motion is founded was taken in pursuance of section 129 of the Judicial Code, which is in the following language:

"Where upon a hearing in equity in a District Court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the Circuit Court of Appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court. * * *"

We find the following reference to the foregoing section in *Walker on Patents* (3d Ed.) § 644a:

"An appeal from an interlocutory decree which grants, continues, refuses, dissolves or refuses to dissolve an injunction, may be taken to the Circuit Court of Appeals, for the circuit in which that decree was rendered, at any

time within thirty days from the entry of the decree. Such an appeal will secure a review of that part of the decree which refers to an injunction; and to that end, the Circuit Court of Appeals will decide the question of validity and infringement, and whatever other questions underlie the question of the justice of an injunction. * * *

In the case of *Kilmer Mfg. Co. v. Griswold et al.*, 67 Fed. 1017, 15 C. C. A. 161, the Circuit Court of Appeals for the Second Circuit, in referring to this question, said:

"Inasmuch as the decree of the Circuit Court is not final, the only appeal which can be considered is from so much of such decree as grants an injunction."

In the case of *Metallic Extraction Co. v. Brown*, 104 Fed. 345, 43 C. C. A. 568, the Circuit Court of Appeals for the Eighth Circuit said:

"It is urged finally in behalf of the appellant that the decree which was entered by the lower court must, in any event, be modified so as to exempt it from an accounting for damages resulting from the infringement, because the appellee did not allege in his bill or tender any evidence that he had marked his machines with the word 'Patented,' together with the day and year the patent was granted, or prove that the defendant was duly notified of the infringement, as required by section 4900 of the Revised Statutes (U. S. Comp. St. 1901, p. 3388). In support of this proposition, the appellant cites *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426; also, *Coupe v. Royer*, 155 U. S. 565, 584, 15 Sup. Ct. 199, 39 L. Ed. 263. With reference to this point, it may be said that, as this is an appeal taken under the provisions of section 7 of the Act of March 3, 1891, c. 517, 26 Stat. 828, as amended by the Act of February 18, 1895, 28 Stat. 666, c. 96 (U. S. Comp. St. 1901, p. 550), the decree below not having as yet become final, the appeal brings before this court for review only so much of the decree as awarded an injunction. Besides, we do not find that the attention of the lower court was directed to that clause of its decree which authorized an accounting as to the damages, and it may be that no damages will ever be claimed by the appellee or assessed in his favor. In view of these considerations, we do not deem it necessary at this time to wade through the great volume of testimony to ascertain if there was, in fact, sufficient evidence that notice of the infringement had been given to the appellant to warrant a recovery of damages as well as profits. This question may well be left open for future consideration when there shall have been a final decree which awards damages."

Also in the case of *Ex parte National Enameling Co.*, 201 U. S. 156, 26 Sup. Ct. 404, 50 L. Ed. 707, the Supreme Court of the United States, in referring to this subject, said:

"* * * It will be noticed that the appeal is allowed from an interlocutory order or decree granting or continuing an injunction, that it must be taken within thirty days, that it is given precedence in the appellate court, that the other proceedings in the lower court are not to be stayed, and that the lower court may require an additional bond. Obviously that which is contemplated is a review of the interlocutory order, and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered. It may be true, as alleged by petitioners, that 'it is of the utmost importance to all of the parties in said cause that there shall be the speediest possible adjudication by the United States Circuit Court of Appeals as to the validity of all the claims of the aforesaid letters patent which are the subject-matter thereof.' But it was not intended by this section to give to patent or other cases in which interlocutory decrees or orders were made any precedence. It is generally true that it is of importance to litigants that their cases be disposed of promptly, but other cases have the same right to early hearing. And the pur-

pose of Congress in this legislation was that there be an immediate review of the interlocutory proceedings and not an advancement generally over other litigation.

"Petitioners rely mainly on *Smith v. Vulcan Iron Works*, 165 U. S. 518 [17 Sup. Ct. 407, 41 L. Ed. 810]. In that case it was held that, when an appeal is taken from an interlocutory order granting or continuing an injunction, the whole of the order is taken up, and the appellate court may (if upon an examination of the record as thus presented it is satisfied that the bill is entirely destitute of equity) direct a dismissal, and is not limited to a mere reversal of the order granting or continuing the injunction. Take an ordinary patent case. If an injunction is granted by an interlocutory order, and the order is taken on appeal to the Circuit Court of Appeals, and that court is of opinion that the patent is on its face absolutely void, it would be a waste of time and an unnecessary continuance of litigation to simply enter an order setting aside the injunction and remanding the case for further proceedings. The direct and obvious way is to order a dismissal of the case, and thus end the litigation. And such is the scope of the opinion in that case. After noticing the general rule that appeals will not lie until after final decree, and that an order or decree in a patent case granting an injunction and sending the cause to a master for accounting is interlocutory only, and therefore not reviewable on appeal before the final decree in the case, it referred to the provision of section 7, and said (165 U. S. 525, 17 Sup. Ct. 410, 41 L. Ed. 810): 'The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interest, but also to save both parties from the expense of further litigation, should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it.' But nowhere in the opinion is it intimated that the plaintiff was entitled to take any cross-appeal or to obtain a final decree in the appellate court. This view of the scope of section 7 was reaffirmed in *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 494, 495 [20 Sup. Ct. 708, 44 L. Ed. 856]."

While the decree of the lower court in the suit upon which this motion is based among other things ordered a reference for an accounting, in accordance with the usual practice, those matters were not argued, and from that portion of the decree standing by itself no appeal could have been taken at that stage of the proceedings. So clearly was this understood that this court did not consider the same or undertake to pass upon any question other than the action of the lower court in holding that the patent was valid and had been infringed and as to granting the injunction.

While the decree of the lower court directs a reference, the same had not been executed at the time the case was brought here on appeal. There had been no determination of the matters involved therein, such as would arise upon the incoming of the master's report and the entry of the final decree.

Where a decree of the District Court is final and has been affirmed by this court and nothing is therefore left to the discretion of the lower court, and the district judge refuses to enforce the same or seeks to enlarge the scope of the decree so as to include matters not contained in the original decree, as alleged in this instance, we would be constrained to issue the writ. However, the decree in question is not final, nor has the same in so far as it relates to the reference for an account-

ing been considered or passed upon by this court; therefore we do not deem it expedient to grant the writ of mandamus as prayed for in this instance.

Motion for mandamus denied.

TORRANCE et al. v. THIRD NAT. BANK OF PITTSBURGH.

(Circuit Court of Appeals, Third Circuit. January 23, 1914.)

No. 1797.

PLEDGES (§ 19*)—CONTRACT—CONSTRUCTION.

Certain parties afterwards bankrupts, having executed a joint note, executed a contract pledging certain corporate stock which they owned jointly as collateral security for the payment of the note, "or any other liabilities of the undersigned to the holder now due or to become due, or that might thereafter be contracted," etc. *Held* that, since the note created a joint liability, the other liabilities for which the collateral was pledged should be construed also to be those incurred by the holders jointly, and hence the collateral was not available in settlement of the several obligations of the bankrupts, assumed by them as indorsers of the notes of other corporations.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 58-63; Dec. Dig. § 19.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by Francis J. Torrance, trustee of the estate of William H. Graham, bankrupt, and Justus Mulert, trustee of the estate of M. K. Salsbury, bankrupt, against the Third National Bank of Pittsburgh. Judgment for defendant, and plaintiffs bring error. Reversed, with directions.

Wm. E. Schoyer, Morris, Walker & Allen, and Lyon & Hunter, all of Pittsburgh, Pa., for plaintiffs in error.

C. F. C. Arensberg and Patterson, Crawford, Miller & Arensberg, all of Pittsburgh, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. On May 1, 1908, William H. Graham and M. K. Salsbury, bankrupts above named, executed their joint and several note to their own order, in the sum of \$43,000.00, and delivered the same, indorsed in blank by them, to the Bank of Pittsburgh, N. A., payable at said bank in consideration of a loan made to them at that time. The following is a copy of said note:

"\$43,000.

Pittsburgh, Pa., May 1, 1908.

"On demand, after date, for value received we jointly and severally promise to pay to the order of ourselves with interest, \$43,000 having deposited herewith as collateral security for payment of this or any other liabilities of the undersigned, to the holder hereof now due or to become due or that may hereafter be contracted, the following property, viz.:

"700 shares West Penn Rys. Pfd. Stock, 300 shares Lustre Mining & Smelting Co. Stock, sold Sept. 15, 1909, with the further right to call for additional se-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

curity, and on the failure to respond, this obligation shall be deemed to be due and payable without demand or notice, with full power and authority to the holder hereof to sell and assign and deliver the whole of the above mentioned securities, or any part thereof, or any substitute therefor or any additions thereto, or any other property at any time given unto or left in possession of the holder hereof, at any broker's board or at public or private sale, at the option of the holder hereof, on the non-performance of this promise, or the non-payment of any of the liabilities above mentioned at any of the times or time mentioned hereafter, without demand, advertisement or notice, and with the right to purchase as any other bidder at any public sale thereof held by virtue hereof. And after deducting all legal or other costs or expense for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so to be made to pay any, either, or all of above mentioned said liabilities as the holder hereof shall deem proper, returning the overplus to the undersigned.

[Signed] M. K. Salsbury.

"[Signed] Wm. H. Graham.

"Payable at the Bank of Pittsburgh, N. A."

At the same time, the makers deposited with the bank certain securities recited in the note. The note was made on a printed form prepared by the Bank of Pittsburgh. The securities so deposited were jointly owned by the makers.

On June 1, 1909, the Lustre Mining & Smelting Company made its note for \$6,950 to the order of John H. Mueller. This note was indorsed by Mueller and by Salsbury and by Graham, individually and successively, and discounted by the Bank of Pittsburgh, N. A.

On July 19, 1909, the Lustre Mining & Smelting Company made its note for \$8,100 to the order of H. D. Gamble. This note was indorsed by Gamble and afterwards by Graham and Salsbury, individually and successively, and was discounted by the Third National Bank, defendant in error, and thereafter held by it.

On August 6, 1909, the said Bank of Pittsburgh, N. A., sold and delivered the note for \$43,000, dated May 1, 1908, with the securities recited therein, to the Third National Bank of Pittsburgh, the defendant in error, and also the note discounted on June 1, 1909, by the Bank of Pittsburgh, N. A., for the sum of \$6,950.

On December 20, 1909, the defendant in error sold said collateral jointly owned by Graham and Salsbury, for the sum of \$56,000, which was applied to the payment in full of their joint note for \$43,000, of which it was the holder, leaving a surplus of \$14,098.79. This surplus was applied to the individual liability of Graham and Salsbury, respectively, on the notes of June 1, 1909, and July 19, 1909.

Petitions in bankruptcy were filed against the said Salsbury and Graham on the 24th day of December, 1909, and they were both duly adjudicated bankrupts on the 13th day of January, 1910, Francis J. Torrance being appointed trustee of the estate of William H. Graham, and Justus Mulert trustee of the estate of M. K. Salsbury.

Thereafter, the plaintiffs in error, as trustees in bankruptcy of Graham and Salsbury, brought suit in the court below against the defendant in error, claiming the said sum of \$14,098.79, being the surplus of the proceeds of the jointly owned securities deposited by Salsbury and Graham with the Bank of Pittsburgh at the time of its discount of their joint note for \$43,000.

The case having been put at issue, a stipulation was entered into between the parties for trial before the judge without a jury, and the matter so came on for hearing, and subsequently thereto the court filed its opinion, setting forth its findings of fact and conclusions of law and ordering judgment to be entered for the defendant. Judgment was accordingly entered on the 28th day of July, 1913, against the plaintiff and for the defendants, and from this judgment plaintiffs have sued out and are now prosecuting this writ of error.

There are no disputed facts in the case, and the findings thereof by the court are substantially as above recited.

The single question presented is as to the proper interpretation of the collateral pledge of securities jointly owned by the makers of the note. We quote again the language of this pledge:

"Having deposited herewith as collateral security for the payment of this or any other liability, or liabilities, of the undersigned to the holder hereof, now due or to become due, or that may be hereafter contracted."

We observe, first, that the note created a *joint* liability. The fact that the liability was also stated to be several as well as joint, bears only upon the rights and remedies of the payee or holder, who may pursue the makers jointly or separately. The liability, however, of the makers *inter sese* is joint, and if the payee or holder receives or recovers from one of the makers the whole sum due upon the note, the one from whom it is thus received or recovered may, in turn, recover from the other joint maker his proportionate share of the indebtedness. It is well to keep in view this familiar legal status of the parties to the obligation created by the note, because of the insistence by defendant in error that the joint and several obligation of the note serves to extend the scope of the pledge of the jointly owned securities as collateral to the individual liabilities of the makers, as indorsers of the notes referred to. It seems to us that the words, "of this or any other liabilities of the undersigned," clearly indicate that the other liabilities referred to are of the same character as the joint liability in the \$43,000 note. Moreover, the natural inference, from the words "liabilities of the undersigned," would be that the jointly owned securities were pledged only for the joint liability of the two makers. So that the clause is as if written, "any other liability or liabilities of Graham and Salisbury." Any other meaning than this is a strained, secondary, or argumentative meaning. Such a meaning cannot be imposed upon the terms of a pledge, which must be construed with a certain measure of strictness. It was for the bank that framed this pledge of jointly owned collateral, to have made the meaning now insisted upon by it clear, by inserting the words "or either of them" after the words "the undersigned," making the clause read:

"Any other liability or liabilities of the undersigned or either of them."

If, as we have said, the words "jointly and severally" in the body of the note have relation only to the remedy of the payee or holder, and do not touch the relation of the makers *inter sese*, the difference between the liability thus created and the individual and several liability of successive indorsers of a promissory note must be at once apparent.

The indorser who pays the amount due on the note is not liquidating a joint liability. He may, it is true, have recourse to a prior indorser for the whole, not a proportionate, amount that he had paid and may recover on the individual contract implied in the indorsement, but the liability of each indorser, individual and several, is in its essential character very different from the liability of the makers of a joint and several note. We think, therefore, that nothing can be predicated upon the word "severally" in the body of the note, that would indicate that the individual liability of Graham and Salsbury, as indorsers of the Lustre Mining & Smelting Company notes, was covered by the jointly owned securities pledged for the protection of their joint note of \$43,000.

The case of *Mulert, Trustee of Salsbury, v. National Bank of Tarentum*, 210 Fed. 857, 127 C. C. A. 419, recently decided by this court and referred to by the learned judge of the court below, concerned the individual note of M. K. Salsbury, to which was attached a like memorandum of securities deposited as collateral for the payment of that note or "any other liabilities of the undersigned to the *holder* hereof." The bank, to whom the note was given and by whom the loan was made, transferred it to another bank, which, as holder, applied the securities, not only to the note thus transferred, but to other liabilities of the maker of the note to the holding bank. The case turned on the meaning and scope of the word "holder," and the court held that the defendant bank came within that distinction—a very different question from the one presented by the case before us.

Defendant in error called attention to the fact that when personal notice was given to both Salsbury and Graham by the bank that it was about to sell the specific securities deposited as collateral to the \$43,000 note, that Salsbury wrote in reply a letter, in which it is alleged that he conceded the right of the bank to sell the collateral pledged with the joint note of himself and Graham, and apply the proceeds to the liquidation of his (Salsbury's) individual liabilities. If this were so, it would not justify the bank in selling those jointly owned securities without the assent of both joint owners. But a reference to Salsbury's letter shows that it is by no means clear that any such authority was attempted to be given in regard to the application of the proceeds of the jointly owned securities.

The judgment below is therefore reversed, with directions to the court below to enter judgment for the plaintiff, unless cause be shown to the contrary.

GUARANTY TRUST CO. OF NEW YORK v. HANNAY et al.

(Circuit Court of Appeals, Second Circuit. December 9, 1913.)

No. 62.

1. CARRIERS (§ 46*)—BILLS OF LADING—RIGHTS OF TRANSFEREES—WHAT LAW GOVERNS.

Where a contract for the purchase and sale of cotton to be shipped from the United States to Liverpool was made in England, and expressly provided that bills of exchange for shipments should be drawn on a Liverpool bank, and such a bill, with bill of lading attached, was presented for acceptance to such bank and accepted and paid in England, the rights of the parties on the subsequent discovery that the purported bill of lading was a forgery are governed by the law of England.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 220; Dec. Dig. § 46.*]

2. EVIDENCE (§§ 517, 541*)—SUBJECTS OF EXPERT TESTIMONY—UNWRITTEN LAW OF FOREIGN COUNTRY—QUALIFICATION OF EXPERTS.

The unwritten law of a foreign country must be proved by the parol testimony of experts, and lawyers who are practicing in such country are competent as experts to prove it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2327, 2354; Dec. Dig. §§ 517, 541.*]

3. CARRIERS (§ 58*)—BILLS OF LADING—RECOVERY OF PAYMENT.

A bill of exchange, with a bill of lading attached, drawn by a firm of American cotton dealers on a Liverpool bank in accordance with a contract for the sale and shipment of cotton to plaintiffs in Liverpool, was purchased by defendant bank, presented to and accepted and paid by the Liverpool bank under authority from plaintiffs. Later it was discovered that the bill of lading was forged, and that no cotton had been shipped. *Held*, that under the law merchant of England as established by expert testimony, the instrument and its acceptance were unconditional; that there was no implied warranty of the genuineness of the bill of lading by defendant, and that it could not be required to repay the money received.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58.*]

In Error to the District Court of the United States for the Southern District of New York.

Action at law by Anthony S. Hannay and others against the Guaranty Trust Company of New York. Judgment for plaintiffs, and defendant brings error. Reversed.

See, also, 187 Fed. 686.

This case comes up on writ of error to review a judgment rendered in the District Court for the Southern District of New York. The defendants in error were the plaintiffs below, and the plaintiff in error was the defendant below, and will be hereinafter so called. The plaintiffs are British subjects, and are engaged in business in Liverpool, England. The defendant is engaged in banking in the city of New York, and in the year 1912 handled foreign bills of exchange amounting to \$236,000,000. Knight, Yancey & Co., at the time a mercantile firm of Alabama engaged in the business of buying and selling cotton, entered into an agreement with the plaintiff on February 1, 1910, to sell them 1,000 bales of cotton. In accordance with this agreement

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

they drew a bill of exchange on the Bank of Liverpool—admitted to be the plaintiffs' agent, which bill was in the following form:

[15 shillings foreign bill stamp cancelled]

Knight, Yancey & Co.

Cotton

Decatur, Ala. U. S. A.

Sale date

2/1

Grade

F M T

27 Apr. 1910

Decatur, Ala. U. S. A.

Exchange for

\$1464 9 0

February 10, 1910.

Sixty days after sight of this first of exchange (second unpaid) pay to the order of
 . . . ourselves. . . . fourteen hundred and sixty-four pounds and nine shillings.
 100

Value received and charge the same to account of

R S M I

bales of cotton.

To Bank of Liverpool, Ltd., (Pay London),

Liverpool, England, SB.

2938

Knight, Yancey & Co.

No. 6338

2190

3051

54230

This bill was for 100 of the 1,000 bales of cotton which plaintiff had sold, and there was attached to the bill an instrument purporting to be a bill of lading of the 100 bales of cotton, and to be signed by the agent of the Louisville & Nashville Railroad Company of 100 bales of cotton marked R S M I for shipment to Liverpool, England. This bill was, in due course of business, purchased by the defendant, and with the bill of lading attached was sent by it to the Bank of Liverpool for acceptance and payment. On its receipt the bank notified the plaintiffs, and asked that they call and inspect the documents and advise it concerning acceptance. After inspection by their representatives the plaintiffs authorized the acceptance of the bill, and it was accepted and in due time paid to the defendant.

The acceptance was in form as follows:

Accepted 23 Feb. 1910

Due 27 Apr. 1910

Payable at

Messrs. Glyn, Mills, Currie & Co.

London.

For the Bank of Liverpool Limited.

Jno. J. Ritchie, Asst. Genl. Manager

Robt. Richardson, Manager.

It subsequently became known that the instrument purporting to be a bill of lading was a forgery. But the spurious character of the document was not known to the defendant when it presented the bill, nor was it known to the plaintiffs when they accepted it, although at the time it was paid rumors that possibly it might be a forgery had been brought to the attention of the plaintiffs and of the Bank of Liverpool.

The action is brought to recover money paid under a mutual mistake of fact.

Stetson, Jennings & Russell, of New York City (William D. Guthrie and Charles Howland Russell, both of New York City, of counsel), for plaintiff in error.

Harrington, Bigham & Englar, of New York City (Howard S. Harrington, of New York City, of counsel), for defendants in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question presented to this court involves the right of the drawee of a bill of exchange to recover from an innocent payee the money paid

if it subsequently turns out that the bill of lading attached to the bill at the time of its acceptance was forged.

[1] The original transaction took place at Liverpool, England. It was there the contract for the sale and purchase of the cotton was made. The contract expressly provided that a bill of exchange should be drawn on the Bank of Liverpool. All the transactions relating to its presentation for acceptance, its acceptance and payment, took place in England. It was there that what are alleged to be the false representations and warranty were made and acted upon which are relied upon as the basis of this action. The defendant has an office and carries on a large part of its business in England, and the action against it might have been brought in that country had the plaintiffs been so disposed. As all the transactions took place in England, there is no doubt but that the law of England, as the place where the contract of acceptance was made and was to be performed, must govern and determine the rights and liabilities of the respective parties. *Boyce v. Edwards*, 4 Pet. 111, 123, 7 L. Ed. 799; *Andrews v. Pond*, 13 Pet. 65, 77, 78, 10 L. Ed. 61; *Tilden v. Blair*, 21 Wall. 241, 247, 22 L. Ed. 632; *Scudder v. Union Bank*, 91 U. S. 406, 412, 23 L. Ed. 245; *Pierce v. Indseth*, 106 U. S. 546, 550, 1 Sup. Ct. 418, 27 L. Ed. 254; *Hall v. Cordell*, 142 U. S. 116, 120, 12 Sup. Ct. 154, 35 L. Ed. 956. The English courts act upon the same principle in like cases. *Rouquette v. Overmann*, L. R., 102 V. 525; s. c., 4 English Ruling Cases, 287.

The trial judge felt bound by the decision on demurrer (*Hannay v. Guaranty Trust Co.* [C. C.] 187 Fed. 686) to direct a verdict for the plaintiffs. But the facts as developed at the trial were essentially different, and the case was materially changed. The law of England was not before the court on the hearing of the demurrer because not pleaded, and no proof of that law had been presented. The complaint under which the trial took place was an amended complaint, and not the one which was before the court on demurrer and the material difference in the state of the pleadings differentiated the case at trial from the case upon demurrer.

Courts do not take judicial notice either of the written or unwritten law of a foreign country. But the defendant in its answer to the amended complaint pleaded the English Bills of Exchange Act of 1882, and averred that there was and still is a uniform general and well-known custom or usage among bankers and cotton dealers in the United States and in England, to the effect that when bills of exchange are drawn against cotton goods sold for shipment to foreign ports, and words are inserted in said bills similar to those in the bill in question ("Charge the same to account of $\frac{100}{RSMI}$ bales of cotton"), such words do not change the unconditional character of the order to pay. It also averred that this usage is a part of the law merchant both of the United States and of England.

[2] The Supreme Court of the United States in *Ennis v. Smith*, 14 How. 400, 425 (14 L. Ed. 472), said:

"The written foreign law may be proved, by a copy of the law properly authenticated. The unwritten must be by the parol testimony of experts."

And lawyers who are practicing in the foreign jurisdiction are competent as experts to prove it. *Slater v. Mexican National Railroad Co.*, 194 U. S. 120, 130, 24 Sup. Ct. 581, 48 L. Ed. 900; *Pierce v. Inseth*, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254; *The Asiatic Prince*, 108 Fed. 287, 47 C. C. A. 325; *In re International Mahogany Co.*, 147 Fed. 147, 148, 78 C. C. A. 58; *Mowry v. Chase*, 100 Mass. 79; *Walker v. Forbes*, 31 Ala. 9; *Title Guaranty, etc., Co. v. Trenton Potteries Co.*, 56 N. J. Eq. 441, 38 Atl. 422; *Dyer v. Smith*, 12 Conn. 384; *Wigmore on Evidence*, § 564; 16 Cyc. 886.

[3] The defendant established the law of England on the subject involved in this case by the testimony of an English barrister of 40 years' standing and experience, who was also a K. C. since 1902, and appears to have been exceptionally well qualified to testify as an expert concerning the true meaning and effect of the English Bills of Exchange Act and on the law of England. He was the only lawyer who as legal expert testified as to the law of England. No testimony was introduced which contradicted or qualified his positive testimony. In *The Asiatic Prince*, 108 Fed. 287, 289, 47 C. C. A. 325, 328, this court said:

"The law of a foreign country and its commercial usages are proved here by calling its lawyers and merchants and interrogating them. That has been done in this case, with a result which certainly warrants the conclusion that the proof is overwhelmingly the one way."

The same statement can be made in the present case. The proof in this case also "is overwhelmingly the one way." The plaintiffs have failed to contradict the defendant's expert as to what the law of England is, and they have made no application to take further proofs. The testimony establishes that the instrument in suit is an unconditional bill of exchange under the law of England; that its acceptance by the Bank of Liverpool was absolutely unconditional; that the presenter of a bill of exchange to the drawee for acceptance does not, under the law of England, impliedly warrant the genuineness of an accompanying document or attached bill of lading; that the duty to investigate and determine to the satisfaction of the party ultimately liable the genuineness of documents accompanying the bill of exchange (in this case the bill of lading) rests upon the person who authorizes the acceptance, in the case before us the plaintiffs herein; that under the law of England the Bank of Liverpool could not recover the amount paid by it in a suit against the payee, or in a suit against the original presenter, on the theory of money paid under a mistake of fact, or upon any other theory known to the law of England. The expert supported his testimony by references to the cases decided in the English courts, and among them was the famous case of *Price v. Neal*, 3 Burr. 1354, decided in 1762, and which he stated was in principle the law of England to-day, and the case of *Leather v. Simpson*, 40 L. J. Ch. 177, s. c., L. R. 11, Eq. 398, which he declared had been the law of England for 40 years. In *Price v. Neal*, supra, it was decided that when one accepted and paid a forged bill of exchange, upon discovering the forgery he could not recover the money from the innocent indorsee to whom he had paid it. The court held it was incumbent

upon the acceptor to be satisfied that the bill drawn on him "was the drawer's hand" before he accepted, and that it was not incumbent on the indorsee to make the inquiry. If there was any negligence it was in the acceptor, not in the payee, and "there is no reason to throw off the loss from one innocent man upon another innocent man." In *Leather v. Simpson*, supra, an attempt was made by the acceptor who had paid the money on the bill of exchange to recover back the money so paid on discovering that the accompanying bill of lading was a forgery. The bill was dismissed on the ground that the plaintiff had no equity to recover back the money.

One cannot destroy the effect of the uncontradicted testimony of a qualified expert in foreign law by the mere criticism of that testimony by counsel or by references to foreign statutes and foreign decisions. Foreign law cannot be proved by the citation of statutes and decisions made by counsel. If that can be done, then the statement that courts cannot take judicial notice of the foreign law is without meaning or significance. But in this case it was expressly stipulated between the parties that:

"Any printed decision of any court in England material to the issues herein may be received in evidence at the trial upon reference to the title of the cause in which such decision was made and to the volume of reports in which it is reported, without further authentication, and without calling any expert to testify as to the law of England."

Still, no decision was introduced in evidence under this agreement which has convinced us that the testimony of the English barrister was mistaken as to the law of that country on the question involved in this case.

Counsel laid emphasis upon the character of the action, and that the plaintiffs are simply seeking to recover back money paid under a mutual mistake. But they have introduced no evidence to show that under English law A. can recover back from B. money which has been paid under a mutual mistake, where the mistake made related to a fact which, as between A. and B., the law made it the duty of A. to know.

The judgment is reversed, and a new trial ordered.

SANDOVAL et al. v. PRIEST et al.

(Circuit Court of Appeals, Fifth Circuit. January 20, 1914.)

No. 2,439.

1. EVIDENCE (§ 29*)—JUDICIAL NOTICE—FOREIGN LAWS—LAWS OF PRECEDENT GOVERNMENT.

The United States courts in Texas take judicial notice of the laws of Mexico in force in that territory prior to its independence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 36, 37, 39, 43-46, 48; Dec. Dig. § 29.*]

Judicial notice of public laws and regulations, see note to *Smith v. City of Shakopee*, 44 C. C. A. 4.]

2. HUSBAND AND WIFE (§ 247*)—COMMUNITY PROPERTY—DESCENT UNDER SPANISH LAW IN FORCE IN TEXAS.

Under the Spanish law in force in Texas while it was a part of Mexico, there generally existed between husband and wife a community of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

acquêts and gains, and where such community existed all property acquired by either spouse by onerous title, as by purchase, during the existence of the marriage, became community property, and on the dissolution of the marriage by the death of one of the spouses an estate in and to one-half of such property at once vested by operation of law in the heirs of the deceased spouse and the estate so descending in realty was a legal title.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 879, 886; Dec. Dig. § 247.*]

3. HUSBAND AND WIFE (§ 247*)—COMMUNITY PROPERTY—DESCENT.

A husband purchased land in Texas in 1809 which under the law of Mexico then in force became community property, and so remained until his wife's death in 1832. *Held*, that on the dissolution of the community by such death the children of the wife as her heirs took full legal title to one-half of the land, which was not divested by any subsequent change in the laws of the state.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 879, 886; Dec. Dig. § 247.*]

In Error to the District Court of the United States for the Western District of Texas; Thos. S. Maxey, Judge.

Action at law by Alberto Sandoval and others against Theo Priest and others. Judgment for defendants, and plaintiffs bring error. Reversed.

The plaintiffs in error on this cause brought suit in trespass to try title to recover the title and possession of a tract of land containing about 82 acres alleged to be of the reasonable cash market value of \$300 per acre, situated in Bexar county, Tex.

The defendants in error pleaded, as against plaintiffs in error, not guilty, and the statutes of limitations of three, five, and ten years.

The plaintiffs in error claimed title by descent from their father, Carlos Sandoval, who was a grandson of Maria de Jesus Carbajal, who was the first wife of Mariano Rodriguez, who purchased the entire Gavino Valdez grant including the land in controversy in Bexar county, Tex., which was granted by the Spanish government to Gavino Valdez, the parish priest of the village of San Fernando, now the city of San Antonio, in 1798. Mariano Rodriguez married his first wife, Maria de Jesus Carbajal, in the year 1800. On September 15, 1809, Mariano Rodriguez purchased the entire Valdez grant from the original grantee, and conveyance duly made. The said first wife of Mariano Rodriguez died in 1832, and plaintiffs in error are Adelaida Lopez de Sandoval, the wife of her grandson, and Alberto Sandoval and Felix Sandoval, her great-grandchildren.

On the trial in the lower court, after plaintiffs in error had introduced their evidence in chief, the trial court announced that if plaintiffs in error had any title it was an equitable title and that it was not necessary for them to proceed further unless they expected to prove that the legal title had been conveyed to them or to some one under whom they claim, or had in some manner become vested in them; and upon the plaintiffs in error announcing that, unless the testimony they had introduced showed that they had a legal title, then they had no legal title, since Mariano Rodriguez at his death left a will, which was duly probated, by the terms of which he bequeathed and devised all of his property, whether real or personal, to three of his children by his second wife, the court announced that it would give to the jury a peremptory instruction to render a verdict in favor of all of the defendants against all the plaintiffs, without requiring the defendants in the lower court to introduce any testimony whatever. And the court gave a peremptory instruction to the jury to return a verdict in favor of all the defendants against all the plaintiffs, which verdict was returned by the jury under said peremptory instruction; and the court then rendered judgment that plaintiffs in error take

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep r Indexes

nothing by their suit against defendants in error, and that defendants in error go without day and recover of plaintiffs in error all their costs, to which judgment the plaintiffs in error in open court then and there excepted.

Don A. Bliss, of San Antonio, Tex., for plaintiffs in error.

Marcus W. Davis, Wm. Aubrey, and J. D. Guinn, all of San Antonio, Tex., for defendants in error.

Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). What estate did the heirs of Maria de Jesus Carbajal, wife of Mariano Rodriguez, take to the property in controversy upon her death in 1832; the parties and property then being in Mexico?

Bearing upon this question, the following propositions appear to be sound:

[1] First. The United States courts sitting in Texas take judicial notice of the laws in force in that territory prior to the independence thereof, since said laws were the laws of an antecedent government to which the government of Texas is the successor. See *Fremont v. United States*, 17 How. 542, 15 L. Ed. 241; *United States v. Perot*, 98 U. S. 428, 25 L. Ed. 251.

[2] Second. Under the Spanish law in force in Texas under the government of Mexico prior to the independence of Texas, there generally existed between husband and wife a community of acquêts and gains, and where such community existed all property acquired by either spouse by onerous title as by purchase during the existence of the marriage became and was community property. *Scott v. Maynard*, Dallam, Dig. 548; *Parker v. Chance*, 11 Tex. 513; *Savenat v. Le Breton*, 1 La. 520.

Third. In Texas prior to independence, upon the dissolution of the marriage by the death of one of the spouses, an estate in and to one-half of the community property at once vested by operation of law in the heirs of the deceased spouse. *White's Recop.* 61; *Schmidt's Civ. Law of Sp. & Mex.* arts. 56, 57; *Thompson v. Cragg*, 24 Tex. 582; *Panaud v. Jones*, 1 Cal. 488; *Veramendi v. Hutchins*, 48 Tex. 531, 550; *Walker v. Kimbrough*, 23 La. Ann. 637. For an interesting case on the line of the proposition involved, see *Garrozi v. Dastas*, 204 U. S. 64, 27 Sup. Ct. 224, 51 L. Ed. 369.

Fourth. The Valdez grant, embracing the land in controversy in this suit, having been purchased by Mariano Rodriguez from the original grantee, Gavino Valdez, in the year 1809 during the existence of the marriage relation between him and his wife, Maria de Jesus Carbajal, became and was community property, and, the same so continuing up to her death in 1832, the title of the said grant, including the land in controversy in this case, at once vested at her death by operation of law in her heirs (her children, *Schmidt's Civ. Law of Sp. & Mex.* arts. 1212, 1213), under whom plaintiffs in error claim.

An estate vesting by operation of law upon an event certain is a legal estate. After death of husband and dower assigned, the dower estate is a legal estate. After the death of the wife and curtesy

consummate, the surviving husband has a legal estate. See authorities quoted under proper heads in "Words and Phrases."

So we think it clear that by descent cast in 1832 the heirs of Maria de Jesus Carbajal took a legal estate in and to one-half of the Galvez grant including the property in controversy. Their right or title to this estate is in and of and from the law, and it is therefore a full legal title as the term is used and has meaning in our jurisprudence.

[3] Has anything happened since the independence of Texas to divest that legal title or change its character so as to deprive the holders of the right to assert the same on the law side of the United States court having jurisdiction of the parties and the property?

Without substantially disputing any of the propositions hereinbefore stated and agreeing to the same, the defendants in error contend, and therein are supposed to voice the opinion of the trial judge, that under the laws of Texas in relation to the community of property between husband and wife and the rulings of the Texas courts the interest or estate of the wife and her heirs in and to the community property is more than a mere expectancy amounting to a substantial right existing before the dissolution of the community, and therein and therefor and growing out of the administration and control of the community by the husband the wife's title to community property is entirely equitable and never becomes a legal title, and that this has become in Texas a rule of property which this court is bound to follow, and many adjudged cases of the Texas courts supporting these propositions are cited. The leading case is said to be *Edwards v. Brown*, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87, decided in 1887, following *Hill v. Moore*, 62 Tex. 610, decided in 1884. *Edwards v. Brown* seems to have been followed down to *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909, and *Stiles v. Japhet*, 84 Tex. 91, 19 S. W. 450, and perhaps later; but it is noticeable that *Wiess v. Goodhue*, 98 Tex. 274, 83 S. W. 178, seems to declare different doctrines and to have gone back to the views in early cases, and as declared by Judge Bell in *Thompson v. Cragg*, 24 Tex. 582; and see *Vera-mendi v. Hutchins*, 48 Tex. 531. In *Belt v. Cetti*, 100 Tex. 92, 95, 93 S. W. 1000, it is distinctly held that:

"Upon the death of Mrs. Roche one-half of the community property of herself and Thomas Roche vested in her children subject to the payment of debts against the community estate"—citing articles 1696, 1697, Rev. Stat. Texas, and quoting with approval *Wiess v. Goodhue*, *supra*.

The matter has been learnedly and exhaustively argued and considered in briefs submitted by counsel for both parties, citing probably all of the Texas cases, from *Dallam* down, bearing on the propositions involved, and it would be interesting to review all the decisions, each in the light of the facts and issues involved, with a view to having, if possible, the jurisprudence as declared by the Texas courts, and determine what rule of property has been established as to the wife's interest in the community property under the laws of Texas both before and after the dissolution of the community by the death of one of the spouses; but, under the view we take of this case, such review is not necessary, as we find no case at all affecting

the title cast under Spanish (Mexican) law, and for this case we say that before Texas became independent and while under the Spanish law the community of acquêts and gains existing between Mariano Rodriguez and Maria de Jesus Carbajal was dissolved by the death of said Maria, and thereupon her heirs took under the law a full legal title to her half of the community property, and since then no rule of property established in Texas by statute or judicial decision could divest said heirs of such legal title.

The judgment of the District Court is reversed, and the cause is remanded, with instructions to grant a new trial and thereafter proceed according to law and the views herein expressed.

CITY OF CAMDEN v. ARMSTRONG CORK CO.

(Circuit Court of Appeals, Third Circuit. December 31, 1913.)

No. 1728 Oct. Term, 1913.

1. DEDICATION (§ 45*)—INTENT TO DEDICATE—QUESTIONS FOR JURY.

Dedication is a question of intent, and if such intention is unequivocally manifested by the dedicatory instrument, the court so holds, but if it is ambiguous, dedication is an inference to be drawn by a jury from all the facts and circumstances of the case.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 88; Dec. Dig. § 45.*]

2. APPEAL AND ERROR (§ 866*)—SCOPE OF REVIEW—EFFECT OF BOTH PARTIES ASKING DIRECTED VERDICT.

Where both parties ask for a directed verdict, and the facts are thus submitted to the court, an appellate court is limited in reviewing its action to a consideration of the correctness of the findings on the law, and must affirm if there be any evidence in support thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467-3475; Dec. Dig. § 866.*]

3. DEDICATION (§ 44*)—EVIDENCE OF DEDICATION—MAPS.

Maps, by which the owners platted lands into blocks and streets and subsequent deeds, considered, and *held* not to have effected a dedication as an extension of a street of land then submerged and lying between high and low water mark, the title to which was in the state, but to which the maker of the map had the right to, and subsequently did, acquire title, under a law of the state, by filling the same; no extension of the street over such land being shown on the maps.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87; Dec. Dig. § 44.*]

4. APPEAL AND ERROR (§ 756*)—BRIEFS.

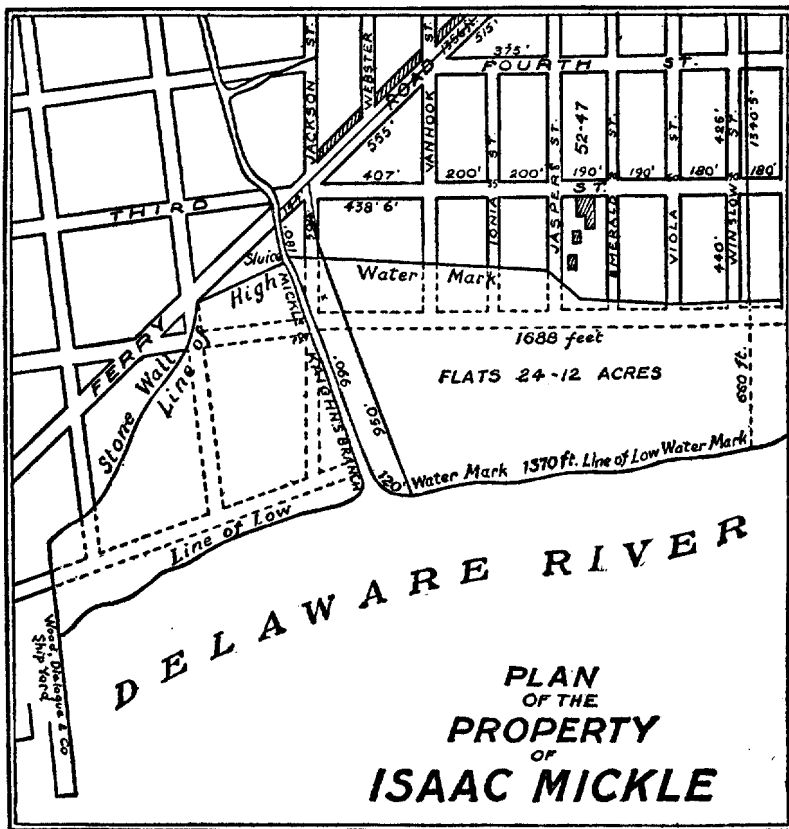
Under the practice in Pennsylvania the brief must contain a concise abstract presenting the questions involved in the order in which they are raised.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3091; Dec. Dig. § 756.*]

In Error to the Circuit Court of the United States for the District of New Jersey.

Action at law by the City of Camden against the Armstrong Cork Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The following is the Mickle map referred to in the opinion:



E. G. C. Bleakly, of Camden, N. J., for plaintiff in error.

Grey & Archer, of Camden, N. J., and Gordon & Smith, of Pittsburgh, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, the city of Camden, N. J., brought an action of ejectment against the Armstrong Cork Company, a corporation of Pennsylvania. The suit concerns a strip of land in Camden 820 feet in length and 33 in breadth, which the city alleges was dedicated by the owners thereof to public use as an extension of Winslow street. The locus in quo was originally submerged bottom land, lying between high and low water marks on the Delaware river. It was subsequently filled by the abutting upland own-

ers, and thereafter by sundry mesne conveyances vested in defendant. No street has ever been opened over the ground, and it has been used by defendant as part of its inclosed factory premises, some buildings in fact being located thereon.

[1] Under the proofs the case turned on the issue of dedication, and dedication, as is well settled (*Irwin v. Dixon*, 9 How. [50 U. S.] 30, 13 L. Ed. 25), is a question of intent. If such intention is unequivocally manifested by the dedicatory instrument, the court so holds: *Elliott on Streets* (3d Ed.) vol. 1, § 131; but if it is ambiguous, dedication is an inference to be drawn by a jury from all the facts and circumstances of the case: *Atlantic City v. Groff*, 68 N. J. Law, 670, 54 Atl. 800; *Wood v. Hurd*, 34 N. J. Law, 87.

[2] In this case the proofs consisted of maps, deeds, and oral testimony, and at the close of the case both sides asked for binding instructions. Thereupon the court directed a verdict for defendant. On entry of judgment this writ was sued out. The only two errors now urged are the refusal of plaintiff's, and the grant of defendant's, requests for directions. Both parties having asked for binding instructions, and the facts having been thus submitted to the court, we are limited in reviewing its action to the consideration of the correctness of the findings on the law, and must affirm, if there be any evidence in support thereof. *Beuttell v. Magone*, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654.

[3] As the case turns on the question of an intent to dedicate, it follows that if these proofs disclose evidence from which the intention not to dedicate—which the court found—could be inferred, its judgment will not be disturbed. In other words, both parties having united in calling on the court to decide the whole case, its judgment should stand, if there was substantial evidence on which to rest.

[4] Pursuant to our rule requiring "a concise abstract, or statement of the case, presenting succinctly the questions involved," the plaintiff thus summarizes the question before us:

"Although the defendant may claim to have a good paper or record title to the land in dispute, it is contended by the plaintiff that the defendant acquired title to said lands subject to the easement of the public in Winslow street as a highway by reason of certain dedications. These alleged dedications are based mainly on the construction of three different maps, known, respectively, as the Mickle map, Exhibit P 15, the Manufacturers' Land & Improvement Company map, known as the Bourquin plan, Exhibit P 14, and Camden's Official Map, Exhibit P 16."

Turning first to the Mickle map, the pertinent part of the littoral portion of which is here reproduced, we note that Isaac Mickle, when he made this map in 1872, owned the tract of land abutting the Delaware river, which he laid out in lots and streets plotted thereon. Fronting said upland, and lying between high and low water marks, was a flat or meadow containing some 24 acres. In view of the New Jersey decisions (*Gough v. Bell*, 22 N. J. Law, 441, *Stevens v. Patterson*, 34 N. J. Law, 532, 3 Am. Rep. 269, and the New Jersey Act of March 31, 1869, § 8, P. L. 1022), the court below rightly said:

"It is true that at that time Mickle did not own the land under high water; it belonged to the state of New Jersey. However, the riparian owner,

that is, the owner of the upland bounded on high water, had the right to fill in the land submerged by the tides, by complying with the state statutes and regulations, and exclude the water from overflowing the land thus made. So that while Mickle did not actually own the land which was being submerged, he stood in a different relation to the upland from a mere stranger."

Such being the relation of the upland and the submerged meadow, and Mickle as upland owner being the possible future owner of the latter, he made the map in question. It treats the upland and submerged meadow as a whole. Its plotting unmistakably shows an intent on Mickle's part, not only to lay out lots and dedicate streets on the upland, but evidences as well his purpose to fill the submerged frontage and to lay out such a connected system of streets through his submerged land as to connect with his upland streets. Moreover, it will be noted he treated the different parts of the submerged abutting land in dissimilar ways. To illustrate: A creek or estuary divided the submerged land into two parts. North of the creek block lots were plotted on the submerged land, and the upland streets were run clear across such submerged land, so as to reach a plotted cross street which ran along the low-water line. But south of the creek no cross street was laid out on the submerged land at or near the low-water line, but only through the main body of the submerged tract. To this cross street and no further, were the upland cross streets, including Winslow, carried down. It is suggested that the making of Winslow street across the submerged land by dotted line evidences only a possible, but not an actually, run or dedicated street. It is true that in surveys dotting is often used where a line has not been actually run. Newman v. Foster, 3 How. (Miss.) 383, 34 Am. Dec. 98, but this map, as well as the two others here in question, use dotting to indicate lines on submerged ground. Moreover, that some dotted lines on this meadow were actually run is shown by the recorded measurements of three of its sides.

In further contrast it will be noted that south of the creek the whole meadow in front of the cross street at which Winslow, Viola, Emerald, Jasper, Ionia, and Van Hook streets ended was plotted in a solid tract of ascertained acreage, thus evidencing Mickle's purpose not to give Winslow street a water outlet, but that when the flat was reclaimed Winslow street was to stop at the intersecting cross street. It is, however, contended that as Winslow street was plotted to reach the then high-water line, that fact alone should be considered, and from it a dedication to high-water mark be inferred and decreed. But such reasoning is to our mind unsound in logic, unjust in principle, and at variance with rules of construction. The whole map, the ownership of the upland, its incident of reclamation and possible ownership of the abutting submerged land, the utilization of such filled land for wharves, manufacturing, and other private uses in a large city, were factors in the mind of a riparian owner making a plot that cannot justly be ignored in ascertaining the purpose sought to be expressed by his map. Indeed, to hold that this map dedicates Winslow street to high-water mark sets at naught an intention to the contrary, as clearly expressed in this map by lines and limits as Isaac Mickle could have expressed it in words. That even the actual opening of a road to the water front

is not conclusive evidence of dedication is pointed out in *Palen v. Ocean City*, 64 N. J. Law, 669, 46 Atl. 774. There a road was opened to an existing wharf, and it was contended that when the site of the wharf and submerged abutting land was reclaimed, the road followed through the reclaimed land to the advanced high-water front, in accordance with the rule that streets leading to the high-water line of navigable streams will be continued over reclaimed land. But it was held in that case that this rule had no application, and the real question was whether the wharf where this road ended had been dedicated to public use. If the interposition of a nondedicated wharf at the end of a road prevents a dedication of such road beyond such wharf when its site is reclaimed, it would, by analogy, seem equally clear that when Mickle clearly expressed his intent that Winslow street should only extend a limited distance through the reclaimed frontage, such lawful purpose should be respected. It is clear, therefore, that the court committed no error in inferring from the map a purpose on Mickle's part not to dedicate Winslow street to high water mark.

We next consider the map of the Manufacturers' Land & Improvement Company, by which in 1874-1875 that company plotted in lots its Brown tract, which adjoined the Mickle tract on the south. The northeast end of its Brown tract overlapped the southwest corner of the Mickle map. This plot, evidently with the object of co-ordinating the street systems of the two tracts, extended the Mickle streets through the Brown tract. In this way the streets and blocks, but not the lots of the Mickle property, were shown on the Manufacturers' map. By this map it is alleged Winslow street was shown as opened to high water; and, as the Manufacturers' Land & Improvement Company subsequently purchased the Mickle property and reclaimed and filled the land in front of Winslow street, it is contended its map was a dedication of such street to the water front of the filled land. But it should be observed that the land company's map does not in fact evidence the alleged intent to open Winslow street to high water. While its draftsman, who evidently intended to follow the Mickle map in ending Winslow street at the cross streets on the submerged land, has protracted the side lines of that street somewhat beyond the river side of the cross street, it is evident that it was a mere inaccuracy, since no shore line or high-water mark is shown to connect with such extended lines. But passing this and turning to the all-controlling facts it will be observed that when its map was made the Manufacturers' Land & Improvement Company was not the owner of the Mickle upland or of its submerged frontage, and that Winslow street as plotted on said map did not abut the Brown tract, but lay wholly within the Mickle tract. But apart from the land company's inability to dedicate the property of another to a public use, it seems to us the map clearly shows that the inclusion of Mickle land, and indeed of the property of other abutters on the south and east of the land company's property, was solely for the purpose of co-ordinating it with the intersecting streets in that portion of the city. In that respect the court below well said:

"The showing of the streets and the blocks formed by them on the tract to the north of the Brown lands can hardly be said to have been any more at that date than a showing of the lay of the land to the north of the land company's property; and that the streets of the company's land running north and south connected directly with other streets on the adjoining land. An examination of the plotting of the lands not then owned by the company discloses a notable difference at the water front; while the map of the company's land shows high-water mark, no such high-water mark is shown, or attempted to be shown, on the maps of the land to the north thereof. The streets running toward the river are left with open and irregular ends, indicating rather the directions of such streets than their exact ending."

We are therefore of opinion that this map of the land company in no way affected Mickle's land, and the subsequent purchase thereof by such company, in and of itself, gave the map no other effect than it had when made. And this conclusion is in accord with the recent case of *Camden v. McAndrews*, 88 Atl. 1034, not officially reported, lately decided by the Court of Errors and Appeals, where in discussing the relation of this map to Winslow street and to property conveyed by successors to Mickle's title, that court said:

"The company made various conveyances, referring to this map both by names of streets and by block and lot numbers. The rule is of course too well settled to admit of question that the use of such a map as a sales map, and reference to it in the deeds and descriptions therein of lots as bounded on a designated street, constituted a dedication to public use of the street as laid out thereon. *Clark v. Elizabeth*, 40 N. J. Law, 172. This court has so held with reference to the very tract plotted on this land company's map, in the litigation between the same parties, but as to a different part of the tract. But that decision related to Jefferson street, the next street south of Winslow street, and which was within the tract owned by the company when the map was made, and running between and through lots exhibited for sale. The present case is different and in the aspect now under examination presents the question whether the delineation on the map of a street which does not traverse or bound any of the owned property, coupled with sales of property by reference to such map, but bounding on other streets, operated as a dedication of the first-mentioned street. We are clearly of opinion that it does not. Naturally an owner (plotting) cannot dedicate streets over land that he does not own, and as Winslow street from end to end was located on alien territory, the location of it on the map could answer no purpose except that of location and to notify customers that such an actual or proposed street lay in a certain position with reference to the tract."

We accordingly hold the court below committed no error in inferring from this map no purpose on the part of the land company to dedicate Winslow street to high water. It follows, therefore, that defendant's title must prevail unless the land company has, by some subsequent act, made such dedication. Such dedication, the city alleges, was made by the company by its deed to West of May 11, 1881, and by its two deeds to Howell of 1884; the second deed to Howell being in confirmation of the first. The property covered by all three was part of the Brown tract, was owned by the land company when its plan was made, and was plotted in lots thereon. The trial judge refused to hold that such deeds themselves, or by reference to plans, dedicated Winslow street to high water. His so doing commends itself to us, and is supported by the Court of Errors and Appeals in *Camden v. McAndrews*, supra, wherein that court, referring to the deed "to West in 1881 of property bounded by Winslow, Jefferson, Fourth street, and Broadway," said:

"As between the parties this is plainly a dedication of Winslow street in front of the premises conveyed, and doubtless as far as the nearest cross street. In *Clark v. Elizabeth*, 40 N. J. Law, 172, there was express reference to the city plat, and this supported a dedication of the street as appearing on that plat. In fact almost all of the reported cases are based on either the promulgation of a layout of lots by the owner or his adoption of an official plat. In the case of a mere reference to a street as fronting the property conveyed, there being no map or plat referred to, it would be impracticable to extend the dedication beyond the length of that street as actually opened at the time of that conveyance, and it is undisputed in this case that Winslow street was not open to the west of Third street. So the deed to West has no bearing in the case at bar."

The Howell deeds refer both to the land company's map and the city map, which is alleged to show Winslow street open to high water. Of these deeds the court further says:

"Two deeds refer to both maps. They are made by the land company to Zophar C. Howell, and the second is confirmatory of the first. Several tracts are indicated, but none of their bounds on Winslow street, nor is that street mentioned, and the evident intent of the reference to the city map is to superpose the land company's map on it, and thus indicate a coincidence of streets laid on both maps. The result is thus to limit the adoption of the city's map to so much thereof as is plotted on the land company's map, the description being by lot and block numbers on the latter map."

Holding as we do, the judgment below is affirmed.

In re COLUMBIA COTTON OIL & PROVISION CORPORATION.

VARNEY v. HARLOW et al.

(Circuit Court of Appeals, Fourth Circuit. December 18, 1913.)

No. 1,197.

BANKRUPTCY (§ 223*) — COMPENSATION OF REFEREES — COMMISSION ON MONEY CONSTRUCTIVELY PAID TO LIENHOLDERS.

Where mortgaged property of a bankrupt corporation is sold by its trustee free from the lien with the consent of the bondholders who buy it in, being permitted for their convenience to use their bonds in payment of their bid except as to the amount required to pay the costs and expenses of the sale, the referee, under Bankr. Act July 1, 1898, c. 541, § 40a, 30 Stat. 556 (U. S. Comp. St. 1901, p. 3436), as amended by Act Feb. 5, 1903, c. 487, § 9, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1500), which allows him a commission "on all moneys disbursed to creditors by the trustee" is entitled to such commission from the purchase money on the amount constructively disbursed by the trustee to the lienholders.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 888-894; Dec. Dig. § 223.*]

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Virginia, at Alexandria, in Bankruptcy; Edmund Waddell, Jr., Judge.

In the matter of the Columbia Cotton Oil & Provision Corporation, bankrupt. On petition by Walter U. Varney, referee, against Leo P. Harlow, trustee, Milton E. Ailes and Clarence F. Norment, attorneys in fact for certain bondholders, and the American Security &

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Trust Company, mortgage trustee, to revise an order denying petitioner a commission on the proceeds of mortgaged property. Reversed.

D. Lawrence Groner, of Norfolk, Va., for petitioner.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. The petitioner is a referee in bankruptcy. He will be called the "referee." One of the respondents is the trustee in bankruptcy of the Columbia Cotton Oil & Provision Corporation. He will be styled the "trustee," it the "bankrupt." The others are the trustee under a mortgage of the bankrupt intended to secure bonds issued by it, and the attorneys in fact of the holders of such bonds. The trustee, these attorneys, and the individual holders of bonds will be indifferently referred to as the "bondholders."

The question in the case is whether the referee is entitled to be paid \$879.55, being one per cent. upon the amount constructively disbursed by the trustee to the bondholders.

An involuntary petition in bankruptcy was filed September 13, 1911. On October 9th adjudication followed. The real and apparently most, if not all, of the personal property of the bankrupt was subject to the lien of the mortgage already mentioned. One hundred thousand dollars of bonds secured by it were outstanding. The mortgaged property came into the hands of the trustee. It was by order of the referee appraised. The appraisers reported that, if it was to be used for the purposes for which it was intended, it was worth \$155,000. If it was to be dismantled and the machinery sold as junk, its value was only \$101,000.

On December 26th the trustee asked for an order of the District Court to sell clear of liens. Due notice of this application was given by the referee. On January 5, 1912, the bondholders united in the request for such sale. It was ordered. The decree was obviously drafted to meet the bondholders' convenience. If they became purchasers they could turn in their bonds as cash. On February 7th the sale took place. The bondholders bought in the property for \$90,000; that is, for some \$10,000 less than the face of their lien claim. The sale was ratified in due course and without objection. The referee performed the same services he would have been called upon to render had some one other than the bondholders been the successful bidder, except that he did not have to countersign the check or checks which in the latter event the trustee would have given to the bondholders or their representatives. The latter paid the trustee \$2,044.30 to cover the cost and expenses of the sale. No other cash passed between the trustee and the bondholders. The District Court directed him to indorse on the bonds as a payment thereon the difference between the purchase price and the cash paid to him for costs and expenses, or \$87,955.70. The bondholders were allowed to file as general creditors their claim for the upwards of \$12,000 still due them.

The learned judge below treated the statutory commission of the trustee as part of the costs and expenses of the sale to be paid by the

bondholders. He did not think that within the meaning of the statute any money had been disbursed to the bondholders by the trustee, and he therefore refused to allow the referee a commission of one per cent. upon the \$87,955 which they had nominally received. Such action was taken upon his own motion. It was not asked for by the bondholders or by anyone else.

The referee then filed his petition to superintend and revise. All the respondents had the due and usual notice of its pendency here. None of them entered their appearance to oppose it. Apparently they are perfectly willing that the allowance for which the referee asks shall be given him. Upon the adjudication in bankruptcy, the bondholders doubtless realized that a judicial sale of the mortgaged property had become inevitable. The mortgage provided that one selling under it should receive a commission of 5 per cent. It would be much cheaper for the sale to be made by the trustee under the direction of the bankruptcy court. Such proceeding would doubtless be simpler and more speedy. The bondholders wished to avail themselves of it.

Two questions may arise with reference to the allowance of commissions to referees and trustees on the money paid to lienholders out of the proceeds of property subject to their lien:

First, are those officials entitled to commissions at all?

Second, if they are, out of what funds are they to be paid?

The latter problem presents itself when security has been sold by the trustee against the lienholder's consent or without his knowledge. This court has said that under such circumstances he cannot be compelled to contribute to the costs of the general administration of the bankrupt estate. *Mills v. Virginia-Carolina Lumber Co.*, 164 Fed. 171, 90 C. C. A. 154, 21 L. R. A. (N. S.) 901.

Such is, however, not the case here. The sale was made with the consent and approval of the bondholders. There is no question of saddling them with any part of the expense of the general administration of the bankrupt estate, if indeed there was any estate, other than that covered by their mortgage, to be administered. There is nothing in the circumstances to make it inequitable that they shall be called upon to pay whatever is the legal cost of making such sale in the way in which it was made.

The question whether the law entitles the referee to commissions on the amount constructively disbursed by a trustee to lienholders out of the sum for which they have bid their security in is the only one which arises in this case.

By the original act of 1898 the referee's one per cent. was to be reckoned only on the sums paid as dividends and commissions. It was held that he was not entitled to any allowance upon payments made to secured creditors, as they were not dividends in the bankruptcy sense of that term. It soon became evident that the referees were inadequately compensated. It not infrequently happened that practically all the assets of large and troublesome estates in the end were awarded to secured creditors. In 1903, for the avowed purpose of remedying this state of affairs, Congress so amended section 40

of the act as to allow a one per cent. commission to referees "on all moneys disbursed to creditors by the trustee." Since then the commission has been reckoned on all sums paid to creditors irrespective of whether they were secured or unsecured.

In the case before us was any money paid the lienholders? Literally no. Not a dollar was handed over by the trustee to them. The relatively small sum which passed between them was paid by them to him. Is this fatal to the referee's contention? If at the sale any other than the bondholders had bought, the purchase price would have been received by the trustee, and, less the costs and expenses, would have been by him disbursed among the bondholders. In that event the referee would have been entitled to his commissions. If, because of uncertainty as to the extent or validity of their lien, difficulty in ascertaining speedily and accurately how great the expenses would be, or the character and amount of prior claims, or for any other reason the bondholders had been required to pay their bid in cash, the same thing would have happened. It would hardly seem that the referee's rights should be different merely because for the convenience of the bondholders they were excused from paying in \$90,000 and getting \$87,955 back. The payment of the latter sum was as effectually made to them by crediting it on their bonds as it could have been in any other form. It does not seem wise to make substantial rights depend on such unessential differences. The way of making payment adopted in this case is far the simplest and most convenient for everybody. Nothing is to be gained by holding that if it be adopted the referee will lose what would come to him if the more roundabout and troublesome method of doing the same thing were employed. The learned judge below recognized that the trustee was entitled to commissions on the full amount of the purchase price, as being a sum disbursed by him or turned over to lienholders.

Subsequent to 1903 and prior to 1910, section 48 allowed trustees commissions on all sums disbursed by them. By the amendments of the later year the allowance was declared to be "on all moneys disbursed or turned over to any person, including lienholders, by them." A similar change was made in the provisions of the section fixing the compensation of receivers or marshals. Section 40, dealing with the fees of referees, was left as it had been amended in 1903.

Does the fact that section 48 was altered by the insertion of the words "turned over to any person, including lienholders," while section 40 was not, indicate that Congress wished to make a distinction in this respect between trustees, receivers, and marshals on the one hand, and referees on the other? A very vital and important difference was established by the act of 1903. Before that time trustees' commissions, as well as those of referees, were calculated upon the amount paid as dividends and commissions. By the amendatory act of the last-mentioned year trustees were allowed commissions on all sums disbursed by them.

This court has pointed out why it would have been highly inexpedient that any similar provision should have been made as to referees. *Bray v. Johnson*, 166 Fed. 57, 91 C. C. A. 643.

As we have already seen, the allowance to the latter was increased in another way. The amendment of section 48 made in 1910 was not so much for the purpose of changing the law as it was to settle a question upon which the courts had divided by declaring the agreement of Congress with those decisions which had held trustees entitled to commissions on sums turned over to lienholders. Report No. 691, Senate Judiciary Committee, 2d Session, 61st Congress. It does not seem probable that Congress intended in so indirect a manner to change the construction which had been previously put upon section 40. 2 Remington on Bankruptcy, § 2105.

It follows that the referee was entitled to the allowance claimed.

Although we have not been able to concur with the learned judge below in the conclusion he reached, we wish to record our emphatic approval of his course in taking up on his own motion the propriety of permitting the allowance to stand. District judges should scrutinize with care the commissions and fees asked for by the officers of their courts. Absence of objection to a charge made by a referee does not always indicate that those out of whose pockets it will come are satisfied that it is either just or legal. Other considerations may close their mouths, or those of the members of the bankruptcy bar through whom they must act. It is very possible that the learned judge is right in deprecating such allowances to referees. It is frequently, perhaps usually, expedient that all the property of a bankrupt estate, as well that subject to liens as that free of them, shall be administered in the court of bankruptcy. It will be unfortunate if the imposition of a charge of one per cent. in favor of the referee on the selling price of mortgaged property of great value shall discourage resort to those courts. It might be that a discretion to reduce the allowance when it seemed just and expedient so to do might by statute be wisely conferred upon the courts.

A peculiar situation as to costs presents itself. The respondents neither below nor here have made the slightest objection to the allowance to the referee of the sum to which we hold him entitled. It would not be just to impose the costs upon them. At the argument here the counsel for the referee acquiesced in the suggestion that of necessity his client would have to pay them. The order below will be reversed, but the petitioner must pay the costs.

Reversed.

TWEETEN v. TACOMA RY. & POWER CO.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914.)

No. 2303.

1. COURTS (§ 371*)—FEDERAL COURTS—STATE LAWS—FELLOW SERVANTS.

The Washington fellow servant rule that the question of fellow service will not be resolved by measuring the rank of the employes, but by the character of the act, and that in order to be the representative of his principal an employe need not be the foreman in charge of the work as a whole, but it is sufficient if he has authority to direct the work in hand,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and the employer is responsible if the injured employé acts in obedience to the command of one having authority to give it, does not obtain in the federal courts, and is not applicable in a suit by a resident against a nonresident corporation removed from the state to the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 907, 972-976; Dec. Dig. § 371.*]

2. COURTS (§ 367*)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

While federal courts will follow decisions of the highest state courts in construing the common law when such decisions establish a rule of property, the federal courts are required to ignore state decisions when they establish no more than a rule of liability for personal injuries.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. § 367.*]

Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank of Memphis v. City of Memphis, 49 C. C. A. 468; Converse v. Stewart, 118 C. C. A. 215.]

3. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—DUTY TO WARN—FAILURE TO PERFORM—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a servant by the breaking of a suspension wire, evidence *held* to require submission to the jury of defendant's negligence in failing to warn plaintiff of the dangers incident to the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

4. RELEASE (§ 24*)—CONSIDERATION—RETURN—TENDER.

Where defendant customarily paid the doctor's bills of injured employes, and, on paying the bill for physician's services rendered to plaintiff, who was injured while in defendant's employ, exacted from plaintiff a release of liability for such injuries, plaintiff was not required to tender a return of the money so paid to the physician as a condition to his rescission of the release.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 41-46; Dec. Dig. § 24.*]

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by O. Tweeten against the Tacoma Railway & Power Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

The parties herein will be designated plaintiff and defendant, as they were in the court below. The plaintiff was in the employment of the defendant as a common laborer, digging holes for poles to sustain electric wires. He had been so employed for five months when he was called from his regular work to assist the lineman in tightening suspension wires. The wires were 22 feet above the ground, and the work was done from the top of a work car. The lineman, Watson, was in charge of the work, and directed the plaintiff. The plaintiff was engaged in tightening a wire when he was injured. Watson had put the blocks on the wire and ordered the plaintiff to pull all he could. They both pulled, and the wire became detached from the post to which it had been tied by Watson on the day before, causing the plaintiff to fall to the street below, whereby he sustained serious injury to his ankle. The plaintiff had had no prior experience in that particular work, except that he had assisted Watson for a short time on three or four occasions, and he received no warning from the defendant as to the dangers incident thereto. Some time after the accident the plaintiff met the defendant's claim agent on a street car, and told him that he owed the doctor some mon-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ey for medical services in treating his injured ankle. The claim agent told him to call at his office, and when he called the claim agent paid the doctor's bill in the sum of \$25, and produced a paper which the plaintiff signed at his request. The paper was a release of the defendant of all claims for damages on account of the injury. The plaintiff could not read in the English language, and the release was not read to him. He testified that he signed it understanding it to be a receipt for the money so paid to the doctor. The plaintiff some time thereafter brought the present action in one of the state courts of the state of Washington, from which the cause was removed by the defendant to the court below. The complaint alleged: (1) That the defendant was negligent in taking him from his regular employment and placing him at work in tightening suspension wires; (2) that the defendant was negligent in not warning him of the danger incident to the work; (3) that the defendant was negligent in not providing him with a reasonably safe place in which to stand while fastening said wires; and (4) that the defendant was negligent in not properly fastening such suspension wire. The answer denied the allegations of negligence, and alleged that the injuries were caused as the result of the ordinary risk and hazard of the employment, which was apparent and known, and was assumed by the plaintiff; that if the plaintiff sustained any injury, it was caused by the negligence of a fellow servant; that the plaintiff was guilty of contributory negligence; that the plaintiff, for the sum of \$25, executed a release. On the trial of the cause, at the close of the testimony, the defendant moved the court for a directed verdict in its favor, which motion was granted, the court ruling that the proximate cause of the accident was the parting of the wire, and that it parted by reason of the negligence either of the plaintiff's fellow servant, Watson, in fastening it, or the negligence of both in pulling too hard. Judgment was thereupon rendered on the verdict.

J. A. Sorley, of Tacoma, Wash., for plaintiff in error.

John A. Shackleford and F. D. Oakley, both of Tacoma, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] The court below correctly ruled that the plaintiff was the fellow servant of Watson, the lineman under whose direction he was working, for, while under the settled rule of the Supreme Court of the state of Washington the doctrine is established that the question of fellow service will not be resolved by measuring the rank of the employés, but by the character of the act itself, that in order to be the representative of his principal, an employé need not be the foreman in charge of the work as a whole, or have authority to employ or discharge men, but that it is sufficient if he have the authority to direct the work in hand, and that the employer is responsible if the injured employé acted in obedience to the command of one having authority to give it (*Durante v. Great Northern R. Co.*, 64 Wash. 395, 116 Pac. 870; *McLeod v. Chicago, Milwaukee, etc., R. Co.*, 65 Wash. 62, 117 Pac. 749; *Allend v. Spokane Falls & N. Ry. Co.*, 21 Wash. 324, 58 Pac. 244; *Martin v. Hill*, 66 Wash. 433, 119 Pac. 849; *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400; *Johnson v. Motor Shingle Co.*, 50 Wash. 154, 96 Pac. 962; *Jasper v. Bunker Hill, etc., Min. & Con. Co.*, 50 Wash. 570, 97 Pac. 743; *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369; *Howe v. Northern Pacific Ry. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949; *Sandquist v. Independent Tel. Co.*, 38 Wash. 313, 80 Pac. 539; *Anustasakas v. International Contract Co.*, 57 Wash.

453, 107 Pac. 342), the rule is otherwise in the federal courts; and the plaintiff, a citizen of the state of Washington, while he might, on the ground of the lineman's negligence, have had a good cause of action in the state court in which the action was originally begun, was deprived of that right when the defendant, a corporation of New Jersey, removed the cause to the court below. Here is a situation which seems to demand remedial legislation; for, while the courts of the United States will follow the decisions of the courts of the state in which they are held when, in construing the common law, those decisions establish a rule of property, they must ignore them when they establish no more than a rule of liability for personal injuries. *Beutler v. Grand Trunk Railway*, 224 U. S. 85, 32 Sup. Ct. 402, 56 L. Ed. 679; *Salmons v. Norfolk & W. Ry. Co.* (C. C.) 162 Fed. 722; *Snipes v. Southern Ry. Co.*, 166 Fed. 1, 91 C. C. A. 593; *Snare & Triest Co. v. Friedman*, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367; *Illinois Cent. R. Co. v. Hart*, 176 Fed. 245, 100 C. C. A. 49.

[3] But we think there was sufficient evidence to go to the jury on the question of the defendant's negligence in failing to warn the plaintiff of the dangers attending the work which he had been directed to do. Prior to that time the plaintiff had been a common laborer, engaged in digging holes and piling poles. He testified that on three or four occasions he had assisted the linemen at work on top of the work car for an hour or two, but that he had never been warned of the dangers attending such work, and this testimony was undisputed. There is evidence in the record tending to show that the work was dangerous. The lineman testified that "once in awhile" a wire would break loose, "not very often," but that it "would usually hold." It thus appears that the danger of the wire becoming detached when subjected to the strain incident to tightening it was one of the dangers to be reckoned with; and, in view of that evidence, we think it was the duty of the defendant, in placing the plaintiff, an inexperienced workman with an imperfect knowledge of the English language, at the work of assisting linemen engaged in tightening wires from the top of a work car, to instruct him as to the dangers of the work. In *Britton v. Central Union Tel. Co.*, 131 Fed. 844, 65 C. C. A. 598, where an ordinary laborer was directed to do a lineman's work in removing wires from certain old poles, in which work he was injured by the falling of a pole, it was held that the question whether the defendant was negligent in permitting him to do such work, which involved the climbing of the poles, without warning him to make an inspection thereof, and instructing him as to the manner in which such inspection should be made, was for the jury. Among other cases illustrating the principle are *Montana Coal & Coke Co. v. Kovec*, 176 Fed. 211, 99 C. C. A. 565; *Peters v. George*, 154 Fed. 634, 83 C. C. A. 408; *Pennsylvania R. Co. v. Hartell*, 157 Fed. 667, 85 C. C. A. 335; *Richardson v. Swift & Co.*, 96 Fed. 699, 37 C. C. A. 557; *Michigan Cent. R. Co. v. Majkzrak*, 200 Fed. 936, 119 C. C. A. 320; *Atlantic Coast Line R. Co. v. Linstedt*, 184 Fed. 36, 106 C. C. A. 238.

[4] The defendant contends that the failure of the plaintiff to return, or tender a return of the money received by him in settlement

of his claim against the defendant precludes a recovery in this action, citing the decisions of this court in *Mahr v. Union Pac. R. Co.*, 170 Fed. 699, 96 C. C. A. 19, *Price v. Connors*, 146 Fed. 503, 77 C. C. A. 17, and *Hill v. Northern Pacific Ry. Co.*, 113 Fed. 914, 51 C. C. A. 544. But the evidence indicates that the plaintiff has not received from the defendant any money which he is required to return. The money was paid to the doctor who attended him, and the defendant's claim agent testified that it was customary to pay the doctor's bills of injured employes. If so, the payment of the doctor's bill was something which the plaintiff had the right to expect as part of his contract of employment, and by way of compensation for services rendered. He was under no obligation, therefore, to return to the defendant the \$25 so paid to the doctor.

The judgment is reversed, and the cause remanded for a new trial.

In re POST OFFICE SITE IN BOROUGH OF THE BRONX. UNITED STATES v. WIENER et al. RANDEL et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

Nos. 73 and 74.

1. EMINENT DOMAIN (§ 133*)—RIGHT TO COMPENSATION—FIXTURES.

Where an engraving plant was located on premises condemned, the owner was entitled to compensation for a motor bolted to a platform about seven feet above the floor bolted through two walls with a heavy wooden column supporting the corner of it, a lathe weighing 3,500 pounds fastened to three concrete pillars resting upon the ground and built up through the floor, a special cylinder router weighing 300 pounds resting upon the floor and supported by two extra beams specially put under the floor to carry its weight and bolted through the floor into the beams, which machine was specially constructed for the building, a lathe milling machine weighing 800 pounds and bolted to the floor and fastened overhead to the ceiling, and a planer milling machine weighing 700 pounds built into the floor with angle irons bracing it, since in condemnation proceedings the rule as to fixtures is that which applies between vendor and vendee, and not the rule applying between landlord and tenant, and if the owner could not resume business in some other location with profit they should not be left with useless machinery on their hands.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 358-361½; Dec. Dig. § 133.*]

2. EMINENT DOMAIN (§ 247*)—RIGHT TO INTEREST ON AWARD ON JUDGMENT.

In a condemnation proceeding by the United States, interest was improperly allowed on the award, as, assuming that it was a final judgment, interest would not run against the United States, especially where the owner had the use of the property for the time during which he claimed interest.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 638-643; Dec. Dig. § 247.*]

3. EMINENT DOMAIN (§ 95*)—ELEMENTS OF COMPENSATION—REMOVAL OF BUSINESS.

An owner of property condemned was not entitled to an allowance for the removal from the condemned premises of the business as distinguished from the plant and machinery.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 239-242, 244, 266-268, 273; Dec. Dig. § 95.*]

4. EMINENT DOMAIN (§ 265*)—COSTS—ALLOWANCE.

In a condemnation proceeding by the United States, there was no authority for awarding costs against the United States.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 690-693; Dec. Dig. § 265.*]

In Error to the District Court of the United States for the Southern District of New York.

Proceeding by the United States to condemn and acquire land for a site for a United States post office in the borough of the Bronx, city of New York. To review a final order affirming the award of commissioners, the United States and Mary A. Randel and another bring cross-writs of error. Modified.

On cross-writs of error to the District Court for the Southern District of New York sued out by the United States and by Mary A. Randel and Fanny S. Norton to review the final order of the court confirming the award of commissioners appointed to ascertain and determine the amounts to be paid as damages to the owners of property in the borough of the Bronx which the United States desires as a site for a post office. With the exception of parcel 11 the objections to the confirmation of the report of the commissioners were taken by the United States and as to parcel 11 by both parties.

H. Snowden Marshall, U. S. Atty., and Addison S. Pratt, Asst. U. S. Atty., both of New York City.

Arthur L. Howe, of New York City, for Fanny S. Norton.

Philip B. La Roche, Jr., of New York City, for Matthew F. Norton's Sons, Mary A. Randel, and Fannie S. Norton.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The questions involved in the present controversy are whether the commissioners were right in allowing Fanny S. Norton, owner of the premises, 560, 561, and 562 Mott avenue, the sum of \$3,890.80 for the machinery of an engraving plant located in the rear of said premises and the sum of \$2,500 for damages incident to a change of the location of the business. These questions are presented by exceptions filed by the United States. The United States also excepts to the allowance to the landowners of interest and costs. The owners of the property insist that the various awards are insufficient for the reason that they do not take into consideration the expenses necessarily incurred for counsel, experts, etc., and which, if not allowed by the court, will have to be paid by them personally, and thus decrease, pro tanto, the amounts to which they are entitled as landowners. They also insist that they are entitled to an extra allowance under the provisions of the New York Code. These questions are presented by exceptions duly taken to the respective rulings.

[1] Was the award of \$3,890.80 for the value of the machinery a proper one? There is no question as to the amount of the award; the contention of the United States is that the machinery is personal property and cannot be regarded as fixtures. It is argued, except as to a few pieces of machinery where the difficulty of removal is so small as to be almost negligible, that the entire plant can be readily removed without damage to the machinery or the freehold. If the business is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 210 F.—53

to be carried on elsewhere, these or similar machines will be needed. The United States does not want the machines, cannot use them, and, if compelled to pay for them, will have to sell or give them away. On the other hand, they are essential to the existence of the engraving plant. It is urged by the United States that the only damage to the owners of the plant is the expense of taking the machinery down, removing it, and setting it up in a new location. It is also argued that there is nothing to show that when the machinery was placed in the building it was with the intent that it should remain there permanently. For aught that appears, it will operate as well in any other similar building as in the building which has been condemned. The owners contend, on the contrary, that the engraving plant is a part of the realty and cannot be removed without damage thereto; that some portions of the plant can only be used in the locality where they are now installed, being built with reference to the conditions and location of the present factory. Regarding some of this machinery the commissioners say:

"The motor is set up on a wooden platform about seven feet above the floor, bolted through two walls with a heavy wooden column supporting the corner of it. The motor is bolted to the platform.

"The Prentiss lathe is fastened to three concrete pillars which are built up through the floor. These pillars rest upon ground beneath the floor. The machine weighs about 3,500 pounds.

"The Royle special cylinder router weighs about 300 pounds and rests upon the floor, which is supported by a couple of extra beams specially put under the floor to carry the weight. The machine is bolted through the floor into the beams. Power is transmitted to these machines by a belt on a pulley. This machine was specially constructed for this building and this work.

"The lathe milling machine is 6 feet long, 2 feet wide, and 4 feet high and weighs about 800 pounds. It is bolted to the floor and is likewise fastened overhead to the ceiling.

"The planer milling machine is 8 feet long, 4 feet wide, and 4 feet high. Its weight is about 700 pounds. It is built into the floor with angle irons bracing it, in order to give it rigidity. It is operated by power from the shaft in the same way as the others. It has three counter shafts."

We are inclined to the opinion that in condemnation proceedings, where the property is taken in invitum, the rule which obtains is analogous to that between vendor and vendee and not that between landlord and tenant.

As was said in *Re Park Com'rs* (Super.) 1 N. Y. Supp. 763:

"If, by the lessees' consenting to a sale and transfer, the deed would vest in the purchasers perfect title to the whole as real property, how can a different result be arrived at when the purchase is enforced? The city, by instituting these proceedings, occupies the position of a purchaser."

See, also, *Matter of City of New York*, 118 App. Div. 865, 103 N. Y. Supp. 908; *In re Mayor*, 39 App. Div. 589, 57 N. Y. Supp. 657; *In re Block Avenue A, etc.*, 66 Misc. Rep. 488, 122 N. Y. Supp. 321.

In the latter case the court says:

"The city took the entire buildings as they stood, including the trade fixtures therein, and for the purposes of this proceeding they must all be regarded as real property; that is, as between the tenant and the city, the trade fixtures were real property and must be paid for by the city the same as a building, and the tenant was under no more obligation to remove them than he would be to remove a building if he were the owner. As between

the tenant and the owner, however, the trade fixtures were personalty, and could be removed, and therefore any award made for them would go to the tenant."

We therefore reach the conclusion, though not without some doubt, that the award rightly treated the machinery as fixtures for which the United States should pay. The owners may conclude that they cannot resume business in some other location with profit and they should not be left with nearly \$4,000 worth of useless machinery on their hands.

[2] We think the court below was in error in allowing interest on the awards for the following reasons:

First. Assuming that these are final judgments, interest will not run against the United States.

Second. The owners have had the use of the property until the present time and they are not entitled to the use of land and interest also.

[3] There seems to be no authority for an allowance for the removal of the business as distinguished from the plant and machinery. The District Court allowed \$2,500 as damages which may result from the change of location. This was based upon hypothesis and speculation and we are unable to find any controlling authority to support the award.

[4] We know of no authority for the award of costs. The award of \$2,500 and the items for interest and costs are disallowed; in all other respects the order is affirmed.

No costs of this court are allowed.

CITY OF FORSYTH v. CRELLIN et al.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914. Rehearing Denied March 10, 1914.)

No. 2290.

MUNICIPAL CORPORATIONS (§ 1007*)—CLAIMS—CONTRACTS—SUBMISSION.

Rev. Codes Mont. § 3278, provides that all contracts for work or for supplies or material for which more than \$250 must be paid shall be let by the city council to the lowest, responsible bidder, etc. Section 3279 declares that no money must be paid to any person claiming under a contract with the city council until he has first filed with the clerk a statement under oath disclosing the names of all persons interested in the contract or the proceeds or profits thereof. Section 3280 provides for the alteration or modification of such contracts, and section 3281 declares that no allowance for extra work shall be made except by resolution, and an agreement as provided in the preceding section. *Held*, that a contract with the city for the construction of a waterworks system was governed by such provisions, and not by sections 3283, 3288, providing that all demands against the city or town must be itemized and verified and presented to the council for allowance within one year from the date of accrual, etc., and hence a claim for a balance due under such contract was not objectionable because not so verified.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 1007.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Action by E. W. Crellin and others, copartners doing business under the name and style of the Des Moines Bridge & Iron Company, against the City of Forsyth. Judgment for plaintiffs, and defendant brings error. Affirmed.

F. V. H. Collins, of Forsyth, Mont., and Gunn, Rasch & Hall, of Helena, Mont., for plaintiff in error.

Edward Horsky, of Helena, Mont., for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This is an action upon contract to recover a balance of consideration for constructing a certain waterworks system for the town (now city) of Forsyth, Mont. An itemized statement of the account for construction, showing the alleged balance due the contractors, was presented to the city council for its approval, and it is alleged by the complaint that said city council approved said account and audited the same. The answer shows that the account was approved, but with certain deductions, leaving a balance due the contractor in a less sum than plaintiffs claim. The dispute is about the difference between these two theories of adjustment. Judgment was rendered in favor of the plaintiffs for the sum of \$2,332.89, from which the city prosecutes a writ of error to this court.

The sole question presented here is whether the defendants in error have proven such a case as to entitle them to recover; the statement of account presented to the city council not having been verified. Plaintiff in error contends that they have not. This contention is based upon sections 3283 and 3288 of the Revised Codes of Montana. Section 3283 reads:

"3283. (§ 4812.) Accounts must be Itemized and Sworn to.—All accounts and demands against a city or town must be presented to the council, duly itemized and accompanied by an affidavit of the party or his agent, stating the same to be a true and correct account against the city or town for the full amount for which the same is presented, and that the same accrued as set forth, and with all necessary and proper vouchers, within one year from the date the same accrued; and any claim or demand not so presented within the time aforesaid is forever barred, and the council has no authority to allow any account or demand not so presented, nor must any action be maintained against the city or town for or on account of any demand or claim against the same, until such demand or claim has first been presented to the council for action thereon."

Section 3288 is the same as the one quoted, with this addition:

"Provided, however, that in case the total indebtedness of a city or town has reached three per centum of the total assessed valuation of the taxable property of such city or town, as ascertained by the last assessment for state and county taxes, it shall be lawful for, and such city or town is hereby authorized and empowered to conduct its affairs and business on a cash basis as provided and contemplated by section 3287 (1) of this act."

It is claimed for these sections that a verification of the claim when presented to the city council for allowance is a condition precedent

to such allowance and to the institution of an action upon the same, and certain decisions of the Supreme Court of the state of Montana are cited in support of the contention, namely, *Helena Water Works Co. v. City of Helena*, 27 Mont. 205, 70 Pac. 513, *Helena Water Works Co. v. City of Helena*, 31 Mont. 243, 78 Pac. 220, and *Palmer v. City of Helena*, 40 Mont. 498, 107 Pac. 512. Without attempting to analyze these decisions, it may be considered that they construe these sections as it is insisted they do. We are of the opinion, however, that the sections have no application to the case in hand. Sections 3278 to 3281, inclusive, manifestly govern as to contracts of the kind entered into between the parties here. These sections are as follows:

"3278. **Awarding Contracts.**—All contracts for work, or for supplies, or material, for which must be paid a sum exceeding two hundred and fifty (250) dollars, must be let to the lowest, responsible bidder, under such regulations as the council may prescribe: Provided that no contract shall be let, extending over a period of three years, or more, without first submitting the question to a vote of the resident taxpayers of said city or town. [Act approved February 27, 1907, § 1.] (10th Sess. Chap. 48.)

"3279. (§ 4808.) **Contractor, Oath of.**—No money must be paid to any person claiming under a contract with the council, until such person has first filed with the clerk a statement, under oath, disclosing the names of all persons directly or indirectly interested in the contract, of the proceeds or profits thereof, declaring that no persons other than those named are interested, and that no person forbidden by this title has any interest in the same. (*State v. Great Falls*, 19 Mont. 527, 49 Pac. 18.)

"3280. (§ 4809.) **Alteration and Modification of Contract, How Made.**—When it becomes necessary in the prosecution of any work to make alterations or modifications of the specifications or plans of a contract, such alteration or modification must only be made by resolution of the council, and such resolution is of no effect until the price to be paid for the same is agreed to in writing, and signed by the contractor and approved by the council.

"3281. (§ 4810.) **No Allowance for Extra Work.**—No contractor must be allowed anything for extra work, caused by an alteration or modification unless a resolution is made and an agreement signed as provided in the preceding section, nor must he, in any case, be allowed more for such alteration than the price fixed by such agreement."

We assume that the contract with the city was let in accordance with the law as declared by these sections, and that, if there were any alterations made or any extra work performed, the provisions with reference thereto were duly complied with.

These sections of the statute provide specially for letting contracts involving a consideration above \$250, and for dealing with the contractor in relation to modifications and extra work. Before anything can be done, the city council must let the contract under such regulations as it may prescribe, and when let, all modifications or extra work done must be approved by resolution of the city council and agreed to in writing.

Thus is provided a specific method by which the city may not only secure the work to be done, but may obligate itself to compensate the contractors for doing the work. The contract being perfected by compliance with the statute, and fully executed, the city becomes completely bound to the contractor to pay him at the time and in the manner stipulated in the contract.

Upon the other hand, it would seem the contractor would be entitled to his pay in pursuance also of the stipulations of the contract. The method thus prescribed for entering into a contract of the kind is complete within itself, and it would seem that no other conditions were designed to be imposed upon either the city or the contractor to entitle the latter to his compensation according to the stipulations of the contract which the law specifically empowers and authorizes the parties to make.

Sections 3283 and 3288, although quite comprehensive in language, reading "All accounts and demands against a city," were evidently intended to cover claims against the city arising in the ordinary course in carrying on the city government, in providing for the city's welfare in sundry directions, and in transacting the business and economic affairs of the city, but not on such contracts as are specifically provided for, which it must be presumed are designed to contain their own specific provisions, and, among other material and essential conditions, stipulations respecting the time and manner of the payment of the consideration on the part of the city.

As illustrative, the city by the contract in question covenants and agrees that it will well and truly pay to the contractor out of the waterworks fund, by warrants drawn thereon by order of the town council, certain specified sums for certain designated pieces of work, and that all payments for work under the contract shall be made in monthly installments of 85 per cent. of the contract price on the completed work, being any materials built in place, and the balance upon the final completion and final test of the said waterworks system, and the acceptance thereof by the town council and its duly qualified and acting engineer. Thus the time and amount of payment were definitely and specifically fixed and determined by express and explicit agreement between the parties, and all under the intendment of the statute, so that there could be no necessity for any verification of the claim or demand in order to fix upon the city its liability to the contractor to pay the stipulated consideration.

We are therefore impressed that it was not designed nor intended that sections 3283 and 3288 should apply to claims against the city of the character of the one in suit. While it might be necessary for the claimant to present such a claim to the city council before suit could be maintained, yet we think it was not the purpose of the statute that such claims should be verified as a condition precedent to the city council's allowance thereof, or to the institution of an action against the city.

These considerations lead to an affirmance of the judgment of the District Court; and it is so ordered.

ROBINSON BROS. & CO. v. PATTERSON et al.

(Circuit Court of Appeals, Third Circuit. January 29, 1914.)

No. 1771.

1. SALES (§ 200*)—CONTRACT—PASSING TITLE.

Where a contract for the sale of sewer pipe required that the quantity of pipe should be ascertained, the quality graded, and the price computed, title did not pass by the mere execution of the contract, nor until such conditions had been complied with.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 524-528; Dec. Dig. § 200.*]

2. SALES (§ 182*)—PASSING TITLE—DELIVERY—QUESTION FOR JURY.

Where plaintiff sold certain sewer pipe on leased premises to defendant, and also transferred the lease, but it was necessary, before the amount due for the pipe could be determined, that the quantity and grade should be ascertained, and the price computed, and it did not appear that a surrender of the premises was intended as an acceptance of the pipe by defendant, whether title passed by such delivery was a question for the jury, and it was therefore error to charge that there was a consummated sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 492-495; Dec. Dig. § 182.*]

3. SALES (§ 182*)—DELIVERY AND ACCEPTANCE.

Delivery and acceptance as elements of a sale of personal property are essentially questions of intention, and therefore questions of fact.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 492-495; Dec. Dig. § 182.*]

4. ARBITRATION AND AWARD (§ 37*)—APPOINTMENT OF ARBITRATORS—APPOINTMENT OF UMPIRE.

A contract for the sale of personal property provided for the fixing of the price by arbitrators in case the parties could not agree, and declared that each of the parties should select an arbitrator and the two should adjust and fix the grade of the material between themselves, rendering their award in writing, and at the time of their appointment the two arbitrators, before examining the material, should select a third arbitrator, who, in the event of a disagreement between the two, could then be called in and the decision of the third should be final between the parties. *Held*, that under such contract the parties had no power to choose the third arbitrator, nor could they be charged with fault merely because the two arbitrators chosen failed to agree on the third.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 193; Dec. Dig. § 37.*]

In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Action by Luther M. Patterson and others against Robinson Bros. & Co. Judgment for plaintiffs and defendant brings error. Reversed, and new trial ordered.

See, also, 180 Fed. 668, 103 C. C. A. 634.

Candor & Munson and Brown & Stevenson, all of Williamsport, Pa., for plaintiff in error.

Max L. Mitchell, Archibald M. Hoagland, and Seth McCormick, all of Williamsport, Pa., for defendants in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. B. McPHERSON, Circuit Judge. This controversy between L. M. Patterson & Co., a Pennsylvania partnership, and Robinson & Co., an Ohio corporation, arises upon the following facts:

In 1900 L. M. Patterson & Co., the plaintiffs below, were the lessees of a sewer-pipe manufacturing plant in Clinton county, Pa., the owner and lessor being the Lock Haven Clay Works. At the same time the plaintiffs bought from a former lessee a certain quantity of pipe that was then upon the premises. Patterson & Co. continued to manufacture for several months, and in December, 1901, were the owners of the unexpired lease with an option of renewal, and of an increased quantity of pipe. Under date of December 16th they entered into a written agreement with Robinson & Co., which has two distinct parts. By the first part Patterson & Co. agree to use their best efforts toward inducing the Clay Works to make a satisfactory lease of the plant to Robinson & Co., agreeing also to assign their own interest in the existing lease. On December 18th the Clay Works consented to accept Robinson & Co. as substituted lessee, whereupon Patterson & Co. assigned, and Robinson & Co. accepted, the lease, which included—"the plant of the said clayworks at Lock Haven, containing 33 acres, 103 perches, the building, machinery, tools, and fixtures now placed thereon and used in the manufacture of sewer pipe and brick."

Robinson & Co. thereupon paid to Patterson & Co. an agreed consideration of \$7,000. This part of the agreement was fully executed, and needs no further attention. The dispute arises out of the second part, which reads as follows:

"(Robinson & Co.) further agree to pay, and (Patterson & Co.) agree to accept, for all the manufactured goods now on hand at the works in Lock Haven, Pa., the following rates and prices.

"No. 1 pipe and fittings at 87½ per cent. discount, No. 2 pipe and fittings at 92½ per cent. discount.

"Terms of payment of the above shall be, note of (Robinson & Co.) at three months without interest, said note to be dated January 1st, 1902.

"In the event of any disagreement arising between the parties of this contract as to the grade of pipe and fittings now on hand at works of (Patterson & Co.), the same shall be settled by arbitration in the following manner:

"Each of the parties hereto shall select an arbitrator, and these two arbitrators shall adjust and fix the grade of the pipe and fittings between themselves, and render their award in writing; and at the time of their appointment the two arbitrators shall, however, before examining said pipe and fittings, select a third arbitrator, who, in the event of a disagreement between the two arbitrators first selected, shall then be called in, and the decision of the third arbitrator shall then be final between the parties hereto."

Robinson & Co. took immediate possession of the leased ground and plant, and thereupon both parties made efforts to carry out the executory provisions just quoted. But they soon disagreed, and (after much delay for which the parties themselves appear to have been responsible) their differences reached the Court of Appeals in 1910. The only question then decided was the effect of the foregoing paragraph concerning arbitration, as will be seen by referring to the report of the case in 180 Fed. 668, 103 C. C. A. 634. For the reasons there set forth the controversy was sent back for another trial. This has now been held, but the present writ of error raises another fundamental question that is wholly new. We regret exceedingly that this prolonged dispute

cannot be ended now by a judgment of affirmance, but at least one of the errors complained of is vital, and compels us to reverse.

[1] We hope to make this clear by a brief discussion. There can be no doubt that the provisions quoted were executory in several particulars: (1) The quantity of pipe was not accurately known, and had to be determined; (2) the pipe was to be graded; that is, divided between first and second quality; and (3) the price was then to be computed. Grading was evidently regarded by the parties as the most important of these tasks. Quantity could be ascertained by counting, a process that could hardly afford much room for disagreement; and, although the contract did not specify the price, this was to be fixed by certain discounts from an unnamed standard, which was probably understood to be the price generally prevailing in the trade. But apparently the parties foresaw that grading was likely to be a more contentious subject, and accordingly they provided for arbitration in case they should disagree in this particular. In all three particulars, however, something remained to be done before the terms of the contract could become precise, and in such a situation the general rule is well settled that title does not pass by the mere execution of a contract. *Elgee Cotton Cases*, 89 U. S. (22 Wall.) 180, 22 L. Ed. 863; *Benjamin, Sales* (7th Am. Ed.) § 308 et seq., note. This is conceded by counsel for Patterson & Co., whose brief admits the correctness of the general proposition, that "so long as anything remains to be done to determine the quality, quantity, or price of the goods, the sale is incomplete, and the title does not pass." They contend, however, that this general proposition should be modified by adding, "provided there has been no delivery"; and they contend further that "where a delivery has been made, this rule has no application, and that delivery was made in the present case."

[2] This brings us to the decisive error that was committed by the learned trial judge. In answer to a point of the plaintiffs he instructed the jury as a matter of law that all the sewer pipe belonging to Patterson & Co. that was on the premises at the date of the agreement—"became the property of (Robinson & Co.) immediately upon the delivery of the said contract and the entrance into possession of the said premises."

And in the general charge he said:

"Before proceeding to the consideration of the questions of fact presented, I will say to you that in my opinion there was an actual sale consummated by the plaintiffs to the defendants of all the manufactured goods upon the premises in question, for which the latter were bound to pay in the manner stipulated in the writing. The agreement to pay, and acceptance of, a certain stipulated price for the pipe measuring up to a certain grade, as a consideration for all the manufactured goods upon the premises, followed by either actual or constructive possession, whichever it may be regarded in this case, constituted a valid sale, and obligates the defendants to make settlement as agreed upon by the parties. All that was left open by the agreement was to fix and determine the extent of the liability of the defendants for the purchase in question, and this the defendants had a right, under the contracts, to have ascertained by arbitration as agreed, before the plaintiffs' cause of action was complete, unless dispensed with or otherwise prevented by the defendants.

"Coming, then, to the questions which I am about to submit to you: First, did the plaintiffs make reasonable effort to determine by arbitration, as pro-

vided in the writing, the grade of the pipe and fittings in question, or were they prevented from so doing by the defendants? and, second, if you find the plaintiffs free from reasonable blame for such failure, then you will determine whether there was any such pipe and fittings as were designated in the agreement as No. 1 and No. 2, and the quantity and value thereof."

[3] These instructions assume that the title had passed, and (laying the question of arbitration aside) that nothing remained to be done except to determine how much the plaintiffs should recover. We cannot agree with this position; whether the title had passed depended on disputed questions of fact, and these were for the jury to determine, and not for the court. Undoubtedly Robinson & Co. went into immediate possession of the leased premises, and in a certain sense this carried with it the possession—or at least, the custody—of the pipe. Of necessity possession of the real estate involved the physical control and manual possession of the pipe also, but it did not follow that Robinson & Co. intended thereby to accept a legal delivery of the pipe under the contract. Delivery and acceptance are essentially questions of intention, and intention is always a question of fact. Benjamin, Sales, supra, cases cited in note 24 A. & E. Ency. (2d Ed.) 1047; 35 Cyc. 202, 302. The evidence on this subject was in conflict, and therefore the learned judge went too far when he himself determined its effect. For obvious reasons we refrain from discussing the facts and the inferences that might be drawn therefrom; these matters must be submitted to a jury if another trial takes place, and anything we might say now may be inappropriate then, or may even be regarded as expressing an opinion on one side or the other. But we do say that upon the evidence contained in this record the jury should have been instructed that the title to the pipe did not pass, unless there had been delivery of possession under the contract on one side, and acceptance under the contract on the other. And (if the evidence be the same) the jury should determine this dispute under proper instructions.

[4] There was error also in what was said concerning arbitration. The provisions of the contract on this subject were construed when the case was here before, and what was decided then should have been applied on the second trial. We quote from Judge Bradford's opinion (180 Fed. 670, 103 C. C. A. 636):

"The arbitration clause did not provide that the parties to the agreement or either of them should choose or agree upon or have anything to do with the choice of a third arbitrator. On the contrary, it expressly directed that, in the event of a disagreement between the parties as to the grade of pipe and fittings:

"Each of the parties hereto shall select an arbitrator and these two arbitrators shall adjust and fix the grade of the pipe and fittings between themselves and render their award in writing, and at the time of their appointment, the two arbitrators shall, however, before examining said pipe and fittings select a third arbitrator, who in the event of a disagreement between the two arbitrators first selected, shall then be called in and the decision of the third arbitrator shall then be final between the two parties hereto."

"The third arbitrator was to be chosen solely and exclusively by the two original arbitrators and not by the parties to the agreement, or either of them. The verdict for several reasons cannot support a judgment for the defendant. It appears from the verdict itself that so far as it was intended to relate to the agreement of December 16, 1901, the only ground on which it was rendered was that:

"In the opinion of the jury (Patterson & Co.) did not make proper effort to agree upon a third arbitrator to appraise and value the sewer pipe sued for, as provided in the agreement on which suit is brought."

"The jury restricted itself to that ground. But the agreement contained no such provision, and consequently the verdict was erroneous and without justification, and could not support a valid judgment."

The arbitration clause in this contract is unusual in some respects, and is to be distinguished from many other clauses that have been the subject of decision. The parties had no power to choose the third arbitrator, and they could not be charged with fault merely because the two arbitrators failed to agree upon the third. Of course, interference by either party to prevent a choice might be a fault; but, if there was no such interference, and if the two arbitrators failed to select the third, we think the arbitration clause simply became unworkable and might be disregarded. Nevertheless the learned judge asked the jury to determine—and, for anything we know, their verdict may be based upon such determination—whether "the parties" attempted, or made a reasonable effort, to agree upon the third arbitrator, using substantially the same language as was used by the trial judge in the former case. Part of the instructions is as follows:

"It appears that each of the parties, as provided by the agreement, chose an arbitrator. On the part of the plaintiffs, L. M. Patterson was chosen; on the part of the defendants, B. A. Robinson was chosen. When these two arbitrators could not agree between themselves and render their award in writing, adjusting and fixing the grade of the pipe and fittings, the agreement required them to call in a third arbitrator to determine between the parties. * * *

"Other names were submitted from time to time as proposed compromise arbitrators, some by the respective arbitrators and others by the parties in suit. However, none of the proposed persons was selected or agreed upon by the arbitrators. Some correspondence followed regarding this matter, which is in evidence and is for your consideration.

"Did the parties attempt to agree upon a man as a third arbitrator, or, was their effort merely play for position for some reason or other? Do the things the plaintiffs did manifest a reasonable desire to meet the defendants halfway, or, putting it in another way, whose fault was it that this arbitration did not go on to an end, and that the third arbitrator was not chosen?

"If both were equally at fault—and you will bear in mind that it usually takes two to disagree—or, if you conclude that the plaintiffs, or their arbitrator, made a reasonable effort to adjust and fix the grade of the pipe and fittings in the way provided in the contract, and to agree upon a third arbitrator, or that the failure to carry out this agreement is not alone to be charged to them or their agent, they may then recover here, even though the provision of arbitration was not carried out. If, however, on the other hand, putting it in the alternative, you think that no such proper effort was made through the plaintiffs or their agent, and that it was through them that arbitration was not pursued, then the plaintiffs are not entitled to recover, unless the defendants made future arbitration impossible or impracticable by removing or destroying a material portion of the pipe and fittings to be adjusted and graded."

There are other assignments of error, some of them unimportant, but we need consider no others. We venture to express the hope that the parties may see their way to a settlement of this prolonged and expensive controversy without insisting upon another trial.

The judgment is reversed, and a new venire is awarded.

BROWN v. AMERICAN BONDING CO. OF BALTIMORE, MD.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914.)

No. 2289.

SUBROGATION (§ 7*)—SURETY—RIGHTS OF CREDITOR.

Where a state treasurer filed a claim against the receiver of an insolvent bank for unpaid deposits as a general creditor and the bank's surety paid the balance of such claim and took an assignment thereof from the state, the surety's right was limited by the rights derived from the particular claim so filed, and it was therefore not subrogated to the right of the state to priority of payment, if any.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 18, 21-29, 58, 77, 83, 92; Dec. Dig. § 7.*]

Nature and theory of right of subrogation, see note to Merchants' & Miners' Transp. Co. v. Robinson-Baxter-Dissosoway Towing & Transp. Co., 113 C. C. A. 434.]

Appeal from the District Court of the United States, for the District of Montana; George M. Borquin, Judge.

Action by the American Bonding Company of Baltimore, Md., against Arthur H. Brown, as receiver of the First Trust & Savings Bank of Billings, Mont. Judgment for plaintiff, and defendant appeals. Reversed.

Loud, Collins, Brown, Campbell & Wood, of Billings, Mont., and Gunn, Rasch & Hall, of Helena, Mont., for appellant.

Walsh, Nolan & Scallon, of Helena, Mont., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The question in this case is the alleged right of the appellee (complainant in the court below) to be subrogated to an alleged priority which it claims that the state of Montana had in the assets of the insolvent bank of which the appellant is receiver, over the general creditors of the bank. The case was heard upon the bill and answer, the material allegations of the former being expressly admitted by the latter. Those allegations are, in substance, that while the bank was carrying on its business the state of Montana was one of its depositors, having \$25,000 of its money deposited therein, as security for the repayment of which (and such other sums as might be so deposited by the state) the appellee bonding company had previously executed to the state, at the request of the bank, a bond in the sum of \$10,000; that prior to June 14, 1910, the bank became and thereafter remained insolvent, and that on the day mentioned a receiver was appointed of all of its property and effects, in a suit brought against it by the state of Montana in one of its courts; that on the 15th day of December, 1910, the said indebtedness to the state had been reduced to \$10,000 by payments thereon; and that on the last-mentioned date the receiver issued this certificate to the state:

"Receiver's Certificate of Proof of Claim.

"#868.

Receiver's Office,

"Billings, Montana, Dec. 15, 1910.

"This is to certify that Elmer E. Esselstyn, as Treasurer of the State of Montana, has this day made legal and satisfactory proof that he is a gen-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

eral creditor of the First Trust and Savings Bank of Billings, Mont., to the amount of ten thousand (\$10,000.00) dollars, and ——— cents, upon the following claims, to wit:

	Dollars.	Cents.
First mortgage bonds.....		
Time certificate of deposit No. ——— issued by the First Trust and Savings Bank of Billings, Mont.....		
Unpaid draft No.....		
Protest fees on draft No.....		
Savings account No. 1002, the First Trust and Savings Bank of Billings, Mont.....	10,000	00
Interest on Time Certificate of Deposit No.....		
Unpaid Cashier's Check No.....		
Total	10,000	00

"And he, or the lawful assignee of this claim will be alone entitled to the dividends thereon.

"No assignment of this claim, or any portion thereof, will be recognized in the payments of dividends, unless notice of such assignment is given to the receiver and entered upon his books before such dividends are declared, as evidenced by his indorsement hereon. This certificate is to be surrendered to the receiver upon the payment of the final dividend.

"S. G. Reynolds,

"Receiver of the First Trust & Savings Bank of Billings, Billings, Montana."

The bill further alleged that because of the bond the appellee thereupon paid to the state the sum of \$10,000, whereupon "the said state of Montana, by its State Treasurer and Attorney General, appearing as attorneys for it in the said cause," in which the receiver was appointed, "assigned and transferred to your orator its said claim against the said bank, evidenced by the certificate aforesaid, and your orator is now the owner and holder of said claim, and has succeeded and is subrogated to the rights of the state of Montana against the said bank"—the assignment being in the following words:

"Billings, Montana, Dec. 15, 1910.

"For value received I hereby assign the within claim to the American Bonding Company of Baltimore, Maryland.

"Elmer E. Esselstyn, State Treasurer,

"By Albert J. Galen, Attorney General for Montana.

"Witness: S. G. Reynolds."

The bill then alleged that under the laws of the state of Montana, the said state has and at all times had a preferred "right to be paid in full in preference to all other creditors of the said First Trust & Savings Bank, and that by virtue of the facts hereinbefore set forth your orator has a right to be paid the full amount of the said claim so evidenced by the said certificate in full, in preference to the claims of all other creditors," which alleged right the receiver refuses to recognize.

The court below sustained the contention of the state that it is entitled to priority over the general creditors of the insolvent bank upon the ground "that the state, having adopted the common law of England, succeeds to or is vested with a like prerogative of the crown," and that by paying to the state the amount of its bond the surety company became subrogated to such right of the state.

It is conceded that the state of Montana has no statute giving to public debts any priority over those due other creditors, but that state has these statutory provisions in respect to the common law:

"Sec. 3552. Common Law, When Rule of Decision.—The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state, or of the Codes, is the rule of decision in all the courts of this state."

"Sec. 8060. No Common Law in This State.—In this state there is no common law in any case where the law is declared by the Code or the statute; but where not so declared, if the same is applicable and of a general nature, and not in conflict with the Code or other statutes, the common law shall be the law and rule of decision."

Revised Codes of Montana 1907.

It is contended on the part of the appellant that if the common-law prerogative of sovereignty ever existed in Montana by reason of the above-cited sections of the statutes, it was subsequently abrogated by these subsequent provisions of its Revised Codes:

"Sec. 6214. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

"Sec. 6123. A creditor, within the meaning of this title, is one in whose favor an obligation exists by reason of which he is or may become entitled to the payment of money."

"Sec. 6124. In the absence of fraud every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract."

"Sec. 6125. A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another."

"Sec. 6140. In all assignments of property made by any person, association, corporation, copartnership, chartered company or corporation, to trustees or assignees on account of inability of the assignor or assignors at the time of the assignment to pay his or their debts, or in proceedings in insolvency, the wages of the miners, mechanics, salesmen, servants, clerks or laborers employed by such assignor or assignors for services rendered within sixty days immediately previous to such assignment, not to exceed two hundred dollars for each person, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of such assignor."

But did the prerogative right which constitutes the basis of the state's claim ever in fact exist? All of the states with the exception of Louisiana have adopted, in one form or another, the common law of England except where inconsistent with their Constitutions and statutes, and yet nearly all of them have statutes giving preference to taxes, rates, and other debts due the state, over the debts of the citizen, See 26 Am. & Eng. Encyc. of Law (2d Ed.) p. 479. It is there further truly said that:

"Whether a state, in the absence of positive enactment, is entitled to the priority claimed by the crown under the common law appears to be not well settled."

See, on the one side, *State of Maryland v. Bank*, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; *State v. Mayor*, 10 Md. 504; *In re Carnegie Trust Co.*, 151 App. Div. 606, 136 N. Y. Supp. 466; same case on appeal, 206 N. Y. 390, 99 N. E. 1096; *Hoke v. Henderson*, 14 N. C. 12; *U. S. Fidelity & Guaranty Co. v. Rainey*, 120 Tenn. 357, 113 S. W. 397; *Seay v. Bank of Rome*, 66 Ga. 609; *State v. Foster*, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226, 63 Am. St. Rep. 47; and, on the other

side, *Zimmerman, Commissioner of Banking, v. Chelsea Savings Bank et al.*, 161 Mich. 691, 125 N. W. 424; *State v. J. M. Harris*, 2 Bailey (S. C.) 598; *Klinck, Administrator, v. Keckley, Executor*, 2 Hill Eq. (S. C.) 256; *Potter et al. v. Fidelity & Deposit Co. of Maryland*, 101 Miss. 823, 58 South. 713.

Notwithstanding the *Carnegie Trust Company Case* above referred to, we find the Circuit Court of Appeals of the Second Circuit saying, in *Central Trust Co. v. Third Avenue R. Co.*, 186 Fed. 291, 292, 110 C. C. A. 1, 2:

"We regard it as settled law in this state that the state does not succeed as sovereign to all the prerogatives of the British crown, among others the right to a preference for debts due it over all other creditors. It has been expressly held that taxes due the state have no priority of payment out of a fund in court for distribution, unless the priority was expressly given by statute, or unless the fund has come into court impressed with a priority for the tax. *Wise v. Wise Co.*, 153 N. Y. 507, 47 N. E. 788. O'Brien, J., said:

"The contention of the learned counsel for the receiver of taxes rests upon a somewhat novel proposition. It is that from the most ancient times the courts of England have recognized the right of the sovereign, representing the state, to priority of payment over all other claims, though they may have been secured by specific liens; that the people of this state have succeeded to all the prerogatives of the British crown as parts of the common law suitable and applicable to our condition. In support of his contention he has called our attention to various authorities in England and in this country. *Giles v. Grover*, 9 Bing. 130-285; 2 Bac. Abr. p. 363; *Toller on Ex.*, c. 2, p. 259; *In re Columbian Ins. Co.*, 3 Abb. Dec. (N. Y.) 239; *Central Trust Co. v. N. Y. C. & N. R. R. Co.*, 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260; *Union Trust Co. v. I. M. R. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; *U. S. v. State Bank of North Carolina*, 6 Pet. 29-34, 8 L. Ed. 308. The general doctrines contained in these cases would seem, upon a superficial view, to go far in support of the contention upon which this appeal is based, although it should be observed that a very important fact present in this case was absent in the cases cited, and that was the existence of a specific lien at law upon the personal property acquired by a levy under valid legal process in the hands of the sheriff.

"On a closer examination, however, it will be found that they do not sustain the broad principle contended for. They undoubtedly go far enough to sustain the principle that, when a fund is in the hands of the court or the trustee of an insolvent person or corporation, a claim due to the government upon a debt or for taxes is entitled to a preference in certain cases or under certain circumstances. The prerogatives of the crown with respect to the imposition and collection of taxes was the subject of a long and obstinate dispute in England between the people and the executive. Without attempting to ascertain whether the limits of this prerogative have ever been judicially defined with anything like precision, it is entirely safe to say that many of the utterances of the English courts on the subject to be found in the books cannot be considered law here, or even in that country. The great contest with respect to the right of the sovereign to levy and collect what was called "ship money" illustrates the extent to which the claim of prerogative was pushed, the nature of the dispute, and the conflicting views of the judges. 3 *Howell's State Trials*, 826-1254.

"In this country the right of the government to be preferred in the distribution of such a fund exists, under the authorities, in two cases: (1) Where the preference is expressly given by statute, as was the case in *U. S. v. State Bank of North Carolina*, *supra*. (2) Where, before the fund has come to the hands of the receiver or trustee, a warrant or some other legal process has been issued for the collection of the tax or debt, and the fund has come to his hands impressed with a lien in favor of the government in consequence of the proceedings for collection, as was the case in the *Columbian Ins. Co. Receivership*, 3 Abb. Dec. (N. Y.) 239. But where there is no statute

giving the preference, and no warrant or process has been issued for the collection of a tax on personal property, there is no controlling authority for preferring such a claim over specific prior liens in favor of creditors, obtained by levy under attachments or executions. *Roraback v. Stebbins*, 4 Abb. Dec. (N. Y.) 100."

By section 722 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 582) it was provided that:

"The jurisdiction in civil and criminal matters conferred on the district and circuit courts, by the provisions of this title, and of title 'Civil Rights,' and of title 'Crimes,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

The obligations to the respective parties here litigating are manifestly "civil obligations." *Guarantee Co. v. Title Guaranty Co.*, 224 U. S. 152, 160, 32 Sup. Ct. 457, 56 L. Ed. 706.

In *United States v. Bank of North Carolina*, 6 Pet. 29, 35 (8 L. Ed. 308), the Supreme Court said:

"The right of priority of payment of debts due to the government is a prerogative of the crown well known to the common law. It is founded, not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens, and discharge the public debts. The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes. The same policy which governed in the case of the royal prerogative may be clearly traced in these statutes, and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms."

If, as there expressly held by the Supreme Court, the priority of debts due the government of the United States does not stand upon any sovereign prerogative, but is exclusively founded upon their own statutes, we are unable to understand how the right of priority of payment of debts due a state can be founded upon such a prerogative. Surely no state can have any greater sovereign right than the general government of the entire country.

But even if it be conceded that the state of Montana has the right here claimed for it, and it be further conceded that a private party can be subrogated to such prerogative right, which is by no means certain—see *Commissioner of Banking v. Chelsea Savings Bank et al.*, 161 Mich. 704, 127 N. W. 351, where the negative was distinctly adjudged by the Supreme Court of Michigan, and *Guarantee Co. v. Title Guaranty Co.*, supra, where the Supreme Court assumed, for the purposes of the case but without deciding, the affirmative of the question—still, we are of the opinion that upon the facts made the basis

of the bill in the present case, the appellee cannot be properly held to have been subrogated to the prerogative right claimed, for the reason that the suit is based upon the alleged proof of the state as a general creditor of the insolvent bank and a written assignment of *that* claim to the appellee.

For the reasons stated the judgment of the court below is reversed.

WOODRUFF v. YAZOO & M. V. R. CO.

(Circuit Court of Appeals, Fifth Circuit. February 10, 1914.)

No. 2485.

1. PLEADING (§ 111*)—PLEA IN ABATEMENT—DENIAL.

Where a plea in abatement raised an issue of law only, which was overruled, the court properly permitted defendant to plead over to the merits, and refused to render judgment *quod recuperet*, which is only authorized on the denial of a plea presenting an issue of fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 234-236; Dec. Dig. § 111.*]

2. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—LUBRICATOR INDICATOR TUBE—QUESTION FOR JURY.

Where decedent, a locomotive engineer, was injured by the explosion of a lubricator indicator tube when subjected to a steam pressure of but 145 pounds, when it should have had a tensile strength to withstand 300 pounds, whether defendant was negligent in furnishing such tube to plaintiff without subjecting it to the proper test was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 124*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES.

Where a railroad company furnished indicator tubes for use on its engines which were required to withstand a pressure of 150 pounds to the square inch, it was the company's duty, before furnishing tubes to an engineer for use to test them, to ascertain that they had proper tensile strength.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

4. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES.

Where the tensile strength of lubricator indicator tubes used on locomotives could only be ascertained by a test, and tubes which were of proper and of insufficient tensile strength had the same appearance, and a locomotive engineer, using such tubes, had no opportunity for making the test himself, he did not assume the risk of the use of insufficient tubes as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

In Error to the District Court of the United States for Jackson Division of the Southern District of Mississippi; Henry C. Niles, Judge.

Action by Elise H. Woodruff, as administratrix, etc., against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—54

Marcellus Green, Garner Wynn Green, and Marcellus Green, Jr., all of Jackson, Miss. (Ackland H. Jones, of Woodville, Miss., of counsel), for plaintiff in error.

Mayes & Mayes, of Jackson, Miss. (C. N. Burch, of Memphis, Tenn., of counsel), for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This cause comes to this court upon a writ of error to the District Court of Mississippi at Jackson, to review a judgment for the defendant, rendered on a directed verdict in an action to recover damages for personal injuries, consisting in the loss of an eye, which the plaintiff's intestate and husband received, while engaged in the employment of the defendant as a railroad locomotive engineer, by the explosion of an indicator tube of the lubricator of the engine he was in charge of. The action was brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]). The original plaintiff was the injured employé; he died before judgment, and the cause was revived in the name of his wife as administratrix.

Two errors are assigned:

[1] (1) The court erred in not rendering judgment *quod recuperet* upon finding the issue on the first plea of abatement for the plaintiff, and in permitting the defendant to plead to the merits. We think the court below properly permitted the defendant to plead over to the merits, after overruling its plea in abatement. The issue presented by the plea was substantially one of law rather than one of fact, conceding that even in the latter case it would have been proper to deny the defendant the right to answer over. 1 Encyc. Pl. & P. 30, and cases cited. *Kendrick v. Watkins*, 54 Miss. 495, relied on by plaintiff in error, asserts that a judgment *quod recuperet* is proper only when a plea in abatement, presenting an issue of fact, as distinguished from an issue of law, has been overruled. The plaintiff in error should take nothing by her first assignment.

(2) The second assignment is based upon the action of the court below in sustaining the defendant's motion for a peremptory instruction and in giving and not refusing the same. The original plaintiff, J. H. Woodruff, was, at the time of his injury, and for many years had been, a locomotive engineer in the employment of the defendant. When injured he was running between Woodville, Miss., and Slaughter, La., in charge of a freight engine and engaged in interstate commerce. His engine was equipped with what is known as a Nathan No. 8 lubricator, which had four glass tubes, three called feed tubes, and one an indicator tube. The original tubes were furnished to the railroad company by the manufacturer with and as a part of the lubricator. They were tested by the manufacturer under a test which indicated that their tensile strength, as was true of all the parts of the lubricator, was such that they were able to withstand a pressure of 300 pounds to the square inch. When the lubricators came from the factory, the glass tubes were protected by a tin shield with perfora-

tions, which extended around the tubes, to keep the glass from flying in case of explosion. On the engine the plaintiff's intestate was running when injured, the tin shield, with which the factory had equipped the lubricator, had been removed, and a wire coil had been substituted for it around the tube that exploded. The substitution had been made a considerable time before the accident, and the plaintiff's intestate knew of the substitution and of the greater comparative danger from the substituted appliance, as compared with the original, in the event of an explosion. This appears without dispute from the record. With such knowledge of the character of and risk from the substituted appliance, the plaintiff's intestate continued in defendant's employment and in the use of the dangerous appliance for a time long enough to have charged him with the assumption of the risk of the danger arising from the substituted appliance. This also appears without conflict from the record. It is clear that the court, so far as the negligence of the defendant was predicated upon the substituted cover for the indicator tube, properly instructed the jury to find for the defendant, if the defense of assumed risk was still open to the defendant under the federal Employers' Liability Act. This was contested by the plaintiff in the court below. The court below ruled that the assumption of risk, except with relation to defects of the employer's plant covered by the Safety Appliance Acts of Congress (Act March 2, 1893, c. 196, 27 Stat. 531, as amended by Act April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3174]), was still open to the defendant. There is conflict of opinion in different circuits with reference to the construction of the federal Employers' Liability Act in this respect, and the Supreme Court has not definitely ruled upon it. In view of the fact that the judgment in this cause is to be reversed on another ground, and the probability of a controlling decision by the Supreme Court, before the cause is retried, we refrain from deciding that question in this case.

The plaintiff in the court below, as is the case in the state court, relied principally, if not entirely, upon the substituted wire coil for a recovery, and the court below as is true of the Supreme Court of Mississippi, probably considered only this defect in sustaining the defendant's motion for a peremptory instruction. It is now pressed upon us, both in oral argument and in brief by counsel for plaintiff in error, that the evidence shows a negligent defect upon the idea that the indicator tube, which exploded, was not of sufficient tensile strength to withstand the steam pressure, which the engine was intended by defendant to carry, and that, as to this defect, there was no assumption of risk by plaintiff's intestate, since it was not an obvious one, and the record fails to show any knowledge on plaintiff's intestate's part that the tube was of insufficient strength.

The evidence shows that the engine was constructed to carry a steam pressure of 150 pounds to the square inch, and that such pressure was frequently maintained; that at the time of the explosion the steam pressure was only 145 pounds. The automatic safety valve did not permit a greater steam pressure than 150 pounds. The evidence showed that a short time before the accident the indicator tube on the lubricator had

broken, from a cause not disclosed by the record, and that the plaintiff's intestate had replaced it with the tube that exploded and injured him afterwards; that the substituted tube was furnished to the plaintiff's intestate, with others, from the defendant's shop, for the purpose of being used by the intestate in the event that a tube broke while on the road; that the intestate made the substitution in the proper way; that the tube remained intact for eight days, when it exploded; that if there had been a defect in the glass, it would have exploded immediately upon being subjected to steam pressure; but if its insufficiency was due to a lack of tensile strength, and not to a specific imperfection, it might not explode for some time after it was subjected to steam pressure; that the tubes furnished by the manufacturer were tested and made to endure a steam pressure of 300 pounds before being placed in the lubricators. The intestate testified that if the explosion of the tube was due to its insufficiency in tensile strength to resist the steam pressure it had to encounter, it might have gone for some time after being subjected to the strain of steam pressure and then have exploded; that if the tensile strength of a boiler or of a glass tube was not sufficient to stand the pressure, it often happened that the boiler or other glass tube would go for several days under steam, and then explode all of a sudden and for want of tensile strength to hold the pressure.

[2, 3] It was open to the jury to infer from this evidence, recited from the record, that the explosion of the indicator tube was due to lack of sufficient tensile strength to resist the steam pressure the defendant knew it was required to encounter in the ordinary daily operation of the engine, namely 150 pounds, since it is shown to have exploded under a pressure of but 145 pounds; that it should have had a tensile strength of 300 pounds, according to manufacturers' standard, but did not, in fact, have one-half that amount; that the defendant, having furnished the tube to intestate for the purpose for which it was used, must either have known of its insufficiency in this respect, if the tubes were tested by it, or have been in negligent ignorance of it, if no test was made, since its duty would have been to make a test, before furnishing it to the intestate for use on his engine. The issue of the negligence or the absence of negligence in this respect was an issue of fact, which should have been submitted to the jury.

[4] It is clear that the evidence in the record was of a character that required the submission to the jury of the issue of assumption of risk on intestate's part of the insufficiency of the tube in tensile strength, if there was any evidence of such assumption on his part. The sufficient and insufficient tubes in this respect were of the same appearance, and a test was required to tell of the insufficiency. The intestate had no means of making the test, and had the right to assume the tensile sufficiency of the tube that was furnished by his employer, until he acquired knowledge to the contrary. The record does not show such knowledge on his part. His knowledge of the likelihood of an explosion of the tubes, even when of sufficient tensile strength, would not be an assumption of the risk of an explosion of a tube which was of insufficient tensile strength, of which fact he was unaware.

For these reasons, we think the case should have been submitted to the jury, and that the court below erred in directing a verdict for the defendant. The judgment is reversed, and the cause remanded to the District Court for a new trial.

SCHAAP v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 11, 1914.)

No. 4030.

(*Syllabus by the Court.*)

1. INDIANS (§ 35*)—INTRODUCTION INTO INDIAN COUNTRY—APPLICATION OF STATUTE—EXCLUSION OF EVIDENCE.

The provisions relative to the introduction, and the attempt to introduce, intoxicating liquor into the Indian country, found in section 2139 of the Revised Statutes, as amended by the Act of July 23, 1892, c. 234, 27 Stat. 260, and in the Act of January 30, 1897, c. 109, 29 Stat. 506, ceased to apply to portions of Oklahoma which were formerly in the Indian country when those portions respectively ceased to be Indian country.

In the trial of a charge of attempting to introduce intoxicating liquor into the Indian country in violation of these acts, it is error to refuse to permit the defendant to prove that the original Indian title to the land in the town in that part of Oklahoma which was formerly in the Indian Territory, into which town he attempted to introduce the liquor, had been extinguished so that it was no longer Indian country at the time the offense was charged to have been committed. The test of the applicability of these provisions of the acts of Congress cited is whether or not the town, city, or place into which the introduction, or attempt to introduce, is charged to have been made was Indian country at the time the offense is charged to have been committed.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.*]

2. INDIANS (§ 35*)—INTRODUCTION INTO INDIAN COUNTRY—APPLICATION OF STATUTE.

These acts of Congress and the above construction of them apply to charges of introductions of intoxicating liquor and attempts to introduce it into the Indian country, in violation of them from within as well as from without the state of Oklahoma.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.*]

3. INDIANS (§ 35*)—INTRODUCTION INTO "INDIAN COUNTRY."

The criterion to determine what is "Indian country" is that all the country which was declared to be Indian country by the Act of June 30, 1834, c. 161, 4 Stat. 729, remains Indian country as long as the Indians retain their original title, and in the absence of a different provision by treaty or by act of Congress ceases to be Indian country whenever that title is extinguished.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3545-3549.]

4. INDIANS (§ 35*)—INTRODUCTION INTO INDIAN COUNTRY—APPLICATION OF STATUTE.

The Act of March 1, 1895, c. 145, § 8, 28 Stat. 693, 697, which prohibited the introduction of intoxicating liquor into the Indian Territory, is still

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in force so far as it relates to the introduction of such liquor from without the state of Oklahoma into that part of Oklahoma which was formerly the Indian Territory, but it is not in force in so far as it relates to such introduction from within the state of Oklahoma.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.*]

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

John Schaap was convicted of attempting to introduce intoxicating liquors into the Indian country, and brings error. Reversed and remanded for new trial.

Ira D. Oglesby, of Ft. Smith, Ark., for plaintiff in error.

J. V. Bourland, U. S. Atty., of Ft. Smith, Ark., for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and RINER, District Judge.

SANBORN, Circuit Judge. The defendant below was convicted of the charge that at Ft. Smith, Ark., on November 29, 1912, he—

“did unlawfully attempt to introduce into the Indian country, to wit, into that part of the Indian country known as the Choctaw Nation of the Indian Territory, spirituous and intoxicating liquors, to wit, six gallons of alcohol, contrary to the form of the statute,” etc.

At the trial the United States introduced evidence tending to show that the defendant, who was engaged in selling drugs at wholesale at Ft. Smith, on November 29, 1912, delivered two boxes containing intoxicating liquors at the station of a railroad company in that city directed to Palace Drug Store, Kiowa, Okl., and obtained a bill of lading from the railroad company for their transportation to that address. The town of Kiowa is located on what was formerly land of the Choctaw Nation in that part of Oklahoma which was formerly in the Indian Territory. The defendant offered to prove that on November 29, 1912, the Indian title to the land on which the town of Kiowa, the railway station at that town, and the Palace Drug Store, to which the boxes were directed, were situated, was and long had been completely extinguished, but the court, on the objection of the United States, excluded this evidence and over the objections and exceptions of the defendant instructed the jury that they might convict him under section 2139, Revised Statutes, as amended by Act of July 23, 1892, 27 Stat. 260, which declares that:

“Any person who introduces or attempts to introduce any ardent spirits, ale, wine, beer or intoxicating liquor of any kind into the Indian country, shall be punished by imprisonment not more than three years and by fine of not more than three hundred dollars”

—and under Act of January 30, 1897, c. 109, 29 Stat. 506, which provides that:

“Any person who shall introduce or attempt to introduce any malt, spirituous or vinous liquor, including beer, ale and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

shall include any Indian allotment, while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee, without the consent of the United States, shall be punished by imprisonment for not less than sixty days and by a fine of not less than two hundred dollars."

Complaint is made of these and other rulings of the trial court.

[1-4] The defendant offered to prove, not only that the Indian title to the land in the town of Kiowa had been extinguished, but also that before the time that the indictment charged that he committed the offense, the town was situated on 160 acres which had been reserved from allotment and made a town site, that all the land therein had been sold, and unrestricted titles thereto had been conveyed to the purchasers, in accordance with acts of Congress, so that no part of it was held as an allotment or in trust, and that none of the titles to it was inalienable. The charge against the defendant was that he attempted to introduce intoxicating liquor into the Indian country. All the country which was declared to be Indian country by the Act of June 30, 1834, c. 161, 4 Stat. 729, remains Indian country as long as the Indians retain their original title, and in the absence of a different provision by treaty or by act of Congress, ceases to be Indian country whenever that title is extinguished, and there was no different provision regarding the land in the town of Kiowa. *Bates v. Clark*, 95 U. S. 204, 203, 24 L. Ed. 471; *Clairmont v. United States*, 225 U. S. 551, 558, 32 Sup. Ct. 787, 56 L. Ed. 1201; *Evans v. Victor*, 204 Fed. 361, 365, 122 C. C. A. 531, 535.

Counsel for the United States cite, in support of the rulings of the court below, *United States Express Co. v. Friedman*, 191 Fed. 673, 112 C. C. A. 219, *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248, and *United States v. Wright*, 229 U. S. 226, 33 Sup. Ct. 630, 57 L. Ed. 1160. In *United States Express Co. v. Friedman*, the question was whether or not the court should issue a mandamus to compel an express company to transport intoxicating liquor out of the state of Arkansas into that part of the state of Oklahoma which was formerly the Indian Territory. That question was answered in the negative by that part of the Act of March 1, 1895, c. 145, § 8, 28 Stat. 693, 697, which had not been repealed, and which prohibits such an introduction (*Ex parte Webb*, 225 U. S. 663, 681, 691, 32 Sup. Ct. 769, 56 L. Ed. 1248), and this court answered the question in the same way (*Evans v. Victor*, 204 Fed. 367, 368).

In *Ex parte Webb*, 225 U. S. 663, 681, 691, 32 Sup. Ct. 769, 56 L. Ed. 1248, Webb had been indicted and convicted of introducing intoxicating liquors into the Indian country, and he applied to the Supreme Court for a writ of habeas corpus. Because the parties admitted that the liquors had been shipped from Joplin, Mo., to and had been received by Webb within the city of Vinita in Oklahoma, and because the only question before that court on the application for the writ was whether or not the trial court had jurisdiction of the case, the Supreme Court limited its decision to the affirmance of the jurisdiction of the district court on the ground that the transfer of the liquor from one state to another was a violation of that part of the act

of March 1, 1895, which under the commerce clause of the Constitution prohibited the introduction of intoxicating liquors from another state into that part of Oklahoma which was formerly Indian Territory. 225 U. S. 681, 691. The Supreme Court expressly decided, however, that it was unnecessary for it to decide (225 U. S. 676), and it neither considered nor decided whether or not the specific town or place into which the liquor was introduced was Indian country, or whether or not an introduction of liquor into a place in the former Indian Territory which was not Indian country, would have been a violation of section 2139 of the Revised Statutes, as amended by the Act of 1892, or of the Act of January 30, 1897, c. 109, 29 Stat. 506. The question presented in the case at bar was not at issue, and hence could not have been authoritatively decided in the two cases which have been reviewed. Whatever was said in the opinions in those cases that relates in any way to the question now in hand falls under the rules announced by Chief Justice Marshall:

"An opinion in a particular case, founded on its special circumstances, is not applicable to the cases under circumstances essentially different." *Brooks v. Marbury*, 24 U. S. (11 Wheat.) 78, 90, 6 L. Ed. 423. And: "General expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. Virginia*, 6 Wheat. 264, 393, 5 L. Ed. 257; *King v. Pomeroy*, 121 Fed. 287, 294, 58 C. C. A. 209, 216; *Traer v. Fowler*, 144 Fed. 810, 817, 75 C. C. A. 540, 547; *Mason City & Ft. Dodge Ry. Co. v. Wolf*, 148 Fed. 961, 968, 78 C. C. A. 589, 596.

But in *United States v. Wright*, 229 U. S. 226, 232, 236, 238, 33 Sup. Ct. 630, 57 L. Ed. 1160, the Supreme Court, after a studied review and consideration of all the acts of Congress relevant to the question at issue in this case, deliberately and doubtless finally (1) affirmed its decision in *Ex parte Webb* that the act of 1895 was repealed so far as it related to the introduction of intoxicating liquors into what was formerly the Indian Territory from places within the state of Oklahoma, but remained in force so far as it related to such introduction of liquors from without the state, page 236, decided; (2) that section 2139 of the Revised Statutes, as amended by the act of 1892 and the act of 1897, remained in force and applied to the introduction of intoxicating liquors into the Indian country whether from within or without the state, page 268; (3) that "if, and when, and so far as, portions of the Indian Territory ceased to be Indian country, the Acts of 1892 and 1897 would cease to apply," pages 232, 236, and that the test of the prohibition in those acts was "Indian country," while the test of the prohibition under the act of 1895 was the territorial test, was whether or not the introduction was into that part of Oklahoma which was formerly Indian Territory, and that it was immaterial under that act whether the place into which the introduction was made was or continued to be Indian country, page 233. The terms of these acts of Congress which have been quoted in the opening of this opinion, the persuasive reason of the case, and this opinion of the Supreme Court in *Wright's Case* leave no doubt regarding the decision which this court ought to render in the matter in hand. The conviction of the

defendant cannot be sustained under the act of 1895, because the charge and the proof are not of the introduction of intoxicating liquor into that part of the state of Oklahoma which was formerly Indian Territory, but of a vain attempt to introduce it into Indian country, and there is no prohibition of such an attempt in the Act of 1895. Section 2139, as amended by the act of 1892 and the act of 1897, ceased to apply when and so far as any portion of the former Indian Territory ceased to be Indian country. The court refused to permit the defendant to prove that the portion of Oklahoma which was formerly Indian Territory, into which he attempted to introduce intoxicating liquor, had ceased to be Indian country before he made his attempt. That fact, if proved, would have been a perfect defense to the charge against him, and this ruling of the court necessitates another trial of the case, and makes it unnecessary to consider any other question which has been presented.

Let the judgment be reversed, and let the case be remanded to the court below, with directions to grant a new trial.

MULERT v. NATIONAL BANK OF TARENTUM.

(Circuit Court of Appeals, Third Circuit. July 23, 1913.)

No. 1735.

PLEDGES (§ 19*)—DEBTS OR LIABILITIES SECURED—"HOLDER."

A promissory demand note, payable at the Bank of P. to the order of the maker, indorsed by him and delivered to such bank, recited the deposit of certain collateral security for payment of it, or any other liability of the maker to the holder thereof then due, or to become due or thereafter contracted, with full power to the holder to sell, sign, and deliver such security at public or private sale on the nonperformance of the promise to pay or the nonpayment of any of such liabilities, and to apply the residue, after deducting expenses, to pay all of such liabilities as the holder should deem proper, returning the overplus to the maker. *Held*, that the maker must have meant to give to the word "holder" its well-understood, broad, inclusive, legal meaning, as the one in actual or constructive possession of the note and entitled to recover or receive payment, and not to restrict its meaning to the Bank of P.; and hence, where that bank sold the note and delivered the collateral to the transferee, such transferee could hold the collateral as security for notes held by it on which the maker was liable, though never owned by the Bank of P.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 58-63; Dec. Dig. § 19.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit by Justus Mulert, trustee in bankruptcy of M. K. Salsbury, against the National Bank of Tarentum. From a judgment for defendant, the petitioner appeals. Appeal dismissed.

Alvin A. Morris, of Pittsburgh, Pa. (Morris, Walker & Allen, of Pittsburgh, Pa., of counsel), for appellant.

J. Merrill Wright and Albert Schultz, both of Pittsburgh, Pa. (McKelvy & Wright, of Pittsburgh, Pa., of counsel), for appellee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. This case involves a dispute between the National Bank of Tarentum, Pa., and Justus Mulert, trustee in bankruptcy of M. K. Salsbury, as to the ownership of some \$3,600 now held by the bank, subject to the order of the court below. The referee, and the court on his certificate, awarded the money to the bank. Thereupon the trustee took this appeal.

Restricting ourselves to a statement of the facts pertinent to the question before us, we note that on November 30, 1904, Salsbury executed a negotiable demand note payable to his own order, indorsed the same in blank, and in consideration of \$17,000 delivered it, together with certain collateral, to the Bank of Pittsburgh. The note was in form following:

"17,000.

Pittsburgh, Pa., Nov. 30, 1904.

"On demand, after date, for value received, I promise to pay to the order of ——— myself ——— with interest ——— seventeen thousand ——— dollars, having deposited herewith as collateral security for payment of this or any other liability or liabilities of the undersigned to the holder hereof, now due or to become due, or that may be hereafter contracted, the following property, viz.:

175 shares Midland Coal Co.

50 " U. S. Steel Corp. Pfd. delivered 11/17/08,
with the further right to call for additional security and on failure to respond this obligation shall be deemed to be due and payable without demand or notice, with full power and authority to the holder hereof to sell and assign and deliver the whole of the above-mentioned security, or any part thereof, or any substitute thereof, or any additions thereto or any other property at any time given unto or left in possession of the holder hereof, at any broker's board, or at public or private sale, at the option of the holder hereof, on the nonperformance of this promise, or the nonpayment of any of the liabilities above mentioned, at any time or times hereafter, without demand, advertisement or notice, and with the right to purchase as any other bidder at any public sale thereof held by virtue hereof. And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales, so to be made, to pay any, either or all of said above-mentioned liabilities, as the holder hereof shall deem proper, returning the overplus to the undersigned.

"[Signed] M. K. Salsbury.

"Payable at

"The Bank of Pittsburgh, N. A."

Indorsed: "M. K. Salsbury."

He subsequently paid the interest thereon, part of the principal, and lifted the steel stock. In the meantime he became liable to the bank on another note, for the security of which his collateral concededly stood, the total of his indebtedness being, on August 6, 1909, some \$10,600, with collateral worth over \$15,000. On August 6, 1909, the Bank of Pittsburgh sold the said two notes to the Third National Bank for the amount unpaid thereon, and delivered therewith Salsbury's collateral. Three days thereafter the Third National Bank bought from the National Bank of Tarentum a note for \$2,800, and from the First National Bank of Natrona another for \$4,300, on both of which Salsbury was liable as indorser. At the time of these purchases the latter banks agreed to repurchase the notes on request of the Third Na-

tional. Pursuant to request, such repurchase was subsequently made by the Tarentum Bank, and as part of the same transaction it also bought from the Third National the Salsbury notes, and therewith the collateral the latter bank had received from the Bank of Pittsburgh. Thereafter Salsbury having been adjudged bankrupt, and the collateral having been sold by the National Bank of Tarentum by order of court, there was applied, by consent, after cost of sale, \$11,192.53, to the payment of the purchased original indebtedness of Salsbury to the Bank of Pittsburgh. The balance of \$3,657.47 the National Bank of Tarentum claimed, as the holder of the original note, to apply to the two Natrona and Tarentum notes owned by it, and on which it alleged Salsbury's collateral was liable, by virtue of the agreement of Salsbury in his original note that his stock was—

“deposited herewith as collateral security for payment of this or any other liability or liabilities of the undersigned to the holder hereof, now due or to become due, or that may be hereafter contracted.”

On the other hand, it was contended by Salsbury's trustee that the only liabilities secured by the collateral were those of Salsbury to the Bank of Pittsburgh, the original holder of the note. This question, be it observed, is the only one here involved and decided.

The case turns on the meaning and scope of the word “holder.” In ascertaining that meaning, we must bear in mind that the instrument in which it is here used is a promissory, demand note, negotiable in form, payable to the order of the maker, who has conferred negotiability upon it by an unconditional indorsement. Such indorsement imparted to the note the possibility of passage by delivery and of ownership without assignment. Possession, the mere holding of such a note, without assignment, created title and ownership, and conferred on such holder the legal capacity to bring suit and enforce payment. Indeed, the possession or holding, the sanctity of the holding, and the integrity and incontestability of such held paper, constitute the foundations on which the whole superstructure of negotiable paper, and the legal principles applicable thereto, stand. When applied to negotiable paper, the word “holder” has a recognized meaning. Thus in *Bowling v. Harrison*, 47 U. S. (6 How.) 248, 12 L. Ed. 425, it is said:

“The term ‘holder’ is properly applied to the person having possession of the paper.”

In *Crocker-Woolworth Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169,

“The term ‘holder’ is properly applied to the person having possession of the paper and making the demand, whether in his own right or as an agent for another. * * * ‘Holder’ is a word of the same import as ‘bearer.’ * * * ‘Holder’ is a general word applied to any one in actual or constructive possession of the bill, and entitled at law to recover or receive its contents from the parties to it.”

So in *Rice v. Hogan*, 38 Ky. (8 Dana) 133:

“The ‘holder’ of a bill is he who is in possession of the bill, and is legally entitled to the benefit of it.”

And *Baring v. Lyman*, 1 Story, 396, Fed. Cas. No. 983:

"A bill is properly said to be negotiated, when it has passed into the hands of the payee, or indorsee, or other holder for value, who thereby acquires a title thereto."

In *National Exchange Bank v. Wiley*, 195 U. S. 257, 25 Sup. Ct. 70, 49 L. Ed. 184, the Supreme Court quotes with approval Byles on Bills, that:

"Holder is a general word, applied to any one in actual or constructive possession of the bill, and entitled at law to recover or receive its contents from the parties to it."

Recognizing, therefore, as *Salsbury* must be held to have recognized, the legal principles applicable to the creation, currency, and ownership of negotiable paper, and invoking, as he did, the application of such principles by indorsing and negotiating a negotiable note payable to his own order, and thus conferring upon it the possibility of others holding it, it would seem that by the use of the words "the holder hereof," "liability or liabilities of the undersigned to the holder hereof," "with full power and authority to the holder hereof to sell and assign and deliver the whole of the above-mentioned security," and "to apply the residue of the proceeds of such sale or sales, so to be made, to pay any, either or all of said above-mentioned liabilities, as the holder hereof may deem proper, returning the overplus to the undersigned," he meant to give to the word "holder" in this note its well-understood, broad, inclusive, legal meaning, and to enhance the negotiability of his paper by conferring on every subsequent purchaser thereof all the advantages enjoyed by holders of such paper. There is nothing in the note itself to evidence an intent on his part to restrict the word "holder" to the Bank of Pittsburgh, and to so restrict it we must make it read "the holder, to wit, the Bank of Pittsburgh." This, we think, would be to write into the note a change for which we have no warrant. The mere fact that the note is made payable at that bank serves no more to limit the word "holder" than it would have broadened it if the note was made payable at some other bank.

After mature consideration, we are of opinion the court below committed no error, and the appeal should be dismissed.

UNITED STATES ex rel. MYLIUS v. UHL

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 65.

1. ALIENS (§ 47*)--RIGHT TO ENTER--DISQUALIFICATION--CONVICTION OF MISDEMEANOR INVOLVING "MORAL TURPITUDE."

Conviction of an Englishman of criminal libel against the King by charging him with bigamy in putting away his lawful wife in order to obtain a woman of royal blood was not a conviction of a misdemeanor involving moral turpitude, within Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 899 (U. S. Comp. St. Supp. 1911, p. 500), providing that aliens who have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been convicted of a felony, or other crime or misdemeanor involving moral turpitude, shall be excluded from the United States.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 106; Dec. Dig. § 47.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4580, 4581.]

2. ALIENS (§ 54*) — EXCLUSION — CONVICTION OF MISDEMEANOR INVOLVING MORAL TURPITUDE.

Whether an alien seeking to enter the United States has been convicted of a misdemeanor involving moral turpitude so as to justify his exclusion as provided by Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. p. 899 (U. S. Comp. St. Supp. 1911, p. 500), must be determined by the judgment of conviction, and not from the testimony adduced at the trial.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

3. ALIENS (§ 46*) — EXCLUSION — CONVICTION OF MISDEMEANOR INVOLVING MORAL TURPITUDE.

Where an alien has been convicted of a crime which in its essence does not involve moral turpitude, he cannot be excluded on that ground when applying to enter the United States because of evidence outside the record showing that he is a depraved person.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 105; Dec. Dig. § 46.*]

Appeal from the District Court of the United States for the Southern District of New York.

Habeas corpus by the United States, on the relation of Edward F. Mylius, against Byron H. Uhl, Acting Commissioner of Immigration, to obtain relator's discharge from detention under a deportation warrant. From an order sustaining the writ (203 Fed. 152), respondent appeals. Affirmed.

On appeal from an order of the District Court of the United States for the Southern District of New York sustaining a writ of habeas corpus and discharging the relator, who is an alien and a subject of the King of England. He arrived at the port of New York, September 22, 1912, and was brought before a Board of Special Inquiry on the charge that he had been convicted of a criminal libel which, the appellant contends, is a crime involving moral turpitude under the act of February 20, 1907, c. 1134 (34 Stat. L. 898 [U. S. Comp. St. Supp. 1911, p. 499]), as amended. The board found against the relator upon this issue and he was ordered deported. He appealed to the Secretary of Commerce and Labor who affirmed the decision of the board. Thereafter the relator sued out the writ of habeas corpus as before stated.

H. Snowden Marshall, U. S. Atty., and John Neville Boyle, Asst. U. S. Atty., both of New York City, for appellant.

Simon O. Pollock, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The appellee was convicted of libel in the King's Bench Division of the High Court of Justice and sentenced by the Lord Chief Justice, who presided at the trial, to 12 months' imprisonment, this being the maximum punishment under the law. The indictment was laid under the fifth section of Lord Campbell's Libel Act which provides for the punishment of any person who "shall maliciously publish any defamatory libel."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] The libel in question charged, in substance, that the present King of England during the year 1890 was married to the daughter of Admiral Sir Michael Culme-Seymour at the Island of Malta and that he subsequently abandoned her in order to obtain a woman of royal blood for his wife, and, by so doing, committed bigamy. It further charged that the daughter of Admiral Seymour, if still living, is the lawful queen of England and her children are the only rightful heirs to the English throne.

The question presented is whether a conviction under a charge of having maliciously published a defamatory libel justifies the exclusion of the appellee under a statute which provides that aliens "who have been convicted of * * * a felony or other crime or misdemeanor involving moral turpitude" shall be excluded from the United States. 34 Stat. L. page 899.

The question may be narrowed still further to the inquiry, Does the publication of a defamatory libel necessarily involve moral turpitude? We are of the opinion that it does not. We, of course, do not lose sight of the extreme brutality of the libel, involving, as it does, not only the King, but the Queen, her children and the daughter of Admiral Seymour. But we are dealing with laws designed to exclude from this country those whose records abroad are such as to warrant the inference that they are depraved and will continue to belong to the criminal classes. In construing these laws we should proceed on broad general lines, considering all persons as equal before the law. A decision which makes the infamy of the libel dependent upon the rank of the person libeled cannot be defended either in law or ethics. If it would not involve moral turpitude to publish this libel of a field laborer in Devon or a street sweeper in London, it would not involve moral turpitude to publish it regarding the Lord Chancellor or even the King.

Indirectly such a libel may involve the crime of lèse-majesté or treason, but the only crime charged in the indictment is maliciously publishing the defamatory libel as stated. Issue was joined on that charge and the verdict determined that the defendant had published such a libel, but nothing more. He was not convicted of lèse-majesté or treason and even should the testimony on the trial show him to be guilty of other crimes, the immigration officers must confine themselves to the judgment in determining whether or not he has been convicted of a crime involving moral turpitude. It is not enough that the evidence shows that the immigrant has committed such a crime, the record must show that he was convicted of the crime. To illustrate: A statute of the United States (Rev. St. § 2139) makes it a crime to give a glass of whisky to an Indian under the charge of an Indian agent. A conviction under this section would not be proof of moral turpitude, although the evidence at the trial might disclose the fact that the whisky was given for the basest purposes.

[2] On the other hand, the rule which confines the proof of the nature of the offense to the judgment is clearly in the interest of a uniform and efficient administration of the law and in the interest of the immigration officials as well, for if they may examine the testi-

mony on the trial to determine the character of the offense, so may the immigrant. How could the law be speedily and efficiently administered if an immigrant convicted of perjury, burglary or murder, is permitted to show from the evidence taken at the trial that he did not commit a felony, but a misdemeanor only?

Confining the inquiry, therefore, to the judgment of conviction of having published maliciously a defamatory libel, it is manifest that moral turpitude is not an essential ingredient of this crime, which was a misdemeanor at common law. The sentence did not include hard labor and was to be served, not in a state prison, but in a local London institution where, presumably only misdemeanants are confined. Again, as pointed out by Judge Noyes, editors and publishers have often been convicted of publishing criminal libels who were wholly ignorant of the libel and its publication. So, too, corporations have been convicted of criminal libel, but, having no souls, it can hardly be said that their act involved moral turpitude. That a person wholly free from moral turpitude may be convicted under Lord Campbell's Act is practically admitted by the United States Attorney. At page 4 of the appellant's brief he said:

"It is also true that there may perhaps be cases of criminal libel of the nature Judge Noyes has indicated which are not infamous crimes and do not involve moral turpitude."

We reach, therefore, the conclusion:

First. That the immigration officers act in an administrative capacity. They do not act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convicted does or does not involve moral turpitude.

Second. That this question must be determined from the judgment of conviction and not from the testimony adduced at the trial.

[3] Third. That the law must be administered upon broad general lines and if a crime does not in its essence involve moral turpitude, a person found guilty of such crime cannot be excluded because he is shown, aliunde the record, to be a depraved person.

Fourth. That the law must be uniformly administered. It would be manifestly unjust so to construe the statute as to exclude one person and admit another where both were convicted of criminal libel, because, in the opinion of the immigration officials, the testimony in the former case showed a more aggravated offence than in the latter.

Fifth. That the crime of publishing a criminal libel does not necessarily involve moral turpitude. It may do so, but moral turpitude is not of the essence of the crime.

The order is affirmed.

CHAPPELL & CO., Limited, et al. v. FIELDS et al.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 172.

1. COPYRIGHTS (§ 7*)—THEATRICALS—SCENE.

While the voice, motions, and postures of actors and mere stage business possess no literary quality and cannot be copyrighted, a scene possessing literary quality may be protected.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 5; Dec. Dig. § 7.*]

Matter subject to copyright. See note to *Cleland v. Thayer*, 58 C. C. A. 273.]

2. COPYRIGHTS (§ 7*)—THEATRICALS—SCENE.

A copyrighted scene in a theatrical performance owned and controlled by complainants represented an old miller informing a meeting of English villagers of the danger of a French invasion, it being agreed that in case such a thing should happen a bell should be rung to call them together for resistance. A moving picture company then appears and arranges to take a moving picture representing Napoleon and French soldiers and a young girl beseeching Napoleon to release her sweetheart, who is about to be executed as a spy. The miller, seeing this, rings the bell, the villagers rally, and set upon the party which is being photographed for the picture. Defendants produced a play at the end of the first act of which there was a scene laid in California, in which a countryman warns others of the danger of a Japanese invasion, whereupon it is agreed that if such a thing occurred an alarm bell should be rung, so that the countryside might turn out to resist it. Then a moving picture company appears, arranging to take a picture of a Japanese general and troops and the effort of a woman to save a spy from execution by importuning the general. One of the countrymen, seeing this, rings an alarm bell, and the neighbors turn out and a fight ensues with the moving picture company. *Held*, that complainants' scene involved literary quality, was subject to copyright which was infringed by defendants' scene.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 5; Dec. Dig. § 7.*]

3. COPYRIGHTS (§ 85*)—DRAMATIC PERFORMANCE—PRELIMINARY INJUNCTION.

A preliminary injunction will be granted more readily to restrain the infringement of a copyright in dramatic productions than in other cases, since the delay involved in waiting for a final decree would generally amount to the denial of justice.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 78; Dec. Dig. § 85.*]

4. COPYRIGHTS (§ 34*)—ALIENS.

Copyright Act, March 4, 1909, c. 320, § 8, 35 Stat. 1077 (U. S. Comp. St. Supp. 1911, p. 1475), confers on aliens rights under United States copyrights when the state or country of which he is a citizen or subject grants similar rights to United States citizens, and declares that the existence of reciprocal conditions shall be determined by the President of the United States by proclamation made from time to time as the purpose of the act may require. *Held*, that where the President issued a proclamation stating that citizens of Great Britain were entitled to the benefit of the United States copyright laws, such proclamation was a conclusive determination that the laws of Great Britain permitted United States citizens reciprocal copyright privileges and the courts were bound to presume that such conditions continued to exist until a different proclamation was made.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 36; Dec. Dig. § 34.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit by Chappell & Co., Limited, and another, against Lew M. Fields and another. Judgment for complainants, and defendants appeal. Affirmed.

William Klein, of New York City (Julian Arthur Leve, of New York City, of counsel), for appellants.

William D. Leonard, of New York City (George H. Gilman, of New York City, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. Chappell & Co., Limited, of London, one of the complainants, bought of the German authors and composers the exclusive right to produce the musical comedy called "Filmzauber" in England, the United States, and Canada. They copyrighted in the United States the music and at least the dialogue of the scene, presently to be considered from the English adaption of the play as a dramatico-musical composition under the title "The Girl on the Film." The other complainant, Frohman, has become the owner of the exclusive right to produce the play in this country. The defendants are producing a comedy called "All Aboard," containing a scene which the complainants charge is an infringement of the Girl on the Film. In all other respects the two productions are entirely different.

In the second act of the Girl on the Film a scene occurs in which an old miller informs a meeting of English villagers of the danger of a French invasion, and it is agreed that in case such a thing happen a bell shall be rung to call them together for resistance. Then a moving picture company appears and arranges to take a moving picture representing Napoleon and French soldiers and a young girl beseeching Napoleon to release her sweetheart, who is about to be executed as a spy. The miller, seeing this, rings the bell, the villagers rally and set upon the party which is being photographed for the moving picture.

In the defendant's play, at the end of the first act, there is a scene laid in California in which a countryman warns others of the danger of a Japanese invasion, whereupon it is agreed that if such a thing occur an alarm bell shall be rung, so that the countryside may turn out to resist it. Then a moving picture company appears, arranging to take a picture of a Japanese general and troops and the effort of a woman to save a spy from execution by importuning the general. One of the countrymen, seeing this, rings the alarm bell. The neighbors turn out, and a fight ensues with the moving picture company.

[1] The idea of the scene in the Girl on the Film is shown to be quite novel. It is certainly reproduced in All Aboard with substantially the same dramatic incidents. While the voice, motions, and postures of actors and mere stage business may be imitated because they have no literary quality and cannot be copyrighted (*Bloom v. Nixon* [C. C.] 125 Fed. 977; *Savage v. Hoffman* [C. C.] 159 Fed. 584), a scene like the one under consideration has literary quality, and may be protected by copyright (*Daly v. Palmer*, 6 Blatchf. 264, Fed. Cas. No. 3,552; *Daly v. Webster*, 56 Fed. 483, 4 C. C. A. 10; *Brady v.*

Daly, 83 Fed. 1007, 28 C. C. A. 253). We agree with Judge Hough in thinking that this scene was a subject of copyright, and that the defendants have infringed.

[2, 3] It is, however, contended that, because the defendants deny that they or the authors of the scene in *All Aboard* ever saw the Girl on the Film performed or ever read the book, and aver that the scene in *All Aboard* is an original and independent production, a preliminary injunction should not be granted. We are satisfied, however, that such authors must have at least heard of the scene. Preliminary injunctions are granted more readily in dramatic than in other cases because the delay involved in waiting for a final decree would generally amount to a denial of justice.

[4] Finally, the defendants contend that Chappell & Co., Limited, being a subject of the King of England, was not entitled to the protection of our copyright law. Section 8 of the Act of March 4, 1909, is as follows:

"Sec. 8 (Issue of, to author, assigns, etc.—alien rights.) That the author or proprietor of any work made the subject of copyright by this Act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this act: Provided, however, that the copyright secured by this act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only:

"(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

"(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

"The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time as the purposes of this act may require."

April 9, 1910, President Taft issued a proclamation stating that citizens of Great Britain are entitled to the benefit of our copyright law, with an exception not material in this case. This proclamation is conclusive evidence of the fact that Great Britain at that date gave our citizens the benefit of her copyright laws on substantially the same basis as to her own citizens, and the courts have no right to review it. Since that time Great Britain has made changes in her own law which the defendants say result in a denial to our citizens of substantially the same rights as her own citizens enjoy, and insist that the court should determine this question and act accordingly. Congress, in our opinion, has confided the whole subject to the Executive exclusively. The President is required, by proclamation, to determine from time to time, as the purposes of the act may require, the existence of these reciprocal conditions. As no proclamation has been made since that of April 9, 1910, we are bound to presume that in the opinion of the Executive these conditions do still exist.

The decree is affirmed.

WASHINGTON WATER POWER CO. v. KOOTENAI COUNTY et al.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914.)

No. 2302.

1. TAXATION (§ 449*)—ASSESSMENT—REVIEW BY COURTS—GROUNDS.

An assessment for taxation, ratified and approved by the board of equalization of the county with certain slight modifications after hearing evidence on behalf of the property owner as well as the county, would not be interfered with by the courts except for fraud or the clear adoption of a fundamentally wrong principle.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 790-799; Dec. Dig. § 449.*]

2. TAXATION (§ 449*)—SCOPE OF REVIEW.

In a suit to have an assessment for taxation declared void and to have the amount of taxes fairly and equitably due ascertained and determined by the court, where the county did not appeal from that portion of the judgment granting the relief asked as to the assessment on certain property, that matter was not open for consideration.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 790-799; Dec. Dig. § 449.*]

Appeal from the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the Washington Water Power Company against Kootenai County and another. From a judgment granting insufficient relief to plaintiff, it appeals. Affirmed.

John P. Gray, of Cœur d'Alene, Idaho, F. T. Post and A. G. Avery, both of Spokane, Wash., for appellant.

Robert H. Elder and N. D. Wernette, both of Cœur d'Alene, Idaho, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The appellant is a corporation of the state of Washington engaged in the business of developing and distributing electrical energy for power and lighting purposes in Eastern Washington and Northern Idaho; one of its extensive power plants being at Post Falls, in Kootenai county, Idaho, consisting of various pieces and items of property, which were assessed in the year 1911 by the county assessor of Kootenai county. Claiming that such assessment was unequal, excessive, and fraudulently made by the assessor, and likewise subsequently fraudulently ratified and approved by the board of equalization of the said county, except in minor respects in which it was modified, the appellant filed in the court below its bill by which it sought the judgment of the court that the taxes levied pursuant to such assessment be declared null and void, and that the defendant county be enjoined from asserting or attempting to assert any lien upon any of the property so assessed for or on account of the taxes, and that the defendant assessor and ex officio tax collector, and his successors in office, be restrained from selling any of the said property for such taxes, and that the court "ascertain and determine what taxes

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

are fairly and equitably due upon the property of the plaintiff described in the bill of complaint, and that upon the payment thereof to the defendant tax collector, his successor or successors in office, the said defendant county, its officers and agents, be required and commanded to accept the same as in full for the taxes for the year 1911 upon the said property of the plaintiff, and to enter said taxes against said property upon the books of said county as paid in full."

[1] The general allegations of fraud against the officers of the county are followed by specific averments in respect to their acts, which it is unnecessary to set out in detail. Among other things, the bill alleges that at the regular meeting of the board of equalization of the defendant county held in the month of July, 1911, the complainant appeared and made application to it for a reduction of the values placed upon its property so assessed, and that the board heard evidence on behalf of the complainant as well as on behalf of the county, and:

"That at said hearing this plaintiff made a showing of facts and showed to the said board that the said valuations so pretended to be placed upon its said property by the said assessor were wrongful, excessive, and more than twice the actual cash value and full cash value of the property hereinbefore described, and it appealed to said board of equalization for relief. That the said matter was taken under advisement by the said board, and thereafter, and on the 28th day of July, 1911, the said board passed upon the application of this plaintiff and ordered that the assessment on a certain building located on the Indian reservation be reduced from \$600 to \$25, and the assessment on a branch power line in Kootenai county be reduced from 25 miles to 23 miles; and as to all of the balance of plaintiff's application and petition the said board of equalization arbitrarily, in conflict with the facts so before it, unjustly, wrongfully, and illegally declined, refused, and neglected to give to the plaintiff any relief whatever, and ordered the said assessment so pretended to have been made by the said assessor to stand as the assessment upon the plaintiff's property hereinbefore described."

The law is thoroughly settled that in such cases the courts have nothing whatever to do "with anything less than fraud, or a clear adoption of a fundamentally wrong principle" in the making of the assessment and levy. *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636; *Albuquerque National Bank v. Perea*, 147 U. S. 87, 13 Sup. Ct. 194, 37 L. Ed. 91; *Stanley v. Supervisors of Albany*, 121 U. S. 535, 550, 7 Sup. Ct. 1234, 1239 (30 L. Ed. 1000), in which latter case the court said, among other things:

"In nearly all the states, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions. Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them—of animals, houses, and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the Constitutions of some states is complied with, when designed and manifest departures from the rule are avoided.

"To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the

assessing officers had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on such assessment cannot be recovered back in an action at law, any more than money collected on an erroneous judgment of a court of competent jurisdiction before it is reversed.

"When the overvaluation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally not merely on a single individual but on a large class of individuals or corporations, a party aggrieved may resort to a court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due."

On the trial of the present case in the court below a large amount of evidence was given on behalf of the respective parties, which was manifestly very carefully considered by the learned trial judge, resulting in findings by him to the effect that the charges of fraud contained in the bill were not sustained by the evidence, and also in findings to the effect that there was a large overvaluation in some of the assessments, which included, among others, these two items, "Bear-trap dam and small dam at Post Falls, 562,500.00," and, "Railway spur and bridge, 48,750.00"—the aggregate of the whole assessment made being \$2,529,250, while the court found the aggregate cash value of the whole of the property to be \$1,718,636.37.

The trial judge found that the two dams above mentioned were overvalued in the assessment to the extent of \$386,229, and that the railway spur and bridge were likewise overvalued to the extent of \$28,954.61, and that such overvaluations were so gross, and the manner of making them so unreasonable, that the complainant was entitled to protection against the taxes on those overvaluations, which protection it gave by the decree entered, denying the complainant the relief prayed in all other respects.

[2] As there is no appeal on behalf of the county from that portion of the judgment awarding the complainant the limited relief mentioned, that matter is not for our consideration. And being of the opinion that the evidence would not justify us in disturbing the findings of the trial court to the effect that there was no fraud on the part of the officers of the county in either the making or the approval of the assessments, and would not justify us in holding that they were made under any fundamentally wrong principle, we must affirm the judgment.

Judgment affirmed.

SAN PEDRO, L. A. & S. L. R. CO. v. DAVIDE.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914.)

No. 2,266.

1. MASTER AND SERVANT (§ 286*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action by a railroad section hand for injuries sustained while he and other employes were returning to their camp on a number of hand cars, where there was evidence tending to show that the employes upon the car immediately preceding plaintiff's car negligently slackened their speed without warning, thus causing a collision between such car, plaintiff's car, and the car following plaintiff's car, defendant's negligence was properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. COMMERCE (§ 27*)—INTERSTATE—RAILROADS—"INTERSTATE COMMERCE"—EMPLOYERS' LIABILITY.

A railroad section hand, engaged in ballasting the main track of a railroad which carried freight and passengers between different states, was engaged in interstate commerce within the federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, § 1, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1322).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

Employes engaged in interstate commerce within employers' liability acts, see note to Baltimore & O. R. Co. v. Darr, 124 C. C. A. 571.

For other definitions, see Words and Phrases, vol. 4, pp. 3724-3731.]

3. COMMERCE (§ 27*)—RAILROADS.

A railroad section hand, who had been engaged in interstate commerce during the day, was still so engaged while riding on a hand car furnished by the railroad company at the conclusion of his day's labor, by direction of his foreman, for the purpose, not only of returning from his place of work to the camp maintained by the company, but also for the purpose of taking the hand car to a point where it was to be removed from the track so as to leave the road open to the passage of trains.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

4. MASTER AND SERVANT (§ 198*)—RELATION OF PARTIES—ACCIDENTS WHILE GOING TO OR FROM WORK.

Railroad employes, while being carried as part of their daily service to and from their place of work, are fellow servants, even if there is no agreement that they shall be so carried, if such be the implied agreement or regular custom of the railroad company, assented to by the employes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 493-514; Dec. Dig. § 198.*]

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

Action by Martini Davide against the San Pedro, Los Angeles & Salt Lake Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A. S. Halsted and Pennel Cherrington, both of Los Angeles, Cal., for plaintiff in error.

Harris & Swanwick, Burt Chellis, and Chas. E. Donnelly, Jr., all of Los Angeles, Cal., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error was in the employment of the plaintiff in error as a section hand. He was engaged in ballasting the track of the main line of the plaintiff in error between Las Vegas and Caliente in the state of Nevada. There were about 80 men employed on the work. On April 25, 1911, the men quit work at 5 o'clock in the evening, and were returning to their camp on hand cars, of which there were seven or eight. The defendant in error, with five or six others, was riding on the third car from the front, with his back to the car ahead of him, and was assisting in propelling the hand car. The cars were going at a speed of from 9 to 10 miles an hour. The car in front of the defendant in error was going at the same speed with the others until, while passing through a tunnel, the men on that car became tired and slackened their speed, and the car came out of the tunnel slowly. At that point the car on which the defendant in error was, following rapidly, collided with it, and thereupon the car immediately following the one on which he was, struck his car, and by these collisions the defendant in error was thrown off and injured.

The cause of action was founded on the federal Employers' Liability Act of April 22, 1908, as amended April 5, 1910. The complaint alleged that the defendant in error was acting under the direction of the section foreman of the railroad company, and that he was injured by reason of the negligence of other employes of the company, who materially slackened the speed of the hand car immediately ahead of his, and by reason of the negligence of other employes in allowing the car following his to collide with his car. At the conclusion of the evidence, the plaintiff in error requested the court to direct a verdict in its favor on the ground of the insufficiency of the evidence to show negligence on its part, and on the ground that at the time of the accident the defendant in error was not engaged in any act of interstate commerce. The two questions thus suggested are the only questions presented to this court.

[1] The jury, under proper instructions from the court, found that the fellow servants of the defendant in error were negligent as alleged in the complaint. In view of all the testimony, we think that question was properly submitted to the jury. There was evidence tending to show negligence in that the employes of the plaintiff in error who were upon the car immediately preceding that on which the defendant in error was, were negligent in slackening their speed without warning to the men on the car which followed them, thus causing the collision.

[2, 3] The principal question in the case is whether or not the defendant in error was engaged in interstate commerce. The work which he had been doing on the day on which he was injured was undoubtedly work done in interstate commerce. He had been engaged in ballasting the main track of a railroad which carried freight and passengers

between different states. *Pedersen v. Del., Lack. & West. R. R.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125. And although at the time when he was injured he was returning to camp at the conclusion of his day's labor, he was doing so at the direction of his employer. He got upon the hand car on which he rode under the order of the section foreman, to take it back to a certain designated place on the line of the road. He was not only engaged in returning from his place of work to the camp maintained by the company, but he was engaged in taking the hand car to a point where it was to be removed from the track so as to leave the road open to the passage of trains. He had not been discharged from his day's work. He was still acting under the orders of the section foreman. The foreman testified that he used seven or eight hand cars, sometimes nine, in transferring the men back and forth, and that before the accident he directed the men where to put the cars on the track, and instructed them how to run the same.

[4] It is the well-established rule that railroad employes while being carried as part of their daily service to and from their place of work are fellow servants; and, even if there is no agreement that they shall be so carried, it is sufficient if such be the implied agreement or the regular custom of the railroad company, assented to by the employes. *Dayton Coal & Iron Co. v. Dodd*, 188 Fed. 597, 110 C. C. A. 395, 37 L. R. A. (N. S.) 456, and cases there cited. And if, as held in the *Pedersen Case*, a railroad employe is engaged in interstate commerce when he is merely carrying material for repair to a place where a bridge*used in interstate commerce is being repaired, or, as held in *Lamphere v. Oregon R. & Nav. Co.*, 196 Fed. 336, 116 C. C. A. 156, an engineer is engaged in interstate commerce while proceeding on the right of way under orders to take charge of a train engaged in interstate commerce, no reason is perceived why a section hand, engaged in propelling a hand car furnished him by the railroad company to convey him to his camp, as the concluding part of his daily service of ballasting a track used in traffic between states is not, while so doing, engaged in interstate commerce.

We find no error. The judgment is affirmed.

THE ARGO.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1914.)

No. 2,292.

1. SEAMEN (§ 29*)—INJURY TO SERVANT—DANGEROUS MACHINERY.

Claimant, who was fireman and oiler on a tugboat, slipped as the vessel rolled in heavy weather, and his foot passed through a guard and was crushed in the machinery. The guard, which was placed there four years before for the protection of the employes, was of sheet iron, placed on the inside of the engine standards and fastened only at the top. It gave way at the bottom, allowing claimant's foot to pass through and held it so he could not withdraw it. *Held*, that a finding that such guard was danger-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ous and its maintenance negligence, which rendered the owner liable for the injury was sustained by the evidence.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 186, 188–194; Dec. Dig. § 29.*]

2. DAMAGES (§ 69*)—ACTIONS FOR PERSONAL INJURY—INTEREST.

In cases of tort in admiralty for personal injury, interest is not allowable except from the time the amount of damages has been judicially ascertained.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 137–140; Dec. Dig. § 69.*]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Clinton W. Howard, Judge.

Proceeding in admiralty by the Pacific Towboat Company, owner of the tug Argo, for limitation of liability. From a decree awarding damages to Ivan Nordstrom, intervening claimant, petitioner appeals. Modified and affirmed.

C. H. Hanford, of Seattle, Wash., for appellant.

Walter S. Fulton, Calvin S. Hall, and Howard G. Cosgrove, all of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. [1] The appellant was the owner of the tug Argo. The appellee, who was 20 years of age, and without experience as a marine fireman, had been five weeks on the Argo as a fireman and oiler, when on November 22, 1910, while he was oiling the machinery, he slipped, his left leg going against the lower part of a thin iron guard between the passageway and the crank pit. The guard gave way, allowing the appellee's foot to go into the crank pit. He attempted to withdraw his foot, but the lower edge of the guard held it until the engine was stopped. His foot was so severely crushed under the revolving cranks that amputation became necessary. The guard was of sheet iron, not more than one-sixteenth of an inch in thickness, and possibly less. It had been placed in position about four years before the accident, under the direction of one Chesley, who was at that time the manager of the owner. The guard was attached to the standards of the engines, which stood about five feet in height, and about two feet apart, and it was placed on the inside of the columns, that is to say, on the side toward the crank pit, and not on the side toward the passageway. It was fastened at the top by bolts to the standards, but it was not fastened at the bottom. The appellee had brought an action at law against the towboat company to recover damages for the injuries he had received, and the case was about to be tried, when the towboat company, the appellant herein, filed its petition in the court below for limitation of liability. The appellee thereupon filed his claim, and on March 3, 1913, a final decree was rendered in his favor, awarding him \$5,000 damages, and interest thereon from November 22, 1910, and costs.

The appellant assigns error to the findings of the court below, that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the injuries suffered by the appellee were caused by a defective guard, that the guard was a dangerous contrivance, and that the company's maintenance of the same for years was negligence imputable to the owner of the tugboat. It is contended that it was physically impossible for the accident to have happened in the manner described by the appellee, that his testimony is unbelievable, and that there is no evidence to support the decree in his favor. No theory of the accident is offered by the appellant, and it is not suggested how it could have occurred otherwise than as described in the appellee's testimony. Nor is there anything in the testimony of the witnesses, including those who at the time of the accident came to his assistance, to indicate that the accident did not occur precisely as the appellee stated that it did. We find nothing incredible in his testimony. The vessel was going at full speed in heavy weather. It lurched, causing him to lose his balance. His foot went into the crank pit, and was there crushed. The only obstacle which stood in the way of his foot was the sheet iron guard attached to the engine standards. It is the decided weight of the testimony that the iron was attached only at the top, that it was loose at the bottom, and that it would give way when struck by the foot.

There can be no question that such a guard was a dangerous contrivance. It was worse than no guard at all. It offered but the delusive semblance of protection, and served, as the court below aptly said, as a trap. Had it not been there, the appellee might have withdrawn his foot before it became seriously injured. Although there was some testimony that the purpose of placing the sheet iron upon the standards was not to protect the employes, but to prevent the splashing of oil from the revolving wheels upon the side of the boat, the weight of the evidence accords with the testimony of the former manager of the tug, who testified that he had ordered it put there for the safety of the men. We find nothing in the evidence to sustain the contention that the guard was of the kind that was usually installed in vessels on Puget Sound. It was not shown that in any other vessel was such a guard placed on the inside of the columns and fastened only at the top. The evidence that in one or two instances boats had no guards at all does not avail to establish a custom which justified the use of the appellant's guard. It is obvious that a boat with no guards at all would be safer than the appellant's boat. It was the general opinion of the experts who testified that such a guard was necessary, and that it should be securely fastened at top and bottom. In view of the plain facts of the case, it would seem that such testimony might be deemed superfluous, for it is our judgment that the duty of guarding such a space between the standards is so plain as to be self-evident, and that a compliance therewith is necessary to render a ship seaworthy as to employes, and to furnish the latter a safe place in which to work. That it was feasible to do so in the present case is shown by the fact that, after the accident, the guard upon the Argo was placed outside the standards, and securely fastened both at top and bottom.

[2] We find no merit in the contention that the appellee was award-

ed damages in an excessive amount, but we find error in the allowance of interest on the amount of the award from the date of the accident to the date of the final decree. While damages for loss or injury to property or for the nonpayment of money may, in the discretion of the court, be compensated in admiralty by the allowance of interest (*Hemmenway v. Fisher*, 20 How. 258, 15 L. Ed. 799; *The Scotland*, 118 U. S. 507, 6 Sup. Ct. 1174, 30 L. Ed. 153; *The Maggie J. Smith*, 123 U. S. 349-356, 8 Sup. Ct. 159, 31 L. Ed. 175; *The Albert Dumois*, 177 U. S. 240, 255, 20 Sup. Ct. 595, 44 L. Ed. 751), in cases of tort for personal injuries, interest is not allowable until the extent of the damages is judicially ascertained (*Burrows v. Lownsdale*, 133 Fed. 250, 66 C. C. A. 650). In *Union Steamboat Co. v. Chaffin's Adm'r's*, 204 Fed. 412, 122 C. C. A. 598, in a proceeding for limitation of liability against death and personal injury claims, where the final decree was not rendered until four years after the filing of the commissioner's report fixing the amounts due the damage claimants, it was held that, on the confirmation of the report and final decree, it was not an abuse of the court's discretion to allow interest on the claims from the date when the report was completed. But the allowance of interest in that case was based expressly upon the consideration that the amounts due were judicially ascertained at the time of the filing of the report.

The decree will be modified by striking therefrom the allowance of interest from the date of the injury to the date of the decree. In other respects it is affirmed. As the attention of the court below was not directed to the error of allowing the interest, the appellee will be allowed his costs on the appeal.

LACORAZZA v. CANTALUPO.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 97.

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—DANGER—NOTICE.

In an action for injuries to a servant by the explosion of a heater connected with a sprinkler apparatus, due to its being permitted to freeze, whether defendant had been notified of the danger, and of the necessity of keeping fire in the heater during freezing weather, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—APPLIANCES—EXPLOSION—ACTIONABLE NEGLIGENCE.

In an action for injuries to a servant by the explosion of a heater connected with a sprinkler apparatus, evidence that the explosion was due to defendant's failure to keep a fire in the heater during freezing weather *held* to justify a finding of actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. DAMAGES (§ 170*)—PERSONAL INJURIES—EVIDENCE.

In an action for personal injuries, evidence as to the number and character of plaintiff's family was inadmissible, as bearing on the amount of his damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 496, 497; Dec. Dig. § 170.*]

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a judgment of the District Court, Southern District of New York, in favor of defendant in error, who was plaintiff below. The action was brought to recover for personal injuries sustained in consequence of the explosion of a heater connected with a fire protection sprinkler apparatus located on premises occupied by defendant for the conduct of his business, Cantalupo being one of defendant's employes. The sprinkler apparatus was installed by the owner of the building with assent of Lacorazza, tenant of two floors, the latter agreeing to pay part of the cost of installation. The heater was included in the system for the purpose of preventing the freezing of water in the supply tank or the pipes, so that the system might be always efficient. If ice should once form to any extent, and thereafter fire was kindled in the heater, there was, of course, the possibility that the water, in pipes and heater below the ice pack, being unable to circulate, might be turned into steam and expanded sufficiently to cause an explosion. This was what happened on the day plaintiff was injured. In prior winters Lacorazza had a stove on this floor for heating the premises, but upon installation of the heater it was removed. Thereafter they could be warmed in cold weather only by lighting a fire in the heater. For three or four days preceding the accident, fire was so kindled in the morning, but it was allowed to go out at night.

W. L. O'Brien and Amos H. Stephens, both of New York City, for plaintiff in error.

Franklin Pierce, of New York City, for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The action was brought against two defendants, Lacorazza and the Vogel Company, which installed the heater. The negligence specifically charged against the latter practically resolved itself into the single question whether or not the heater or pipes immediately connecting therewith had been provided with a safety valve. As to that question the testimony was conflicting; the jury found for the defendant company and that part of the case has not been brought here by writ of error.

[1] The plaintiff's theory as to negligence on the part of Lacorazza was this: The heater, with his entire approval, was placed on his premises, in that part of the building which he leased; they were occupied by himself and his employes. How they should be used was for him to prescribe. He had authority to direct or to allow his employes to kindle a fire in this heater.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

There was testimony to the effect: That in cold weather the water in the supply tank and pipes therefrom might freeze. That the Vogel Company inspector, who came to examine the apparatus, four days before the accident told Lacorazza of this liability to freeze; indeed, the water had actually frozen when he got there. That he further told him that in such weather the fire should be kept going all the time, night as well as day, so as to prevent the formation of ice in the tank; that it was dangerous to allow ice to form in the tank. This testimony was contradicted, but it was for the jury to decide whether notice of the danger and of the necessity of keeping up the fire was given to Lacorazza; their verdict shows conclusively that they found such notice was given.

[2] The proof further shows that after the inspector's visit the fire was not kept up continuously; defendant gave no directions to his employes to keep it going; it was allowed to go out each night and was kindled anew each morning, no matter how cold the temperature was. Upon the proof as the jury found it, it might fairly be held that defendant was negligent in allowing the heater to be thus handled, and the jury's finding that Lacorazza did not do all that was reasonably prudent to make the use of this heater safe for his workmen working about there was a proper one. The court would not have been justified in withdrawing such a case from the jury.

The exception to refusal to nonsuit is overruled.

[3] The only other substantial question in the case is as to plaintiff's testimony as to his family. His counsel asked him: "Have you a family?" He began to answer, "I, my wife—" when he was at once interrupted by defendant's counsel, who objected that testimony as to his family was irrelevant and immaterial. If this were all—this statement that he had a wife—the matter would be unimportant; elsewhere in the record Agnes Cantalupo testified to disbursements that had been made for doctors, medicines, etc., and it appeared, without objection, that she was plaintiff's wife. *Metropolitan Street Railway Co. v. Kennedy*, 82 Fed. 158, 27 C. C. A. 136. But plaintiff's counsel was not satisfied; evidently he had not familiarized himself with the decisions of the federal courts, for in face of the objection, he insisted on a full answer to his question, arguing that having a family "bears in some respect on his ability to do." He convinced the trial judge, who overruled the objection, saying: "It bears on the question of injury to his earning power." Exception was duly reserved. The question was then answered, plaintiff stating that he had "a wife and seven children."

We do not see what bearing the possession of a wife and seven children has upon a man's "earning power"; but all question as to the admissibility of such testimony in the federal courts is foreclosed by the opinion of the Supreme Court in *Penn. Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141. It was there held that in actions of this sort such testimony is improper, and should be excluded, and that it is reversible error to admit it over proper objection and exception. See, also, *Baltimore, etc., R. Co. v. Camp*, 81 Fed. 807, 26 C. C. A. 626; *Ches. & Ohio R. R. v. Stojanowski*, 191 Fed. 720, 112 C. C. A. 310; *N. Y. Elec. Eq. Co. v. Blair*, 79 Fed. 896, 25 C. C. A. 216.

We regret very much that we are constrained to reverse this judgment, because, in view of the injuries concededly received, the amount of the verdict seems entirely reasonable, and quite possibly the improper testimony did not operate to enlarge its amount; but unless this court is prepared to hold that it will not accept the rulings of the Supreme Court on questions of law, in cases precisely similar to these in which such rulings are made, we see nothing else to do except to reverse the judgment, because of this error in the admission of testimony.

Judgment reversed.

In re ABRAMSON et al.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 89.

BANKRUPTCY (§ 314*)—CLAIMS—ALLOWANCES—PROOF—JUDGMENT IN FAVOR OF STATE—PENALTIES.

Bankr. Act July 1, 1898, c. 541, § 57j, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), provides that debts owing a state as a penalty or forfeiture shall not be allowed except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, etc., and section 63a declares that debts of a bankrupt may be proved and allowed against his estate which are a fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against the order, then payable or not, etc. *Held*, that a judgment recovered against the bankrupts by the state for their alleged violation of Agricultural Law (Consol. Laws N. Y. 1909, c. 1) § 32, in selling or offering skimmed milk for sale without marking the containers with a label showing that it was skimmed and not pure milk, was not provable, nor allowable, not being a fixed liability, except to the extent of the pecuniary loss the state sustained by the act out of which the penalty arose, together with costs and interest as provided by section 57j.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469-473, 478, 483-487, 489, 490; Dec. Dig. § 314.*]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of bankruptcy proceedings of Nathan Abramson and Aaron Fichhandler, individually and doing business as Shavertown Creamery Company. Petition by Aaron Fichhandler to revise an order denying a petition to stay the enforcement of a judgment recovered by the state of New York against the bankrupts for violation of the Agricultural Law, § 32. Affirmed.

Lewkowitz & Schaap, of New York City, for petitioners.

Thomas Carmody, Atty. Gen. (Robert P. Beyer, Dept. Atty. Gen., of counsel), for respondent.

C. Wickersham, of New York City, amicus curiæ.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. February 17, 1911, the state of New York recovered in a civil action the sum of \$17,241.13 against the Shaver-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

town Creamery Company, as penalties for violation of section 32 of the Agricultural Law, in selling or offering for sale skimmed milk, without marking the containers with a label showing that it was skimmed and not pure milk. Subsequently it brought another action for similar penalties of \$16,600.

May 3, 1913, Abramson and Fichhandler, copartners, trading as the Shavertown Creamery Company, were, on their own petition, adjudicated bankrupts, both individually and as partners.

May 12th the bankrupts filed a petition in the District Court asking that the state of New York, as plaintiff, be stayed from enforcing the said judgment or prosecuting the said action until 12 months after the adjudication, or, if within that time the bankrupts should apply for a discharge, then until the question of the discharge be determined. Judge Holt denied this petition on the ground that the debts were not provable by virtue of the provisions of section 57j and were therefore not dischargeable under section 17 of the Bankruptcy Act.

The bankrupts contend that there is a difference between the proof and the allowance of a claim and say that the judgment may be proved under section 63a, even though section 57j prevents it from being allowed. The provisions of sections 63a and 57j are as follows:

"Sec. 63 (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments."

"Sec. 57 (j) Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

Therefore they say that the judgment being a provable debt is dischargeable under section 17, which provides that a discharge in bankruptcy shall release a bankrupt from all his provable debts, with certain exceptions which do not cover this judgment.

It must be admitted that on the face of things this argument is logical. However, the provisions under consideration are not wholly harmonious and we would not come to a conclusion so against public policy as that Congress intended bankrupts to be released from all liability for violating laws passed to protect the health of the community unless absolutely compelled to do so. Considering section 63 alone, neither penalties for violations of law nor damages arising out of such violation can be proved because they are claims in tort. On the other

hand, a judgment recovered before adjudication for a definite sum could be proved, irrespective of the cause of action. But section 57j takes away from judgments for penalties their character as fixed liabilities. If the legislation stopped there, such judgments could not be proved under section 63a and would not be discharged under section 17. But section 57j in favor of the lawmaker further provides that he may recover any pecuniary damage sustained because of the act of violation. Reading the two sections together, we think that judgments for penalties are not debts which can be proved or allowed as such because they are not for a fixed liability, but that any pecuniary loss the lawmaker has sustained by the act out of which the penalty arose, together with actual and reasonable costs and interest, may be proved because of the provision in section 57j. So construed the act is perfectly reasonable. The lawmaker who has suffered no pecuniary loss is not permitted to share in the assets of the estate with creditors who have. On the other hand, bankrupts who have violated laws passed for the public good cannot escape punishment by going into bankruptcy. The order is affirmed.

GOSHORN v. MURRAY.

(Circuit Court of Appeals, Third Circuit. February 10, 1914.)

No. 1790.

BANKS AND BANKING (§ 167*)—DEPOSITS—OWNERSHIP OF CHECKS—TRUST FOR COLLECTIONS.

Complainant deposited certain checks to the credit of his account in the bank of which defendant was appointed receiver, which checks the bank, before its failure, sent to its correspondents in the city, where the checks were payable. The checks were credited to the bank's account and drafts drawn against such account which, except for the checks, would not have been sufficient to have paid the drafts. *Held* that, though the checks, pending collection, remained in the hands of the bank as a trustee, with the right to charge them back in case of nonpayment, such relation ceased when the bank closed after collecting the checks and using a part of the proceeds, creating the relation of mere debtor and creditor between complainant and the bank, and hence complainant was not entitled to an accounting as against the bank's receiver on the theory that the checks never became the bank's property but were held by it for collection.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 579-582; Dec. Dig. § 167.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Bill by L. R. Goshorn against C. C. Murray, receiver of the Cosmopolitan National Bank, for an accounting of the proceeds of certain checks deposited by complainant with the bank immediately before it closed. Judgment for complainant (197 Fed. 407), and defendant appeals. Reversed.

John S. Wendt, of Pittsburgh, Pa., for appellant.

Lyon & Hunter, of Pittsburgh, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BUFFINGTON, Circuit Judge. In the court below, Goshorn, the plaintiff, filed a bill in equity against Murray, receiver of the Cosmopolitan National Bank, praying an accounting for the proceeds of certain checks deposited by him with said bank immediately before it closed. The grounds of accounting were: First, that the receipt of such checks by the bank was alleged to be fraudulent in that the bank was then insolvent and such insolvency known to its officers; secondly, that such checks never became the property of the bank but were held in trust for collection. On final hearing, the court found against the plaintiff on the first contention and in his favor on the second. It subsequently entered a decree adjudging the receiver, in due course of administration, pay Goshorn the sum involved. Thereupon the receiver took this appeal.

As an examination of the testimony has not satisfied us that the court below committed error in its findings as to the first ground, viz., that of insolvency, we confine ourselves to the second ground above stated. From the proofs it appears that plaintiff, who was collector of delinquent taxes for the city of Pittsburgh, had a deposit account in the bank. On September 3, 1908, he indorsed in blank and deposited in the defendant bank certain checks and vouchers of the Pennsylvania Railroad Company on banks in Philadelphia in payment of its taxes for \$96,469.21, and another check for \$278.06, whereupon his deposit account was duly credited with said amounts, viz., \$96,747.27. The same day the bank forwarded the said checks and vouchers to Philadelphia for collection and credit; \$50,363.17 going to the Third National, and \$46,384.10 to the Southwark National Banks of that city. The Cosmopolitan had with each of these banks two accounts, one for collections, the other for deposits. These deposit accounts were used for the purpose of having funds in Philadelphia on which the Cosmopolitan could draw for the benefit of itself or its customers. On its account with the Southwark National Bank, the Cosmopolitan was paid interest. There is some dispute between counsel as to what followed, but in view of the fact that all of the checks remitted, save the small one noted, were drawn by the Pennsylvania Railroad Company on banks in Philadelphia, and in the course of business would all be paid on September 4th, we see no reason to question the finding of the court below:

"That on September 4th the Third National Bank of Philadelphia received the checks and vouchers, collected the same from the payers thereof and credited the checks and vouchers, or the proceeds thereof, respectively to the general deposit account of the Cosmopolitan National Bank."

On September 4th the Cosmopolitan drew a draft for \$5,000 in favor of a third party on the Southwark Bank, and on September 3d drafts for \$9,000, and September 4th drafts for \$29,000, on the Third National Bank. At the close of business, therefore, on September 4th, the situation of the three banks with reference to the Goshorn checks was as follows: The Cosmopolitan Bank had on deposit in an interest-bearing account in the Southwark National Bank a credit of \$51,047.94, of which amount \$46,384.10 was the proceeds of the checks deposited by Goshorn on September 3d. Against this credit the Cos-

mopolitan had issued its outstanding draft of \$5,000. With the Third National Bank the Cosmopolitan had on deposit in a noninterest-bearing account a credit of \$63,528.33, of which amount \$50,363.17 was the proceeds of checks deposited by Goshorn on September 3d. Against this credit it had issued outstanding drafts of \$38,000. From these facts it follows: First, that, none of Goshorn's deposit having defaulted, the deposit made by Goshorn and credited by the bank was subject to no charging back; second, that the Cosmopolitan Bank had used said checks as its own and had received credit for their collected proceeds as a deposit; third, that it had drawn drafts against such established deposits, which drafts were not justified, save on the basis of the Cosmopolitan using the proceeds of the Goshorn checks as its own money to pay them. Under such facts and conditions, which was the status when the receiver took charge of the bank on the morning of September 5th, had the plaintiff a right to maintain this bill? If his status was that of depositor, clearly not, for the relation of a bank to a depositor is simply that of debtor and creditor. *National Bank v. Millard*, 10 Wall. 152, 19 L. Ed. 897. The right of a creditor to a mere money decree against the debtor for the amount of his debt affords no ground of support to a bill in equity for an accounting. The right to an accounting could only exist in this case if there was a trust relationship between the parties. Assuming, for present purposes, that these checks, when deposited and credited to the plaintiff, still, and pending collection, remained in the hands of the bank as a trustee with the right of charging them back in case of default, such relation assuredly had ceased to exist when the bank closed, by reason of the fact that the bank had not only collected the checks but it had used the collected proceeds as its own, deposited them in its own deposit account, and had exercised its ownership thereof by drawing drafts which could only be paid by using some part of such deposited proceeds. Assuredly, if these two Philadelphia banks had closed on the morning of September 5th, the loss of these proceeds would have fallen on the bank and not on the plaintiff. The whole case turns on the question of fact: What was the status and situation of Goshorn and the bank on the morning of September 5th? Clearly that relation was one of debtor and creditor, depositor and banker. It follows this bill to account cannot be maintained.

The decree below is therefore reversed, and the case remanded, with directions to dismiss the bill.

DU PUY v. POST TELEGRAM CO.

(Circuit Court of Appeals, Third Circuit. January 31, 1914.)

No. 1765.

1. COPYRIGHTS (§ 12*)—VALIDITY—AUTHORSHIP.

Where complainant's copyrighted article containing a proposed program for "Peace Day" in the public schools was taken almost exclusively from a United States Bureau bulletin compiled by another, complainant was not entitled to a copyright thereon, for want of original authorship.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 14, 15; Dec. Dig. § 12.*]

2. COPYRIGHTS (§ 12*)—MATERIAL SUBJECT TO COPYRIGHT—PUBLIC DOCUMENTS.

Copyright Act (Act March 4, 1909, c. 320, 35 Stat. 1077 [U. S. Comp. St. Supp. 1911, p. 1474]) § 7, provides that no copyright shall subsist in the original text of any work which is in the public domain or in any publication of the United States government, or any reprint, or in whole or in part thereof. *Held*, that an article, entitled "Peace Day in Uncle Sam's Schools," purporting to contain a proposed program for observance of such day, taken almost exclusively from a United States bulletin published by the Bureau of Education, and compiled by the secretary of the American School Peace League, was not copyrightable.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 14, 15; Dec. Dig. § 12.*]

Matter subject to copyright, see note to *Cleland v. Thayer*, 58 C. C. A. 273.]

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Action by William A. Du Puy against the Post Telegram Company. Judgment for defendant, and complainant brings error. Affirmed.

Vroom, Dickinson & Scammell, of Trenton, N. J., for Du Puy.

Ott & Carr, of Camden, N. J., for Post Telegram Company.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below William A. Du Puy, the plaintiff, brought suit against the Post Telegram Company to recover a penalty of one dollar for each of 5,000 copies of its newspaper, issued May 14th, which publication plaintiff alleged violated his copyright. At the termination of the proofs the court below directed a verdict for the defendant. Thereupon plaintiff sued out this writ, assigning for error such action by the court below. In the view we take of the case we find it necessary neither to detail nor discuss the proofs, which tended to show that the plaintiff had himself sent and offered for sale his article to the New York Times and 16 other newspapers prior to obtaining a copyright therefor, that he had so sold to the New York Times a copy thereof, which it was alleged was not marked copyrighted, or, if marked copyrighted, was not then copy-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

righted and was so marked in violation of section 29 of the Copyright Law, which provides that:

"Any person who shall knowingly issue or sell any article bearing a notice of United States copyright which has not been copyrighted * * * shall be liable to a fine of one hundred dollars."

Passing by these questions, the further proofs tended to show that the United States Bureau of Education in March, 1912, issued its official bulletin No. 8, whole No. 476, entitled:

"Peace Day (May 18). Suggestions and material for its observance in the Schools. Compiled by Fannie Fern Andrews, Secretary of the American School Peace League."

This bulletin was prepared by Mrs. Andrews at the request of the Bureau. It contained a Peace Day program suggested for use in the schools, a special article on the significance of the 18th of May as the culmination of many recited events in the history of the peace and arbitration movements, and a summary of things that could be done by government by using the army and navy budget for such purposes. All these and numerous other features of this bulletin, in several instances in the exact wording of the bulletin, appeared in an article in the issue of May 14, 1912, of the Post Telegram, the defendant, a newspaper published at Camden, N. J. In addition thereto the article recited at length the steps already taken in New York for the celebration of the day, together with interviews by prominent educators.

[1] The publication in the Post Telegram was of a syndicate matrix furnished by the New York Times. It was used by the defendant without knowledge that any of the matter was, or was claimed to be, copyrighted. It subsequently appeared that on May 12th the plaintiff, who was a newspaper correspondent, had published in the Washington Star an article entitled "Peace Day in Uncle Sam's Schools," and on May 13, 1912, had the same copyrighted. The basis of such article was the peace bulletin already referred to, in many parts its exact wording being used, in other instances a change of a word or sentence here and there, but taken as a whole and from the standpoint of authorship the bulletin was the authority and origin of the article. Looking then at substance, bearing in mind the purpose of securing to authors the exclusive rights to their respective writings, we have in the plaintiff neither the author who originated nor a writer of his own. Not only is the basis of authorship lacking, but another barrier stands in the way of such attempted monopoly. This bulletin was a public official document, one which by its public character was by statute excepted from copyright appropriation.

[2] Section 7 of the Copyright Act provides:

"That no copyright shall subsist in the original text of any work which is in the public domain, * * * or in any publication of the United States government, or any reprint, or in whole or in part, thereof."

Seeing, then, as we do, that there was no original authorship in this Star article, that it was but a word redress of the substance of Mrs. Andrew's article, it is clear that a copyright thereof would be wholly

at variance with that constitutional purpose which is the object of copyright legislation, namely, "securing for limited times to authors the exclusive right to their respective writings." Had Mrs. Andrews' treatise been copyrighted, her copyright would have been violated by the Star article; for, as we have seen, the compiler of the latter finally admitted it was impossible for him to point out any substantial part thereof that is not taken from her article. It follows therefore that what she gave to the public in an official bulletin could not afterwards be taken from that public under the guise of copyright.

The judgment below is therefore affirmed.

JAMESON v. UNITED STATES FARM LAND CO.

(Circuit Court of Appeals, Eighth Circuit. January 28, 1914.)

No. 3899.

BROKERS (§ 49*)—COMPENSATION—FAILURE TO COMPLETE CONTRACT.

A contract by which defendant employed plaintiff to procure S. to undertake the sale of 108,000 acres of land for more than \$3,000,000 to numerous separate purchasers of separate tracts, to be made during many months of time, provided that if defendant made a sale or sales contract with S. at a price of \$35 an acre plaintiff would be paid a commission of 5 per cent. and a further sum of \$25,000, conditioned, however, upon the fulfillment of the contract by S., it being thereby agreed that the commission was not earned, due, or payable except upon the fulfillment of the contract by S., the contract further providing that when defendant had received the net sum of \$300,000 there was earned and would be paid plaintiff \$20,000, and that a like sum would be earned and paid when each additional sum of \$300,000 had been received by defendant. *Held*, that the purpose of the second condition was not merely to fix the time of payment of the commission, but that its chief object was to fix the amount of commission that would be earned under various circumstances, and thereby the damages which plaintiff could recover if a contract was made with S., but not performed by him; and hence, defendant having expressly conditioned its liability for a commission upon the fulfillment by S. of a sale or sales contract and the receipt by defendant of the sums specified, there could be no recovery where no contract with S. was ever made, conceding that ordinarily a broker may recover, though no legally binding contract has been made between the customer and his principal, if their minds meet on the substantial terms of the contract.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 70-72; Dec. Dig. § 49.*]

Compensation of broker as dependent on ability or willingness of purchaser to perform contract, see note to *Robertson v. Allen*, 107 C. C. A. 265.]

On motion for rehearing. Denied.

For former opinion, see 206 Fed. 889, 124 C. C. A. 549.

PER CURIAM. The opinion in this case, which may be found in 206 Fed. 889, 124 C. C. A. 549, states the facts which condition the decision. The motion for a rehearing insists that the plaintiff should have been entitled to go to the jury because (1) it is an implied term of an ordinary contract between a broker and his principal that if the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

broker procures a customer able, ready, and willing to perform the contract tendered by the principal, and the latter fails or refuses to make or perform it on his part the broker is entitled to recover, and that there was substantial evidence in this case that the plaintiff procured such a customer, but the defendant refused to make the contract it had offered, and (2) that it is not indispensable to a recovery by the broker for such a breach that a contract legally binding be made between the customer and the principal, but it is sufficient that their minds meet on the substantial terms of their contract, and that the principal arbitrarily or capriciously refuses to make or prevent the making of the proposed contract, and that the record in this case presents substantial evidence of such a case.

Conceding the law to be as stated, there are nevertheless reasons which seem to us sound why the evidence in this case was insufficient to sustain a verdict in favor of this broker. In the first place his agreement with the defendant was not the ordinary broker's contract for a commission on the proposed sale or contract, but it was a unique agreement, in that it expressly provided in writing in the defendant's letter of September 21, 1911, when and on what conditions only the plaintiff's commission should be earned and paid.

"We hereby agree to give you," reads the accepted offer of the defendant, "in event of our making a sale, or sales contract, with M. W. Savage, of Minneapolis, at a price of thirty-five (\$35) dollars per acre, a commission of five (5%) per cent., and a further sum of twenty-five thousand (\$25,000) dollars, conditioned, however, upon the fulfillment of the contract by Mr. Savage; it being hereby agreed that the commission is not earned, due, or payable except upon the fulfillment of the contract by Mr. Savage. When we have received the net sum of three hundred thousand (\$300,000) dollars in cash from Mr. Savage's sales, there is earned, and will be paid to you, the sum of twenty thousand (\$20,000) dollars, and a like sum will be earned and paid when a further sum of three hundred thousand (\$300,000) dollars has been received by us, and so on, until you have received your full commission."

The purpose of the second condition in this contract was not merely to fix the time of payment of the commission to be earned, its chief object was to fix the amount of the commission that would be earned under various circumstances and thereby the damages which the plaintiff could recover if the defendant made the contract with Savage, but the latter did not completely perform it. The proposed agreement with Savage related to the sales of 108,000 acres of land for more than \$3,000,000, to numerous separate purchasers of separate tracts, to be made during many months of time. Without this condition the plaintiff's damages would have been uncertain and speculative in case of Savage's partial failure to perform the contract, for who could have determined in such a contingency how many acres he would have sold if he had not failed to sell. It was to avoid this uncertainty that the defendant expressly conditioned its liability to the plaintiff for a commission upon the fulfillment by Savage of a sale or sales contract with him, and the receipt by the defendant from Savage's sales of the net sums in cash specified in the contract, conditions of the fulfillment of which there is no evidence in this record.

Moreover, a second examination and consideration in the light of

the law and the ingenious and powerful argument of counsel of the evidence upon the question whether or not the substantial terms of the proposed agreement between Savage and the defendant were ever agreed to by them has but confirmed our minds in the view that there is not in the record such substantial evidence that their minds met upon the vital terms relating to the interest to be paid by Savage and the percentage of cash and the manner of paying it as required the court to submit this case to the jury. The motion for a rehearing must accordingly be denied; and it is so ordered.

RICHMOND LIGHT & R. CO. v. BLAU.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 52.

1. EVIDENCE (§ 157*)—WEIGHTS—PRIMARY TESTIMONY.

On an issue as to the weight of certain junk, evidence of a witness, who was present on each occasion when the cars were weighed, saw the weights on the scales, and noted them down, was primary testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460-470; Dec. Dig. § 157.*]

2. EVIDENCE (§ 317*)—COMMUNICATIONS BY TELEPHONE—HEARSAY.

On an issue as to the weight of certain junk, evidence of plaintiff's witness that he was given the weight of the first shipment over the telephone by defendant's superintendent, who had charge of the transaction throughout, was not objectionable as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

3. APPEAL AND ERROR (§ 1050*)—REVIEW—RULINGS ON EVIDENCE—PREJUDICE.

Where, in an action to recover a portion of the price paid for certain iron, because of a shortage, there was evidence that both parties subsequently to the contract had estimated the value of the iron at \$12,000, defendant was not prejudiced by the admission of the testimony that plaintiff's agent and defendant's superintendent both estimated the value of the iron at the same sum before the contract was signed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

In Error to the District Court of the United States for the Eastern District of New York.

Action by Adolph Blau against the Richmond Light & Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Kennedy & Eadie, of New Brighton, N. Y. (William H. Wadhams, of New York City, of counsel), for plaintiff in error.

Henry B. Singer, of New York City (David L. Podell, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WARD, Circuit Judge. Adolph Blau, the plaintiff, brought suit against the Richmond Light & Railroad Company on the following contract:

S. F. Hazelrigg,
Vice Prest. & Genl. Manager,
Richmond Light & Railroad Co.,
New Brighton, New York City.

July 26th, 1905.

For and in consideration of the sum of two thousand (\$2000) dollars on account, receipt whereof is hereby acknowledged, the Richmond Light & Railroad Company agrees to sell to Jacob Smith, the rails and scrap iron at Brook St. Car Barn and Concord Car Barn—with the exception of what we may wish to retain for our own use—at the rate of \$17.25 per gross ton for the rail and \$16.00 per gross ton for the scrap, balance of purchase price, according to weight, to be paid August 9th, 1905, and rails and scrap iron to be removed at that time. None to be removed until full amount is paid.

A. Blau
Richmond Light & Railroad Company,
T. J. Mullen, Superintendent.

Signed—Jacob Smith.

It was proved at the trial that the name of Blau was inserted in the contract before it was signed because Smith was only acting in his behalf, and the iron was to be paid for with his money. Any objection that Blau was not the proper party plaintiff was waived because not taken either by demurrer or answer (Code of Civil Procedure 499) and the assignment of error on this point was abandoned at the argument.

There were no means of weighing the iron where it lay, and, if there had been, it could not have been weighed, removed, and paid for on one day as the contract required. Accordingly the parties modified the terms by estimating the value of the iron as it lay at the contract rates as \$12,000, which sum Blau paid into the company's hands before any iron was removed. Blau's version of this was that it was a mere deposit to secure the company, and that when the iron was actually weighed, if its price at the contract rates exceeded the estimate of \$12,000, he was to pay the company the excess, while if it was less, the company was to return to him the difference. On the other hand, the company contended that the written contract was abandoned; that Blau bought the iron as it lay for \$12,000, with the proviso that if when weighed it proved at the contract rates to be worth more, he was to pay the excess in addition. The plaintiff's account was much the more reasonable, and has been established by the verdict of the jury.

[1, 2] The only other question that the jury had to pass on was as to the amount of iron Blau received. He proved that there were four shipments, the last three by railroads which weighed the iron. Smith was present on each occasion, saw the weights on the scales, noted them down, and testified to them at the trial. This was primary testimony. As to the first shipment, Smith testified that he was given the weight of it over the telephone by Mullen. The company took an exception to the admission of this testimony on the ground that it was hearsay. We think it was properly admitted because Mullen was the company's superintendent and had charge of the transaction throughout.

[3] The only other error relied on was the refusal of the trial judge

to strike out the testimony of Mullen that Smith had estimated the value of the iron at about \$12,000 before the contract was signed. Prior negotiations were merged in the written contract, and even if the fact sought to be proved was relied on for other purposes than varying it, the company was not prejudiced by the ruling because subsequently it appeared that both parties had estimated the value of the iron at \$12,000. The jury gave a verdict for Blau for the difference at the contract rates between the value of the iron he received and the sum of \$12,000 he deposited.

The judgment is affirmed.

In re PHILIPS & McEACHIN.

FIELDING v. SHANDS et al.

(Circuit Court of Appeals, Fifth Circuit. February 3, 1914.)

No. 2574.

BANKRUPTCY (§ 223*)—REFEREES—FEES.

A referee in bankruptcy is entitled to commissions only on such moneys as have been disbursed to creditors under his authority as provided by Bankr. Act July 1, 1898, c. 541, § 40, 30 Stat. 556 (U. S. Comp. St. 1901, p. 3436), and not on the amount of claims and liabilities of the bankrupt as scheduled.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 888-894; Dec. Dig. § 223.*]

Petition to Superintend and Revise from the District Court of the United States for the Northern District of Florida; Wm. B. Shepard, Judge.

Petition by Thomas W. Fielding, referee in bankruptcy, to superintend and revise as matter of law certain rulings of the District Judge in the matter of bankruptcy proceedings of Philips & McEachin, bankrupts, in which T. W. Shands and others are trustees. Petition denied.

C. R. Layton, of Gainesville, Fla., for petitioner.

W. T. Stockton, of Jacksonville, Fla., and W. W. Hampton, of Gainesville, Fla., for respondents.

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

PARDEE, Circuit Judge. The petitioner, referee in bankruptcy for the Northern district of Florida, complaining of certain rulings of the district judge in the matter of Philips & McEachin, bankrupt, brings a petition to revise and reverse certain orders and rulings made by the court in Re Philips & McEachin, Bankrupt, and concludes as follows:

"Your petitioner feels aggrieved by the orders, decrees, and rulings of the judge of the United States court for the said Northern district of Florida,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and he sheweth to this honorable court that said judge erred in making the said orders, decrees, and rulings as follows:

"1. In making that part of the order or decree, dated January 23, 1913, which reads as follows: 'And it is further ordered, adjudged, and decreed that the report of the trustees' account be and the same is hereby fully approved, except only as to the sum of \$2,480.05, shown as due and payable to Thomas W. Fielding, for his commissions as referee herein.'

"2. In making that part of the order or decree, dated January 23, 1913, which reads as follows: 'And it is ordered that the said Thomas W. Fielding surrender forthwith to the trustees herein, with proper indorsement, certificate of deposit for \$2,480.05, heretofore given said referee by said trustees, and the said trustees shall pay him, the said referee, only for such commissions as may be due him upon moneys already disbursed to creditors, and for such other expenses and charges as he may show that he is entitled to according to law.'

"3. In making that order or decree, dated at Gainesville, Fla., the 2d day of May, 1913, which is attached to this petition and marked 'Exhibit No. 8,' denying and overruling the motion and petition filed by this petitioner, and sustaining and confirming the order entered at Pensacola, Fla., on the 23d day of January, 1913.

"4. In making that order or decree, dated at Gainesville, Fla., the 2d day of May, 1913, requiring the Gainesville National Bank to restore the sum of \$2,480.05, which had previously been paid to Thomas W. Fielding, to the credit of T. W. Shands, W. B. Taylor, and E. Lee Hughes, formerly the trustees in bankruptcy of Phillips & McEachin.

"5. In decreeing that the referee in bankruptcy was entitled to commissions only upon such moneys as had already been disbursed to creditors.

"Wherefore your petitioner prays: That the said orders, judgments, decrees, and rulings of the District Court be reviewed and revised and corrected. That the portions of the order or decree dated the 23d day of January, 1913, to which exception and objection is made by petitioner, be stricken out and expunged therefrom, and that petitioner may have the fees, commissions, and emoluments which are set apart to him in the trustees' account. That the order denying and overruling the motion and petition of this petitioner be set aside and vacated, and the motion and petition be allowed and granted. That the order of decree dated May 2, 1913, requiring the Gainesville National Bank to restore to T. W. Shands, W. B. Taylor, and E. Lee Hughes the sum of \$2,480.05 be set aside and vacated, and that said parties be required to pay to this petitioner the said sum of money. That the commissions, compensations, or emoluments of this petitioner be fixed in accordance with law. And that petitioner may have any and all such other and further relief as the nature of the case may warrant, and as is right and in accordance with equity and justice, although not expressly prayed for; and that the practice in such cases as this may be settled in this circuit."

It seems that the decree of January 23, 1913, was a decree rendered in a quasi composition dismissing the bankruptcy case and restoring the property to the bankrupt, and in so far as it deals with referee's fees was in all respects correct and proper, and in the particular respect complained of particularly proper.

The referee had credited himself with a fee of one per cent. upon the entire amount of the claims and liabilities of the bankrupt as scheduled, and not upon the amount paid and disbursed to creditors, and in addition in payment of said fee had procured a certificate of deposit from the trustees for the sum of \$2,480.05, a sum largely in excess of any amount to which he could be entitled. See section 40, Bankruptcy Law.

The objections and exceptions which he filed to the decree, and which in the subsequent orders complained of were overruled, were

properly overruled by the district judge. The ruling of the district judge that the referee was only entitled to commissions upon such monies as had been under his authority disbursed to creditors was correct. See section 40 of the Bankruptcy Law.

The petition for revision is denied.

ANGLO-SOUTH AMERICAN BANK, Limited. v. McCLEARY, WALLIN & CROUSE.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 112.

1. TRIAL (§ 168*)—PEREMPTORY INSTRUCTION—FORM.

A motion for a peremptory instruction at the end of the entire case should be to direct a verdict and not to dismiss the complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 376-380; Dec. Dig. § 168.*]

2. BROKERS (§ 94*)—LIABILITIES AS TO THIRD PERSONS—DELEGATION OF AUTHORITY—SALES.

Where a bank employed a general merchant to sell certain wool, and he employed a wool broker to make the sale, the court properly charged that if the bank either authorized or employed the broker, or, having ascertained that the merchant had employed him to sell the wool, acquiesced in his employment and ratified it, the bank would be liable for the broker's contract of sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 136; Dec. Dig. § 94.*]

3. APPEAL AND ERROR (§ 1052*)—EVIDENCE—DAMAGES.

Where, in an action for breach of a contract for the sale of wool made May 28, 1909, plaintiff only recovered 2 cents a pound and there was some testimony that such wool sold at 23 cents a pound at the time the wool should have been delivered, and no testimony to the contrary, defendant was not prejudiced by proof that plaintiffs paid 26 cents a pound for such wool in January, 1910.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

In Error to the District Court of the United States for the Southern District of New York.

Action by McCleary, Wallin & Crouse against the Anglo-South American Bank, Limited. Judgment for plaintiffs and defendant brings error. Affirmed.

Whitridge, Butler & Rice, of New York City (Edward J. McGuire and Edwin T. Rice, both of New York City, of counsel), for plaintiff in error.

Selden Bacon, of New York City, for defendants in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. McCleary, Wallin & Crouse brought this action against the Anglo-South American Bank to recover damages for its refusal to deliver certain bales of Mongolian wool under a contract of sale. The contract sued on was a sale note dated May 28, 1909,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

signed by one Kitching, a wool broker. The jury rendered a verdict in favor of the plaintiffs. The testimony shows that the bank had employed one Hamilton, a general commission broker, to get bids for the wool in question, who, with the knowledge of the bank, employed Kitching; he being a wool broker. The bank denied that it had ever authorized Kitching to sell, but Hamilton testified that, after certain negotiations with Kitching, which were brought to the attention of the bank, the manager of the bank had told him to go ahead and sell the wool, and that he accordingly authorized Kitching to do so.

[1] The defendant moved to dismiss the complaint at the end of the whole case and has taken an exception to Judge Holt's refusal to do so. Treating this motion as if it were (as it should have been) a motion to direct a verdict in favor of the defendant, we think that there was sufficient evidence to submit the case to the jury and that the motion was properly denied.

[2] The defendant also excepted to the court's answer to the following request:

"I ask the court to charge that the employment of Hamilton by the defendant did not give Hamilton any authority to delegate his powers, and that such an authority to delegate can only be shown by some statement, act or representation of the defendant.

"The Court: Yes, ordinarily, the general rule is a man employed as agent cannot without especial authority delegate his powers to another. But upon that question you may take into consideration, I think, the fact that Mr. Hamilton is not a wool broker. You must be satisfied by evidence that the bank either authorized the employment of Mr. Kitching as a broker, or, having ascertained that Mr. Hamilton had employed him for that purpose, acquiesced in his employment and ratified it. Of course, if the bank had employed Mr. Kitching as a wool broker and he had gone and employed another wool broker, there would be need of clear proof of authority to do it. But, the bank in this case having employed a general merchant, it is for you to say what weight should be given to that fact in passing upon the evidence in this case, which it is claimed showed either original authority in Hamilton to employ Kitching, or subsequent ratification of his employment."

The modification which the judge made was justified by the evidence and was a correct statement of the law.

[3] The price fixed for the wool in the sale note was 21 cents a pound, and the court admitted, over the defendant's objection and exception, testimony that the plaintiffs paid 26 cents a pound for such wool in January, 1910. This did not prejudice the defendant in any respect because the plaintiffs only asked, and the jury only allowed damages to the extent of two cents a pound. There was some testimony that such wool sold at 23 cents a pound at the time this lot should have been delivered and no testimony to the contrary.

The case was presented carefully and fairly to the jury, and, as we discover no reversible error, the judgment is affirmed.

HOME BOND CO. v. McCHESNEY.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1914.)

No. 2529.

BANKRUPTCY (§ 178*)—TRANSFER OF ACCOUNTS—SALE OR PLEDGE—USURY.

Bankrupt corporations furnished lists of accounts receivable to intervener which, if the account were acceptable, advanced to bankrupts 75 per cent. of their face. The accounts were collected by bankrupts in the usual course of business, and the proceeds were remitted by one acting for both parties to intervener which, in practice, retained 75 per cent. and the stipulated interest and returned the remainder to bankrupts, although by the contracts it was entitled to retain the same to make good other accounts not paid. The contracts further provided that, if an account was not paid at maturity, bankrupts should "repurchase" the same by paying 75 per cent. of its face and the agreed interest. *Held*, that it was clearly the intention of the parties that bankrupts should retain an interest in the accounts, and that the transaction was not a sale, but a pledge of the accounts as security, under which the retention by intervener of sums greater than the legal interest on the advances made rendered the contracts usurious.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.*]

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

In the matter of the American Fibre Reed Company and the New England Chair Company, bankrupts. From an order denying its claim to the proceeds of certain accounts, the Home Bond Company appeals. Affirmed.

For opinion below, see 206 Fed. 309.

S. M. Sapinsky, of Louisville, Ky. (James R. Duffin, Owen D. Duffin, and Duffin, Sapinsky & Duffin, all of Louisville, Ky., of counsel), for appellant.

Brown & Nuckols, of Frankfort, Ky., and Bodley & Baskin, of Louisville, Ky., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. This is an appeal from an order, entered July 10, 1913, overruling exceptions of appellant to the report of a special master, confirming such report, and disallowing certain claims presented by appellant against the estates of the bankrupts. The record is made up under an agreed statement, which was entered into pursuant to Equity Rule 77 of the Supreme Court (198 Fed. xli). A petition in bankruptcy had been filed against each of the two corporations, and, after adjudication and the appointment of a trustee, the two cases were consolidated and "directed to proceed as one cause." The report of the special master and the opinion of the court below appear in 206 Fed. 309, 315. One of two similar contracts which are involved is set out in that opinion; and, since the course of business pursued under these contracts, the nature and extent of the claims so disallowed, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

issue and the conclusions reached, as also the terms of the order, are shown in the report of the case, they need be only alluded to here. The special master and the district judge, upon full consideration of the issue and the evidence, concurred in the conclusion that the transactions had under the contracts were pledges, not sales, of the accounts receivable. This conclusion is decisive of the issue concerning usury; and its rightfulness is the more apparent because the record discloses to us a mutual intendment that the right at least to 20 per cent. of the full value of each of the accounts receivable was always to remain in the bankrupts, except only for purposes of security; this right could not be both sold and owned by the bankrupts. Such transactions are unlike those which in form are sales and involve the taking over of promissory notes or the like, including accounts receivable, at a discount, but with the right alike to the entire face value and proceeds.

Hence the opinion of Judge Cochran is adopted, and the order accordingly is affirmed, with costs.

ASSESSOR OF VERNON PARISH, LA., v. GOULD et al.

(Circuit Court of Appeals, Fifth Circuit. February 10, 1914.)

No. 2382.

1. MANDAMUS (§ 1*)—NATURE OF REMEDY—EQUITY SUIT.

The remedy by mandamus is essentially and exclusively a legal one, unknown to courts of equity, and hence a bill in equity, praying for the issuance of mandamus to correct certain tax assessments, was insufficient to establish equity jurisdiction.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

2. COURTS (§ 322*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

Where federal jurisdiction depended entirely on diverse citizenship, and plaintiffs were alleged to be citizens of New York and New Jersey, but there was no allegation as to defendant's citizenship except that he was the tax assessor of Vernon parish, La., diverse citizenship was not shown within the rule that it must appear by positive averment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876-881, 887; Dec. Dig. § 322.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

Appeal from District Court of the United States for the Western District of Louisiana; Aleck Boorman, Judge.

Bill by George J. Gould and others against the Assessor of Vernon Parish, La. Judgment for plaintiffs, and defendant appeals. Reversed.

Sidney I. Foster, of Shreveport, La., for appellant.

F. G. Hudson, F. G. Hudson, Jr., and John J. Potts, all of Monroe, La. (Hudson, Potts & Bernstein, of Monroe, La., on the brief), for appellees.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

SHELBY, Circuit Judge. This is a bill in equity by George J. Gould and others, involving the assessment for taxes for the year 1908 of a large tract of pine timber land. The purpose is to have set aside an alleged illegal assessment, and to have enforced by the writ of mandamus an original assessment made and returned by the plaintiffs. After the case was at issue there was an agreed statement of facts upon which the case was tried. The view we take of the case makes it unnecessary to comment on the facts. The appellant claims that he is entitled to a reversal of the decree on the merits, that it is a case dependent on the proper construction of statutes of Louisiana, and that the questions involved have been settled by decisions of the Louisiana Supreme Court. And he cites *Southland Lumber Co. v. Lee McAlpin*, Assessor, et al., 126 La. 906, 53 South. 45, and other recent decisions.

[1] But the record, we think, is not such as will permit us to consider the case on its merits. As we have stated, the plaintiffs proceeded in the lower court by bill in equity for the writ of mandamus to correct certain tax assessments. After a statement of facts upon which relief is claimed, there is a prayer that "a writ of mandamus issue from this honorable court (meaning the court below), directing said assessor to record and extend upon his official rolls the said assessment," etc. The decree accords with the prayer "that a writ of mandamus issue as prayed for," etc.

The remedy by mandamus is essentially and exclusively a legal remedy, and is unknown to courts of equity. 8 Ency. U. S. Sup. Ct. Rep. 13, and cases cited in note 23. The bill should have been dismissed for not showing jurisdiction in equity, the new equity rule 22 not being then in force.

[2] But it is fatally defective in another aspect. There is no claim for federal jurisdiction except on the ground of diverse citizenship. It appears that the plaintiffs are citizens of the states of New York and New Jersey, but there is no allegation of the citizenship of the defendant. He is described as "the Tax Assessor for the Parish of Vernon, Louisiana," but it is not alleged that he is a citizen of Louisiana or of any named state. It was suggested at the bar that the allegation of his official position was sufficient to show his citizenship in the state of Louisiana, but we do not deem that sufficient. Jurisdiction cannot be inferred argumentatively. When it is dependent on diverse citizenship, such diversity should be shown by positive averments. *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237, 240, 7 Sup. Ct. 193, 30 L. Ed. 380.

Decree reversed.

ENGEMOEN v. CHICAGO, ST. P., M. & O. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. February 2, 1914.)

No. 3940.

1. CARRIERS (§ 207*)—CARRIAGE OF LIVE STOCK—SPECIAL CONTRACTS—VALIDITY.

A contract by an interstate carrier to transport live stock to their destination within a limited time was void, unless authorized or provided for by its published tariffs.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 129-239; Dec. Dig. § 207.*]

2. JUDGMENT (§ 199*)—JUDGMENT NOTWITHSTANDING VERDICT—EFFECT OF EVIDENCE.

In an action against an interstate carrier for failure to transport live stock to their destination within a limited time, where the invalidity of the contract for such transportation, because not authorized or provided for by the carrier's published tariffs, did not appear on the face of the pleadings, it was a matter of defense to be proved; and hence, though the trial court thought this defense was made out, in setting aside a verdict for plaintiff, it should have granted a new trial, instead of rendering judgment for defendant, as the proof at the second trial might not be the same.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

In Error to the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Action by Halvor Engemoen against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. Judgment was rendered for defendant notwithstanding a verdict for plaintiff, and plaintiff brings error. Reversed and remanded.

Paul J. Thompson, of Minneapolis, Minn. (Adolphe C. Peterson, of Minneapolis, Minn., on the brief), for plaintiff in error.

Richard L. Kennedy, of St. Paul, Minn., for defendant in error.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. This was an action for damages for breach of an alleged contract to transport for plaintiff, in 24 hours, two lots of cattle from South St. Paul, Minn., to Chicago, Ill. The transportation was at regular tariff rates; the complaint was on account of the excess of time taken. A trial to a jury resulted in a verdict for the plaintiff. Afterwards, on motion of the defendant, the court rendered judgment in its favor, notwithstanding the verdict.

[1, 2] If the contract for transportation within the limited time was not authorized or provided for by the defendant's published tariffs it was void. *Chicago & Alton R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033. But the invalidity did not appear on the face of the pleadings, and did not arise from mere legal presumption. It was a matter of defense, and rested in proofs submitted to the jury. Though, notwithstanding the verdict, the court thought the defense

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was made out, it could not be said as of law that the proofs at a second trial would be the same. Under such circumstances a new trial should have been granted, not a judgment for defendant contrary to the verdict. *Slocum v. Insurance Co.*, 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879.

A judgment for plaintiff on a third count for an overcharge was rendered by agreement, and is not in controversy here. The judgment on the first and second counts is reversed and the cause is remanded for a new trial as to them.

In re CAPONIGRI.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 50.

BANKRUPTCY (§ 266*)—TRUSTEE'S SALE—SETTING ASIDE.

Where, though the terms of a sale by a trustee in bankruptcy stated plainly that only the right, title, and interest of the trustee was being sold, after they were read, and after some discussion as to which of two parcels was incumbered by a mortgage, the purchaser asked which parcel was being sold, and was told that it was a lot on Twenty-First street, which lot was conveyed by the bankrupt long before the bankruptcy by warranty deed, the court in accordance with the standard of fair dealing properly relieved the purchaser of his bid.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 266.*]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

Proceeding in the matter of Maria F. Caponigri, bankrupt. On petition by Walter Cook, Jr., as trustee, to revise an order denying a motion to confirm the report of a special master, and relieving the purchaser at public auction of the right, title, and interest of the bankrupt in certain property in the borough of Brooklyn, city of New York. Order affirmed.

F. E. M. Bullowa, of New York City, for petitioner.

J. H. Zieser, of New York City, for respondent.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. The terms of sale stated quite plainly that it was only the "right, title, and interest of the trustee" which was being sold. But after they were read, and after some discussion as to which of two parcels it was which was incumbered by a mortgage, the purchaser, before the parcel now in question was struck down to him, asked the trustee what he was then selling, and was told it was "a lot on Twenty-First street." Long before the bankruptcy the bankrupt had conveyed these premises to one Francesco Marino, by warranty deed recorded in 1903. In view of these circumstances we concur with Judge Hand in the conclusion that, "in accordance with the standard of fair dealing which a court of equity should itself exemplify," the purchaser should be relieved from his obligation to carry out his bid of \$700.

The order is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 210 F.—57

WILSON v. MANHATTAN CANNING CO.

(District Court, W. D. Washington, N. D. January, 1914.)

No. 2477.

1. SEAMEN (§ 6*)—CONTRACT OF EMPLOYMENT—"COMMENCEMENT OF VOYAGE"—ANCHORAGE AFTER LOADING.

A voyage commenced when a vessel left her dock fully loaded to go to an anchorage, although she remained at such anchorage two days before proceeding to sea.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 8-18; Dec. Dig. § 6.*]

2. SEAMEN (§§ 11, 16*)—INJURY IN SERVICE—LIABILITY OF VESSEL FOR COST OF CURE AND WAGES.

Libelant shipped as cook on a vessel which, being fully loaded, left her loading berth and was towed to an anchorage some distance from shore. On the same day libelant, who had been at work for two days, fell and was injured without fault on his part. He was not discharged nor paid his wages, but was sent to a hospital and another cook employed in his place. *Held*, that the voyage had commenced, and that libelant was entitled to recover his medical and hospital expenses and wages to the end of the voyage.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 39-44, 56-65, 187; Dec. Dig. §§ 11, 16.*]

In Admiralty. Suit by J. W. Wilson against the Manhattan Canning Company. On exceptions to findings and conclusions of commissioner. Exceptions overruled, and decree for libelant.

See, also, 205 Fed. 996.

James Kiefer, of Seattle, Wash., for libelant.

Dorr & Hadley, of Seattle, Wash., for respondent.

NETERER, District Judge. The libelant commenced this action to recover wages as seaman on board the brig Harriet G., and for hospital expenses and medical attendance in effecting a cure for the injury received on board. Respondent denies performance of services as seaman, denies all liability, and further alleges that libelant had violated conditions of the shipping articles and was discharged before the voyage began. The provision of the shipping articles alleged to have been violated is as follows:

"No * * * grog allowed, and none to be brought on board by the crew."

Libelant took on board a five gallon cask of whisky, which was taken possession of by the master, the seal of which was unbroken. No breach of contract was asserted at the time by the respondent, nor was anything done other than the taking possession of the whisky by the master, and the matter was treated as a breach of discipline. The testimony is conclusive that libelant was employed as cook on board the brig Harriet G. at \$80 per month, for a voyage from Seattle, Wash., to Port Haiden, Alaska, and return, not exceeding six months. The shipping articles were signed by the libelant on the 21st day of April, 1913. On the 23d day of April, 1913, about 2 o'clock p. m., the brig in tow of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a tug left the dock in the port of Seattle, and was towed to a buoy in the bay; the vessel having been fully loaded. After the vessel left the dock libelant, in passing from the aft part of the vessel to go forward to the galley, sustained the injury. An officer of the ship, being advised of the accident, procured a launch and sent libelant ashore, and caused him to be taken to Providence Hospital for treatment. The master did not furnish libelant a certificate entitling him to the services of a marine doctor.

An examination of the testimony convinces me that libelant was not in an intoxicated condition; that nothing was said to libelant at the time, nor anything done with relation thereto. There was no conduct on the part of libelant disclosed by the testimony which in any way disqualified him from performing his duties, and the master would not have been justified in discharging him. *The Villa v. Herman* (D. C.) 101 Fed. 132.

[1] Did the voyage commence when the brig pulled away from the dock and proceeded to the buoy on the afternoon of April 23d, or did it not commence until the 25th, when it left the buoy and proceeded directly on its voyage? Carver's Carriage by Sea (5th Ed.) § 148, states the rule to be that if a vessel is lying at her port loading, and has to move from the place at which she is lying to go to a loading berth, the "voyage" commences as soon as she breaks ground to go to that berth. Reason would suggest that a voyage at least could be said to commence when a vessel leaves her moorings loaded, and proceeds out into the open water, even though she might anchor at the buoy for several days. The Supreme Court of Massachusetts, in *Bowen v. Hope Insurance Co.*, 37 Mass. 275, 32 Am. Dec. 213, lays down the rule that a voyage is begun when the vessel leaves her moorings, proceeds down the stream, and goes to an anchorage to lie for favorable winds.

"That the vessel has moved on the prosecution of the voyage, whether in the sea, or an arm of the sea, whether in a river or a canal communicating with the sea, enables us to say she is on her passage, and exposed to the perils of such passage. This vessel had *sailed* within the case of *Bond v. Nutt* (Cowp. 601, 607). Lord Mansfield there mentions a ship as having commenced her voyage though she had barely begun to sail, and was stopped by an embargo. * * * In short, the least locomotion with readiness of equipment and clearance satisfies a warranty to sail. *Pettigrew v. Pringle*, 3 Barn. & Adolph. 514." *Union Insurance Co. v. Tysen*, 3 Hill (N. Y.) 118; *Cochrane v. Fisher*, 1 Crompt., Mees. & Rose. 809.

[2] There is no testimony in this case that libelant was discharged. His employment was admitted. The testimony shows that he had worked at least two days. Section 4529, Revised Statutes (U. S. Comp. St. 1901, p. 3077) provides:

"The master * * * shall pay to every seaman his wages * * * at the time of his discharge."

No wages were paid libelant, nor anything done with relation to discharge other than taking libelant ashore and employing another cook. The employment of a cook was necessary. The libelant was incapacitated by the injury, and a duty devolved upon the respondent to effect his cure and pay his wages to the end of the voyage. *The Osce-*

ola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760; The New York, 204 Fed. 764, 123 C. C. A. 214; The City of Alexandria (D. C.) 17 Fed. 390; The Fullerton, 167 Fed. 1, 92 C. C. A. 463; The Nyack, 199 Fed. 383, 118 C. C. A. 67.

The contention that section 4527, Rev. St., applies to this case, and that libelant cannot in any event recover more than one month's wages under the findings upon the facts, cannot be sustained. This section provides:

"Any seaman who has signed an agreement and is afterwards discharged before the commencement of the voyage or before one month's wages are earned, * * * shall be entitled to receive from the master * * * in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation."

The voyage having commenced, and libelant not having been discharged, this section has no application.

The Staghound and The Gamecock (D. C.) 97 Fed. 973, The St. Paul (D. C.) 77 Fed. 998, and Raymond v. Ella S. Thayer (D. C.) 40 Fed. 902, are readily distinguished.

There is no dispute as to the expenses incurred in effecting a cure, to wit, \$30 for hospital service, and \$50 for medical attendance.

I think that the report of the commissioner in finding that libelant is entitled to recover his wages from April 21, 1913, to October 5, 1913, to wit, \$440 and \$80.60 for hospital and medical attendance, a total of \$520, should be sustained.

A decree may be entered accordingly.

In re MORSE.

(District Court, N. D. New York. February 7, 1914.)

1. BANKRUPTCY (§ 217*)—LIENS—FORECLOSURE—STAY.

Where certain persons other than the bankrupt claimed an interest in certain mortgaged real property, the extent of which did not appear, and the general creditors of the alleged bankrupt mortgagor claimed that they were unable to determine whether to bid on foreclosure sale or whether the sale should be stayed and the trustee allowed to sell free and clear of incumbrances or subject thereto, a sale of property might properly be stayed until 20 days after adjudication and the appointment of a trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 323, 330, 340; Dec. Dig. § 217.*]

2. BANKRUPTCY (§ 82*)—PETITION—VERIFICATION.

A petition in bankruptcy may be properly verified before a commissioner of deeds.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 123; Dec. Dig. § 82.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Edward M. Morse. On a motion to vacate a stay of sale in foreclosure proceedings and to strike from the files a certain affidavit attached and referred to in the petition of creditors filed against the alleged bankrupt. Granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Betts & Draper, of Troy, N. Y., for petitioning creditors.

Shaw, Bailey & Murphy, of Troy, N. Y., for plaintiffs in foreclosure.

Thos. F. Powers, of Troy, N. Y., for the alleged bankrupt.

RAY, District Judge. [1] If the bankrupt, Edward M. Morse, has any substantial equity in the real estate sought to be sold in the foreclosure and partition actions, a sale in such foreclosure proceedings and actions ought to be stayed until a trustee is appointed and qualified to the end that he may protect the interests of the general creditors in such property. The general creditors have this right, and it is the duty of the court to protect the estate of the bankrupt for the benefit of both the general creditors and the lienors, so far as possible, without doing injury to the rights of either. It is always onerous to a lienor to have his general right to enforce his valid liens interfered with, and this should not be done to his serious substantial injury except in rare instances. On the other hand, the mortgaged property of a bankrupt should not be sacrificed by hasty sales or under such circumstances that the rights therein, if any, of general creditors are destroyed or seriously impaired. When the validity of a lien sought to be enforced is seriously and in good faith attacked, proceedings to enforce it by sale should usually be enjoined until its validity is established. When the owner of the property is in bankruptcy, on adjudication, the title vests in the trustee, subject to valid liens, on his appointment, and this title relates back to the adjudication. Usually, of course, the sale is an open one, at public auction, and the surplus, if any, will go into the estate. However, until a trustee, representing the general creditors, is appointed, there is no one to represent them, except as each may represent himself, and, as the general creditors are usually scattered, there can be no unity of action, and valuable property may be sold for far less than its real value and the interests of the estate sacrificed. Here it appears that certain persons, other than the bankrupt, claim, and are represented to have, an interest in this real estate, the extent of which does not appear; and hence general creditors claim that they are unable to determine whether or not to bid on a foreclosure sale or whether or not the foreclosures, etc., should be stayed and the trustee allowed to sell, either free and clear of incumbrances or subject thereto. The mortgaged city property is standing idle, and the mortgaged farm property must soon be rented or sold or its value as a security will be more or less impaired. I do not think any serious injury will be done the mortgagee, lienor, and that substantial benefit may be derived by the general creditors, by continuing the stay granted until 20 days after the appointment of a trustee to enable him, and the general creditors through him, to ascertain, by an examination of the bankrupt and such other person as may have knowledge, the true situation and show, if they can, that the estate has a substantial equity in these properties, or one of them, and that the lienor will not suffer by a further stay. It will at least afford opportunity to examine the bankrupt and others and ascertain the truth and make arrangements to bid and purchase for their own protection.

As to the motion to strike from the files the affidavit of Mr. Draper, it is to be regretted that such affidavit was referred to in the petition, and it is more to be regretted that there was any reference to any particular proceeding in the state court wherein Mr. Powers is connected with Mr. Bailey, except in a general way, if necessary, and especially any reference to any pending difficulty between Mr. Powers and a client. The affidavit was used as part of the basis for the stay and is proper as such, except in the particular mentioned, but is no part of the petition in bankruptcy which is complete without it. The motion to strike out and expunge is granted so far as to strike out and expunge from the affidavit referred to the following:

"That the attorney of said Morse, said Thomas F. Powers, is and has been for a long time more or less closely associated with H. D. Bailey, Esq., attorney at law of Troy, N. Y., and of the law firm of Shaw, Bailey & Murphy, of Troy, N. Y., to the extent at least that said H. D. Bailey has for at least five or six months last past been acting as attorney for said Thomas F. Powers in certain litigation pending against said Thomas F. Powers in the Supreme Court of New York state, in the nature of a summary proceeding to make him account to a client."

[2] I think the petition in bankruptcy properly verified before a commissioner of deeds. Judge Hand has held that an oath taken before such officer in a bankruptcy proceeding sustained a charge of perjury alleged to have been committed in such proceeding. Section 20 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3430]) authorizes it. See Collier on Bankruptcy (9th Ed.) 445, 446.

The injunction and restraining order is modified so that it will expire 20 days after the adjudication, unless further continued for good cause shown. There will be orders accordingly.

ST. LOUIS & S. F. R. CO. v. BARKER, Atty. Gen., et al. (and seventeen other cases).

(District Court, W. D. Missouri, W. D. December 20, 1913. Supplemental Opinion January 30, 1914.)

Nos. 2988-3004, 3006.

1. APPEAL AND ERROR (§ 1198*)—REVERSAL OF DECREE—MANDATE—POWERS OF LOWER COURT AFTER REMAND.

A mandate from the Supreme Court reversing the decree of a District Court in an equity case and directing that court to "dismiss the bill without prejudice" leaves nothing to the discretion of the District Court as to dismissal of the bill, but it has power to retain the case for the purpose of considering and determining ancillary questions arising as a result of the suit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4668; Dec. Dig. § 1198.*]

2. APPEAL AND ERROR (§ 1198*)—REVERSAL OF DECREE—JURISDICTION—POWERS OF LOWER COURT AFTER REMAND.

Railroad companies brought suits in a district court against state officers to enjoin the enforcement of legislative acts fixing maximum rates

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and fares, and preliminary, and afterward perpetual injunctions were granted on the giving by complainants of ordinary injunction bonds, conditioned for the payment to defendants or to any person becoming a defendant of all damages sustained by reason of the wrongful issuance of the injunctions. The decrees were reversed by the Supreme Court, with directions to dismiss without prejudice, and the mandates required the District Court "to dismiss the bill without prejudice." All the issues raised by the pleadings were passed on and determined by the Supreme Court. After the mandates were filed, certain shippers and passengers who, during the time the injunctions were in force, had paid rates and fares in excess of those fixed by the statutes applied for leave to intervene and have their claims to such excess payments determined and enforced against the railroad companies, to which the latter made no objections. *Held*: (1) That the matter of such interventions was one with which the defendant state officers had no concern; and (2) that, while the court was bound under the mandates to vacate the injunctions and dismiss the bills without prejudice, it had power to retain the cases on the docket for the purpose of collecting and disbursing such excess charges paid, and to that end to appoint a master before whom any claimant might voluntarily prove his claim.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4668; Dec. Dig. § 1198.*]

In Equity. Suit by the St. Louis & San Francisco Railroad Company against John T. Barker, Attorney General, and John M. Atkinson, John Kennish, Frank Wightman, H. B. Shaw, and W. F. Woerner, constituting the Public Service Commission, of the State of Missouri, heard with seventeen other cases against the same defendants. On entry of decrees after reversal and mandate.

Frank Hagerman and Eugene E. Ball, both of Kansas City, Mo., O. M. Spencer, of St. Joseph, Mo., Martin L. Clardy, of St. Louis, Mo., Gardiner Lathrop and Thomas R. Morrow, both of Kansas City, Mo., W. F. Evans, of St. Louis, Mo., S. W. Moore, of Kansas City, Mo., F. C. Dillard, of Chicago, Ill., Edward L. Scarritt, of Kansas City, Mo., S. H. West, of St. Louis, Mo., John H. Lucas, of Kansas City, Mo., James L. Minnis, of St. Louis, Mo., R. A. Brown, of St. Joseph, Mo., J. W. Jamison and Joseph M. Bryson, both of St. Louis, Mo., James G. Trimble, of Kansas City, Mo., and J. D. Hostetter, of Bowling Green, Mo., for complainant.

John T. Barker, Atty. Gen., W. M. Fitch, Asst. Atty. Gen., and E. J. Bean, of Jefferson City, Mo., for respondents.

SMITH McPHERSON, District Judge. These 18 cases of and concerning Missouri freight and passenger rates are pending on applications for decrees following mandates from the Supreme Court of the United States. By reason of the opinions and mandates of the Supreme Court, the cases, all of which are against the same defendants, should be placed in four groups, classified by number and railroad companies as complainants, as follows:

Group One (1).

2988 St. Louis & San Francisco Railroad Company.

2989 Atchison, Topeka & Santa Fé Railway Company.

2991 Chicago, Rock Island & Pacific Railway Company.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

- 2992 St. Louis, Kansas City & Colorado Railroad Company.
- 2993 Kansas City Southern Railway Company.
- 2997 Missouri, Kansas & Texas Railway Company.
- 2998 Chicago, Burlington & Quincy Railroad Company.

Group Two (2).

- 2990 St. Louis Southwestern Railway Company.
- 2995 Missouri Pacific Railway Company.
- 2996 St. Louis, Iron Mountain & Southern Railway Company.
- 3000 The Wabash Railroad Company.
- 3004 Chicago, Milwaukee & St. Paul Railway Company.
- 3006 Chicago & Alton Railroad Company.

Group Three (3).

- 2994 St. Louis & Hannibal Railway Company.
- 3002 Kansas City, Clinton & Springfield Railway Company.
- 3003 Chicago Great Western Railway Company.

Group Four (4).

- 2999 Quincy, Omaha & Kansas City Railroad Company.
- 3001 St. Joseph & Grand Island Railway Company.

Cases in group one (1) were appealed to the Supreme Court and the decrees of this court were reversed.

Cases in group two (2) cover decrees of this court, resulting in effect in reversals by stipulation, as said cases were to abide the result of cases in group one (1).

Cases in group three (3) were appealed and the decrees of this court were affirmed.

Cases in group four (4) were affirmed in effect by stipulation that said cases were to abide the result of cases in group three (3).

I deem it proper to recite the history of these cases as appears from the records of this and the Supreme Court:

The Legislature of Missouri enacted a statute, approved April 15, 1905, effective June 16, 1905, fixing certain commodity freight rates. The Governor of the state in returning said enactment, having signed the same on April 15, 1905, filed with the Secretary of State his message announcing his signature, and stated in effect that one of the rates seemed to him very low, but that he could not disapprove one section without nullifying the whole measure, and, as the judiciary can declare void the rate that is fixed on any class without affecting the remainder, he would sign the bill, claiming that the bill as a general measure was in the right direction; that the courts could, after hearing all the evidence, decide upon the reasonableness of the bill, and then that the railroad commissioners, or the next Legislature, could equalize such inequalities as may be found to exist in the measure and fix such rates as under the law announced by the courts was right and just to the railroads and to the people.

On June 16, 1905, the day said statute became effective, counsel for all the 18 companies presented to this court (then the circuit court) verified bills of complaint alleging that said statute was void, con-

tending said rates were confiscatory. I, sitting alone, granted restraining orders against the enforcement of the statute and set all the cases down for hearing on the application for a temporary injunction in each of the cases.

On June 27th, on application of the Attorney General, the hearing was continued until July 8, 1905, at which time counsel for both sides fully argued said application before Judge John F. Philips and myself, and the applications were taken under advisement. After conference that day we agreed that a temporary injunction should issue, whereupon I left the district for my home. July 12, 1905, Judge Philips announced our conclusion and then in my absence took up the question of the form of order to be entered and all questions as to the injunction bonds. He then entered an order of record reciting that the restraining orders should remain in force as a temporary injunction, and requiring an injunction bond in each case in the penalty of \$10,000, conditioned to pay, in case the injunction be dissolved, all damages sustained by defendants or any of them, or any person becoming a defendant herein, and the defendants consenting to accept the individual bond of complainants. No objection was made by any one as to the amount of the bond. Judge Philips alone signed those orders in my absence from the state, but I had agreed in conference with him that an injunction should issue. There was never at any time by any person, until within the past 30 days, any objection to either the conditions or the amount of the bond. In due time the issues were made.

On February 26, 1906, the Attorney General and his associates filed a motion to refer the cases to a master. The next day the railway companies filed a motion to have the cases heard in open court. On March 5, 1906, Judge Philips, sitting alone, sustained the motion of the Attorney General and referred the cases to Hon. Frank L. Schofield, of Hannibal, as master to hear, until further orders, such cases as the parties at the beginning agree to be heard.

On October 7, 1907, Judge Philips ordered that the amendments pending the hearing of the original bills had the effect in law of uniting matters complained of in one bill, they therefore constituting but one bill of complaint, and all matters involved be fully heard and the master's findings should be embraced in a single report. From that point Judge Philips never took any other or further step in any of the cases. And from that point I, and I alone, made all orders down to and including final decrees. Thereupon the master took the evidence in the Burlington, Missouri, Pacific, and Wabash Cases and fixed June 18, 1907, for hearing.

On December 26, 1906, the Attorney General of Missouri filed with the Governor of the state a written report of and concerning these cases. The report is quite lengthy, contending that the rates fixed are reasonable, with the possible exception of the rate upon live stock. He also contended that owing to the opinion of Judge Philips, when a temporary writ was issued, it would be for the better to amend the statute with reference to the penalties. He also recommended that expert accountants, who had been working for the state, should give special attention to the reasonableness of the rates in each of the separate classifications of the statute of 1905, and state what would be a reason-

able rate upon these articles, in order that the Legislature might have the benefit of their investigation, to the end that the Legislature might bring about the enactment of a new maximum freight law for the purpose of making mutual concessions in order to avoid the delays incident to further litigation. The Governor on January 18, 1907, sent this report of the Attorney General to the Legislature for the information of that body in the further consideration of the question of freight rates.

The Legislature then passed a new maximum freight car load law, increasing in some respects the rates fixed by the act of 1905, lowering them in some instances, and creating additional penalties, and repealing all of the statute of 1905 excepting the penalties incurred thereunder. The Legislature of 1907 also enacted a 2-cent passenger rate statute. Each of these acts took effect June 14, 1907.

Thereupon, over the objection of the Attorney General, I allowed each of the railroad companies to file an amended and supplemental bill bringing these later statutes in question into the cases. I filed a written opinion therein allowing such supplemental bills to be filed, which opinions are to be found in (C. C.) 155 Fed. 220, and (C. C.) 161 Fed. 419, and as to such allowance of the supplemental bills my order was affirmed by the Supreme Court of the United States in *Re Missouri Rate Cases*, 230 U. S. 474, 496, 33 Sup. Ct. 975, 57 L. Ed. 1571.

On June 17, 1907, by consent of complainant, the injunction bond heretofore filed shall stand as applicable to this order the same as if it were executed and filed this day. By the same order the freight rates were enjoined, but an injunction as to the 2-cent passenger rates was denied. Leave was granted all parties, complainants and defendants, to ask for any further order. No other order was ever applied for.

On June 8, 1908, by written agreement of the parties, the orders of reference to Mr. Schofield, as master, were vacated, and the cases were set down for hearing in open court on October 5, 1908. On that date, by the agreement of parties, the hearing was postponed until November 9, 1908, at which time the hearing in open court was commenced and continued before the court until the cases were finally submitted on December 30, 1908, and by the court taken under advisement.

On June 13, 1907, I issued a restraining order as to the enforcement of both the freight and the passenger rate statute; but on June 17, 1907, I ordered the previous orders as to the passenger rates vacated and that the railroads put in the statutory rates for three months. There was no order at any time thereafter with reference to the passenger rate statute until the case went to final decree. But I did on June 17, 1907, by temporary injunction after argument by both sides, enjoin the maximum freight rate statutes of 1907. To be brief, on June 17, 1907, the freight rate statutes were enjoined and the statutory passenger rates of 2 cents were enforced until final decree in April, 1909.

On March 8, 1909, I filed an opinion reviewing all the 18 cases, with findings of fact, and ordering a perpetual injunction against the enforcement of both the freight rate and passenger rate statutes of 1907. See (C. C.) 168 Fed. 317-359. The decrees were prepared and entered

of record April 17, 1909. As to the defendant shippers and defendant passengers, the cases were dismissed without prejudice.

On July 28, 1909, the Attorney General and his associates took an appeal in the case No. 2998, wherein the Chicago, Burlington & Quincy Railroad Company was the complainant, and the railroad company took a cross-appeal September 22, 1909. Without explanation, no one of the other 17 cases was appealed by the state until March 22, 1911, immediately followed by cross-appeals by the remaining 17 railroad companies. The Burlington Case was argued and submitted to the Supreme Court of the United States on October 13, 1910. In the meantime the other 17 cases had been appealed, and the records shortly thereafter filed. Thereupon, on April 10, 1911, with all the 18 cases pending, the Supreme Court of the United States on its own motion vacated the order of submission in the Burlington Case, and restored the Burlington Case with the other 17 cases for reargument.

On April 1, 2, and 3, 1912, all of the 18 cases were argued, including the reargument of the Burlington Case, and on June 16, 1913, the Supreme Court filed its opinion reversing the 13 cases covered by groups one (1) and two (2) of this statement, and affirming the cases of groups three (3) and 4. See Missouri Rate Cases, 230 U. S. 474, 33 Sup. Ct. 975, 57 L. Ed. 1571.

It will therefore be seen that the complaint about the delay of these cases was occasioned by the delay of the then counsel for the state of Missouri in failing to appeal all of the 17 cases for two years from the time of the decrees of this court. The mandates were issued by the clerk of the Supreme Court of the United States on July 16, 1913, and filed with the clerk of this court on July 19, 1913.

The state allowed the cases to remain dormant until September 15, 1913, when a partial hearing was had on the mandates. The counsel for the state of Missouri then filed a motion for decrees following the mandates in the 13 cases covered by groups one (1) and two (2) hereof, moving the court for such decrees under the mandates, but with the clause added:

"* * * But saving to each shipper, consignee, and passenger, or other party in interest, who paid complainant rates in excess of the maximum rates fixed by the statutes complained of while the restraining order, the temporary injunction, or the injunction on final decree as granted in this case was in force, the right to sue complainant on their original cause of action for such overcharges."

On October 13, 1913, another hearing was had, the state withdrawing the motion last referred to, and moving the court that the decree recite only the dismissal of the cases covered by groups one (1) and two (2) without prejudice, at the cost of the railroad companies. That motion was argued orally, with leave granted to counsel to file briefs, the last of which on each side was filed within the last 10 days.

Although not of record, counsel have orally agreed before me that during the first week of July, 1913, the railroad companies complied with the findings and opinion of the Supreme Court and put into effect the passenger rates of 2 cents per mile. In some instances the railroad companies have complied with the freight rate statutes, and in some not; there being some controversy or dispute with reference

thereto. Such are the facts in these cases, some not material to the ruling now to be made. But they are the facts in the cases so easily ascertained from the records in the clerk's office that they should have been seen before counsel lately coming into the cases made their statements in a brief.

1. There never was a restraining order nor injunction as to the 2-cent passenger rate, other than for a few days, until final decree.

2. The injunctions as to both freight and passenger rates were tied up for two years longer than they would have been but for the delay in appealing the cases. The statute gave this long time for an appeal. Counsel for the state had a perfect right to have such delay. Then the Supreme Court held the cases for decision 15 months. But it is not for present counsel to charge such delays to this court. This court has never delayed the cases two months all told in the aggregate except by agreement of counsel.

3. A large part of the argument of the Attorney General is based on head lines in capital letters, repeated many times

**"WE ARE INSISTING THAT THIS COURT HAS NOTHING TO DO
BUT FILE THIS MANDATE."**

The records of the clerk's office of this court show that the clerk of the Supreme Court of the United States issued all of the 18 mandates on July 16, 1913, and they were received by the clerk of this court and "filed" by him three days thereafter, viz., July 19th, 1913. So that this was done five months ago, and that fact ends all discussion as to "filing" the mandates.

4. Much of the argument of the Attorney General is to the effect that excessive freight or passenger rates collected can be recovered back in an action at law before any court having common-law jurisdiction. He cites a very large number of authorities to sustain his contention, as to which this court has no doubt. But that question is not now, and quite likely never will be, in this or any other case. The question in these cases probably will be whether such additional rates charged by reason of the injunction can be collected by suit in any court, state or national, or, if collectible, must it be collected in this court in these cases? Views now expressed would be mere obiter dictum and not binding.

5. The mandate in each of the 13 cases recites:

* * * * This cause be and the same is hereby reversed. * * * It is further ordered that this cause be and the same is hereby remanded to the District Court of the United States for the Western District of Missouri, with directions to dismiss the bill without prejudice."

The Attorney General and counsel for the Public Service Commission on September 15, 1913, filed in this court in these cases a written motion for a decree of dismissal and for a recital in such decree:

* * * * That each shipper, consignee, and passenger who paid rates in excess of the statutory rates, while enjoined, shall have the right to sue on their original cause of action for such overcharges."

That form of the decree was contended for in oral argument. Thus these cases stood for a month, when that motion was withdrawn and

another motion by the Attorney General and counsel for the Public Service Commission was filed for a decree in the language of the mandate. This is of no importance other than to show a change of opinion by counsel as to what is and what is not the duty of this court.

Shall this court literally follow the mandate? Or can and shall this court add thereto? It is so well known as to be well-nigh a maxim of the law that, when an appellate court speaks, such holding is the law of the case in all subsequent proceedings of the case in both the trial and appellate courts. Occasionally an appellate court has declined to observe this rule when persuaded that the first opinion was wrong. But the rule is as first stated. And the rule is emphasized when the appellate court decides an equity case by reversal.

Nothing can be gained by collecting the cases in large numbers, as is easily done from digests and footnotes to text-books. There are two rules to be observed. The one is as is illustrated by the case of *Gaines v. Rugg*, 148 U. S. 229, 13 Sup. Ct. 611, 37 L. Ed. 432, from this circuit. In that case it was decided that the trial court should take the opinion of the Supreme Court, and with the mandate, construed together, enter a decree in conformity thereto. The last paragraph of the syllabi of the opinion reads:

"The construction of the intent and meaning of the opinion of this court was not a matter for the exercise of judicial discretion by the circuit court, and the case is a proper one for a mandamus by this court."

Many cases cite that holding with approval.

The other rule is as was announced by the Supreme Court in the two cases of *In re Sanford Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414, and *In re Potts*, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994. Such other rule is, after affirming the one first announced, that the trial court may consider and decide any matters left open by the mandate, or by acting on facts omitted warranting a new trial, and its decision of such matters can then be reviewed by a new appeal only. These two cases have been as frequently followed as the one in 148 U. S., and it would be an affected learning to cite them.

Of course other litigation may follow, but it is clear that nothing was left open by the opinion and mandates in these cases. The railways insist that the decrees now to be entered should have a reservation clause as to jurisdiction over the parties and the subject-matter. Such reservation clauses are often and wisely inserted. But both the opinion and the 13 mandates declare that the cases shall be dismissed without prejudice at the costs of the companies. How can a case be both dismissed and retained as a live case? If the usual reservation clause is to be inserted, why does not the opinion or mandate so recite? And, if wrong in its mandate, why has there not been a motion in that court to modify? And has this court the power?

It is said that there will be thousands of cases all over the state of Missouri before circuit courts and justices of the peace for recoveries of small sums from a penny to several dollars, with attendant costs more than the claims. If this be so, will there be no remedy? A discussion of that question, argued at great length, is not now here for decision.

The phrase "dismissed without prejudice" has been a fruitful theme for discussion. Is each case when so dismissed the same as though never brought? Where the rates were charged in excess of the statutory rates during the life of the injunction, can the same be recovered back? Were they unlawful when made lawful by the injunction? This question has been argued at much length. The Attorney General and his associates originally presenting this case, as well as on appeal, were men of high character and great learning, and they represented the shippers and passengers as much so as do the present attorneys. Such shippers and passengers then had their day in court, as they now have; neither more nor less. They either agreed to the injunction bonds, both as to conditions and penalties, or acquiesced therein. No complaint was made until a few weeks since. It is now claimed that the court should have exacted a larger penalty in the bond. In all cases, both in law and in equity, agreements of counsel are accepted by courts as both final and binding. Therefore it is that all contentions as to the bonds are to the one side of what this court can and should now do.

The decrees in each of the seven cases covered by group one (1) aforesaid will be as follows:

This case came on for hearing September 15, 1913, on the motion of the Attorney General of Missouri and his assistant, and counsel for the Public Service Commission of the state of Missouri, for a decree pursuant to the opinion of the Supreme Court of the United States filed June 16, 1913, and the mandate of said Supreme Court dated July 16, 1913, and filed with the clerk of this court July 19, 1913, which said opinion is reported in United States Reports, vol. 230, at page 474 and following,¹ by which said motion the said Attorney General and his said assistant and said counsel for said Public Service Commission moved the court for a decree of dismissal of this case without prejudice at the costs of said complainant, with a recital in the decree that each shipper, consignee, and passenger who paid rates in excess of the statutory rate, while enjoined, shall have the right to sue on their original cause of action for such overcharges. Said motion was then argued by counsel on both sides. October 15, 1913, the said Attorney General and his associates withdrew said motion and moved this court for a decree dismissing this case without prejudice at the costs of complainant without other recital. And now at this time the court sustains said motion.

It is therefore considered, ordered, adjudged, and decreed that the final decree of this court heretofore entered be and the same is vacated, and this case is dismissed without prejudice at the costs of the said complainant, which costs, including the costs of the Supreme Court, will be taxed by the clerk against the said complainant, and for which, if not paid within 41 days, a general writ of execution will issue therefor on the application of any party in interest. Any party feeling aggrieved at the said taxation of costs by the clerk of this court may within the said time, by written motion, filed herein, ask to have said costs retaxed.

The decree in each of said cases covered by group two (2) aforesaid will be as follows:

This case came on for hearing September 15, 1913, on the motion of the Attorney General of Missouri and his assistant, and counsel for the Public Service Commission of the state of Missouri, for a decree pursuant to the opinion of the Supreme Court of the United States filed June 16, 1913, and the mandate of said Supreme Court dated July 16, 1913, and filed with the clerk of this court on July 19, 1913, which said opinion is reported in the United States Reports, vol. 230, p. 474 and following,¹ by which said motion the said Attorney General and the said assistant, and said counsel for said Public Service Com-

¹ See 33 Sup. Ct. 976, 57 L. Ed. 1571.

mission, moved the court for a decree of dismissal of this case without prejudice at the costs of said complainant, with a recital in the decree that each shipper, consignee, and passenger who paid rates in excess of the statutory rates, while enjoined, shall have the right to sue on their original causes of action for such overcharges. Said motion was then argued by counsel on both sides. October 15, 1913, the said Attorney General and his associates withdrew said motion and moved this court for a decree dismissing this case without prejudice at the costs of complainant without other recital. And this court finds that the parties hereto have heretofore stipulated that this case appealed was to abide by the decision of said Supreme Court in said case No. 2988.

It is therefore considered, ordered, adjudged, and decreed that the final decree of this court heretofore entered be and the same is vacated, and this case is dismissed without prejudice at the costs of the said complainant, which costs, including the costs of the Supreme Court, will be taxed by the clerk, and for which, if not paid within 41 days, a general writ of execution will issue therefor upon the application of any party in interest. Any party feeling aggrieved at the said taxation of costs by the clerk of this court may within the said time, by written motion, filed herein, ask to have said costs retaxed.

The decree in each of said cases covered by group three (3) aforesaid will be as follows:

This case came on for hearing September 15, 1913, on the motion of said complainant for a decree pursuant to the opinion of the Supreme Court of the United States filed June 16, 1913, as reported in United States Reports, vol. 230, p. 474 and following,¹ and the mandate of the Supreme Court dated July 16, 1913, and filed with the clerk of this court July 19, 1913, to which reference is made.

It is therefore considered, ordered, adjudged, and decreed that the final decree heretofore and herein entered of record be and the same is hereby confirmed, each party paying one-half of the costs, including the costs of the Supreme Court, which will be taxed by the clerk, and for which, if not paid within 41 days, a general writ of execution will issue therefor upon the application of any party in interest. Any party feeling aggrieved at the said taxation of costs by the clerk of this court may within the said time, by written motion, filed herein, ask to have said costs retaxed.

The decree in each of said cases covered by group four (4) aforesaid shall be as follows:

This case came on for hearing September 15, 1913, for a decree herein pursuant to the opinion of the Supreme Court filed June 16, 1913, and reported in United States Reports, vol. 230, p. 474 and following,¹ and the mandate of the Supreme Court of date July 16, 1913, and filed with the clerk of this court July 19, 1913. And the court finds that the appeal in this case by stipulation of the parties hereto was to follow and abide by the decision of the Supreme Court in case No. 2994.

It is therefore considered, ordered, adjudged, and decreed that the final decree hereinbefore and herein entered of record be and the same is hereby confirmed, each party paying one-half of the costs, including the costs of the Supreme Court, which will be taxed by the clerk, and for which, if not paid within 41 days, a general writ of execution will issue therefor upon the application of any party in interest. Any party feeling aggrieved at the said taxation of costs by the clerk of this court may within the said time, by written motion, filed herein, ask to have said costs retaxed.

Such will be the decrees as of this date.

Supplemental Opinion.

A few weeks since I filed an opinion in these cases resulting in the preparation of decrees dismissing the bill of complaint herein without

¹ See 33 Sup. Ct. 976, 57 L. Ed. 1571.

further order other than for costs. Within a few hours of the same day that the opinion was filed, one or more suits were brought by the state for very large sums of money to recover the excess rates charged by the railroads for the carrying of passengers and freight during the time the injunctions were in force. At a still later hour of the same day the railroad companies by counsel appeared and asked to have declarations of law and findings of fact made, equivalent to an application for rehearing. Since that time supplemental petitions have been filed by the railroad companies, and the cases have been resubmitted and are now for decision.

There were 18 of these cases brought by as many railroads asking that the state officers be enjoined from enforcing both the maximum freight rate statute and the 2-cent passenger statute. The cases were appealed to the Supreme Court of the United States, but only after a delay of two years by the state officers. All the 18 roads were required to put in force the 2-cent passenger statute, and that statute was observed until in April, 1909, when its enforcement was enjoined. Five of these cases were affirmed by the Supreme Court of the United States. There is no way of reimbursing the five roads that were thus compelled to carry passengers at 2 cents per mile for something over two years. There has been no remedy suggested, and that question seems to be at an end. The other 13 companies from the time of final decrees herein until the 1st of last July did charge in excess of 2 cents per mile per passenger, and did charge for intrastate freight more than the statute allowed. And the only question now presented is as to what shall be done by way of procedure for the recovery back of such excess passenger rates and freight rates during the time the state statutes were not observed. Only 2 cents per mile has been charged since July 1, 1913.

Ordinarily there is not the slightest doubt but that if a person, either for passenger or freight service, is charged by the company more than the legal or reasonable rate, such excess can be recovered back. This is so because such payment will be regarded as having been made under protest. Persons are not required to discuss such rates with ticket agents and subordinates, for the reason that such agents have no discretion, but must make the charge as commanded by their superior officers. And courts regard it as the duty on the part of the public to thus make such payment and then bring an action to recover back the excess, as at common law for money had and received.

[1] These cases are pending on mandates from the Supreme Court, and the question is: What shall the decrees be? The mandate recites:

"And it is further ordered that this cause be and the same is hereby remanded to the District Court of the United States for the Western District of Missouri, with directions to dismiss the bill without prejudice."

There is an additional formal printed part to be found in all mandates as follows:

"You therefore are hereby commanded that such execution and further proceedings be had in such cause in conformity with the opinion and decree of this court as according to right and justice and the laws of the United States ought to be had, the said appeals notwithstanding."

The opinion (230 U. S. 474, 33 Sup. Ct. 975, 57 L. Ed. 1571) concludes:

"The decrees * * * are reversed, and the cases remanded, with directions to dismiss the bills respectively, without prejudice."

The opinion and mandate must be construed together. What I stated in my opinion of December 20, 1913, I still adhere to:

"Shall this court literally follow the mandate? Or can and shall this court add thereto? It is so well known as to be well-nigh a maxim of the law that, when an appellate court speaks, such holding is the law of the case in all subsequent proceedings of the case in both the trial and appellate courts. Occasionally an appellate court has declined to observe this rule when persuaded that the first opinion was wrong. But the rule is as first stated. And the rule is emphasized when the appellate court decides an equity case by reversal. Nothing can be gained by collecting the cases in large numbers, as is easily done from digests and footnotes to text-books. There are two rules to be observed. The one is as is illustrated by the case of *Gaines v. Rugg*, 148 U. S. 229, 13 Sup. Ct. 611, 37 L. Ed. 432, from this circuit. In that case it was decided that the trial court should take the opinion of the Supreme Court, and with the mandate, construed together, enter a decree in conformity thereto. The last paragraph of the syllabi of the opinion reads: 'The construction of the intent and meaning of the opinion of this court was not a matter for the exercise of judicial discretion by the circuit court, and the case is a proper one for a mandamus by this court.' The other rule is as was announced by the Supreme Court in the two cases of *In re Sanford Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414, and *In re Potts*, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994. Such other rule is, after affirming the one first announced, that the trial court may consider and decide any matters left open by the mandate, or by acting on facts omitted warranting a new trial, and its decision of such matters can then be reviewed by a new appeal only. These two cases have been as frequently followed as the one in 148 U. S., and it would be an affected learning to cite them."

That such are the two general rules respecting the decrees of a trial court in an equity case reversed by an appellate court, with directions both in the opinion and a mandate to dismiss the bills of complaint, sometimes with and sometimes without prejudice, there can be no question, and counsel before me have not controverted such rules. Counsel for the state officers insist that it is a hard and fast rule and never subject to modification or control. It is without force to contend that the decree of a trial court reversed, with an opinion of the appellate court and its mandate on file, in all cases and under all circumstances must be in the language of the mandate.

There are two questions to be considered:

[2] One of these questions is: Did the Supreme Court of the United States in these cases leave any question open for the further consideration of this court? The question before this court was, first, as to the validity of the commodity freight statutes of 1905. That question soon went out of the case, because the Legislature of Missouri repealed the statute of 1905. Then the statutes of 1907 were enacted, some of them with reference to maximum freight rates, and one with regard to the 2-cent passenger fare. Over the protest of the then Attorney General and his associates, I allowed supplemental bills to be filed bringing the 1907 statutes before the court for consideration. On that question the decree of this court was affirmed by the Supreme Court.

Another question, being one of constitutional law, was: Did the Missouri statutes of themselves so impinge upon the commerce clause of the United States Constitution as to render the state statutes void? On that question the decree of this court was against that contention and was affirmed by the Supreme Court of the United States.

The other and remaining question was one of fact, and that was whether the rates thus prescribed by the Missouri statutes were sufficiently remunerative. This court held that they were not, and issued a perpetual injunction against the enforcement of the statutes. On that question of fact, the Supreme Court of the United States reversed the decrees of this court in 13 cases before this court, holding that the valuation of the roads was not definitely and with sufficient clearness established. On the other five cases there was an affirmance.

There was no other question either of fact or of law before either this court or the Supreme Court of the United States, and on that state of the record the 13 cases now before this court on mandate were reversed, with directions to dismiss the bill without prejudice, leaving it to the railroad companies, should they so elect, when the proofs would be attainable, to commence other cases of like nature, pressing the same on only one remaining point, namely, the question of fact above alluded to. So that on that question of fact nothing was left open by the Supreme Court of the United States, and for that reason the case of *Gaines v. Rugg*, 148 U. S. 229, 13 Sup. Ct. 611, 37 L. Ed. 432, above cited, and prior cases therein referred to, are controlling and conclude the controversy, unless it be because of other cases respecting another rule.

There have been many of these public utility rate cases before the courts, and in some of them there have been mere naked dismissals of the bills of complaint followed by a judgment for costs, but without other recitals in the decrees, nothing added and nothing subtracted. Such was done, as I understand it, in the *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511. In the *Arkansas Rate Cases*, 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. Ed. 1625, which are very much like these 13 cases, the court retained jurisdiction to the exclusion of the state courts for the purpose of ascertaining to whom and in what sums moneys were due because of rates paid during the life of the injunction beyond those allowed by the statute. I have before me the opinion by Judge Trieber of the Eastern district of Arkansas, filed within the past ten days. Judge Trieber discusses many questions in that opinion, reaching conclusions in no wise controlling here. In the *Arkansas Rate Cases* bonds in penalties of \$1,000,000 were conditioned as follows:

"If it should eventually be decided that so much of this order as inhibits enforcement of the rates prescribed * * * that the complainant shall refund to the owners and holders of the certificates issued by it (showing the excess payments) the excess charges as shown by the same."

Judge Trieber was expressly adjudicating the effect of the bonds before him. The rule is that the court can retain the bonds and have all liabilities thereunder adjudicated, or the court may remit the same to another court. In other words, those bonds in Judge Trieber's cases

were precisely one and the same as if a deposit of moneys had been required and placed in the registry of his court to reimburse all those who had paid fares beyond that which would have been reasonable or beyond rates fixed by statute. Such is Judge Trieber's opinion.

The Supreme Court of the United States but a few weeks since (*City of Louisville v. Cumberland Telephone & Telegraph Co.*, 231 U. S. 652, 34 Sup. Ct. 260, 58 L. Ed. —, January 5, 1914) was dealing with a case much like the *Arkansas Rate Cases*. An ordinance of the city of Louisville had been adopted fixing telephone rates. The trial court held that the rates thus fixed were confiscatory. On appeal the decree of the District Court was reversed. *Louisville v. Telephone Co.*, 225 U. S. 430, 32 Sup. Ct. 741, 56 L. Ed. 1151. The opinion concludes by directing "Decree reversed without prejudice." The mandate required the District Court to proceed "for further proceeding not inconsistent with the opinion of this court." The trial court, after this mandate was filed, entered an order dismissing the case but retaining the same on the docket for the purpose of ascertaining the amounts collected by the company from its patrons in excess of the rates prescribed by the ordinance, and for the further purpose of distributing the same among the persons entitled thereto. During the progress of that case in the trial court, the city moved for an order requiring the company to pay into court all sums collected in excess of those rates fixed in the ordinance. To avoid that order and such deposit of money, the company agreed that, if the court would make no order, it (the company) would keep an accurate account of the sums collected on the rates fixed, and would on the final hearing pay the amounts into court for distribution among those entitled thereto, in the event the ordinance was not declared to be confiscatory. By reason thereof the court made no order requiring a deposit. In short, the proceedings of the trial court in the first instance was that the order for depositing the excess would not be made; the company agreeing to have the court ascertain the amount and then pay it into court for distribution. Such was part of the proceedings agreed to by both parties, and such was at the bottom of the opinion of the Supreme Court, as above cited. The trial court, after mandate was filed, proceeded to carry out this agreement, and an application for mandamus was made and denied by the Supreme Court of the United States but a few weeks since. The Supreme Court held that the trial court did not abuse its discretion on the whole record by having an accounting made in the court and requiring the amount found by the accounting to be paid into court and distributed.

Litigation like this arose in West Virginia. The proceedings there were in the state court. The court required coupons to be issued evidencing such excess fares thus paid. The Supreme Court of the state having held the act was constitutional, the case was affirmed by the Supreme Court of the United States in *Chesapeake & O. R. Co. v. Conley*, 230 U. S. 513, 33 Sup. Ct. 985, 57 L. Ed. 1597. After the mandate of the Supreme Court of the United States was filed with the Supreme Court of the state, and the Supreme Court of the state certified the proceedings to the trial court, then the trial court decided

that the moneys represented by these coupons should be gathered in by the court and distributed to the holders of such coupons.

Russell v. Farley, 105 U. S. 433, 26 L. Ed. 1060, is a case strongly urged in support of the contention that this court should appoint a master and assess the amounts of excess fares and distribute them. That case presented a controversy between the receivers of a railroad in the state of Minnesota and certain other parties claiming the right to rails, and perhaps other controversies. The entire contention was with reference to a trust, and as to what property the trust had been or should be impressed. But one party appealed from the decree, and he appealed only from that portion which declared that neither party is entitled to costs or damages. The case was first presented in the state court, and, had it remained there, a Minnesota statute would have been sufficient warrant to require the state to hold that the damages could be ascertained by reference or otherwise, as the court should direct. But, the case having been removed from the state court to the United States court, the Supreme Court held that statute was not applicable. The writer of the opinion, Mr. Justice Bradley, announces the rule to be that, where no bond or undertaking has been required, the court has no power to award damages sustained by either party in consequence of litigation, except by making such decree with reference to the costs as it may deem equitable and just. But that case is with reference to assessment of damages between parties to the record, and there was no other proposition before the court. I cannot reach the conclusion that that case is an authority upon the question now before this court. Commencing 24 years ago in the case of *Milwaukee Railroad Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970, and continuing until the present time, there has been a uniform line of holdings that the fixing of rates is a legislative act, and in determining the question of whether rates thus fixed are remunerative or not is a judicial question. The further holdings are that the only appropriate way to determine such matters is to bring into the record such officers as have the enforcement of the legislative act as part of their duties.

In the case at bar the state officers, charged with the enforcement of the statute, were made parties defendant. For a time one individual shipper and an individual passenger were joined as defendants as supposed representatives of a class, but they were dismissed from the case, and, when these cases went to decree, the decree was only as between the railway company and the state officers. Shortly after the cases were commenced, this court, Judge Philips presiding, exacted and approved a bond of the railway company in the penal sum of \$10,000. After reciting the order the bond reads:

"Now, if said obligor pays, in case said injunction be dissolved, all damages ascertained herein to have been sustained by the defendants or any of them, or any person becoming a defendant herein, then this obligation to be void; otherwise in force and effect."

There was no other bond and no other requirement. And from the date of the filing of that bond, July 22, 1905, parties on both sides acquiesced therein, and by such acquiescence neither party can say

that the bond is to be construed otherwise than on its face, and courts both of law and of equity will consider the same in the language only in which it was given. The bond, it will be noticed, is to pay damages that the defendants or any of them, or any person becoming a defendant, may sustain. There is not a word in the bond with reference to shippers and passengers, and the terms of the bond will admit of no such construction. Therefore, for several years, with the consent of all parties to the record, the case proceeded as if there were no bond other than to reimburse the defendants to the record for such damages as they might sustain. There is nothing for shippers or passengers to adopt by pleading said bond, and there is nothing for the railway companies to assert against the passenger or shipper by reason of that bond. Neither party asked that the excess rates or fares be impounded or paid into the registry of the court or controlled in any way whatsoever. So that, in my opinion, there is nothing left for consideration except a mere money demand in the nature of an action for money had and received. And it can be fairly stated that in every case where the court, sometimes on the motion of the public and sometimes on the motion of the public utility, has compelled all parties to come into court upon a state of facts showing that there was some kind of a trust to be observed and enforced, or with the property in some way or other before the court for distribution. In some instances this trust has been in the nature of a bond taken by the court for the payment of such specific damages; sometimes by the agreement of the parties; sometimes with coupons taken; and sometimes with money in the registry of the court.

The Attorney General and his associates have commenced a case against every of the railroads, claiming the grand total of the excess fares and rates paid during the life of the injunction, on the ground, as I understand it, that the action can be brought by one person for all others of like interest. I do not discuss that question. The theory is, as I understand it, that officers not under bond can collect this grand total and make distribution thereof. But to whom the sums shall be distributed and in what manner the rightful parties ascertained is not made known. And that question I pass by. It is claimed, as I understand it, that, should there be any sum not claimed by any person, firm, or corporation, the same will "escheat," or be forfeited, to the state of Missouri. That question I pass by. As is known by all, a percentage of those paying excess fares and excess rates were and are nonresidents of the state. By what authority the Attorney General can thus act for such persons is not made known. But I pass that question by. It is said that this will result in years of litigation in the state courts before the rightful parties obtain the proceeds for such excess rates and fares. With that I have nothing to do.

The railway companies insist that, by the appointment of a master, these moneys and the rightful claimants could be ascertained and payments made within a few months. I believe that to be true. I believe it to be the simple, methodical, and economical way to proceed if the parties would but agree; but they do not agree. Ordinarily every claimant against another party for money had and received has the

right to proceed in the court of his own choice, provided, always, it is a court having jurisdiction of the subject-matter and of the parties. This is an absolute right, subject only to statutory rights for a change of the place of trial from one state court to another, and in some instances for a change from a state to a national court. But the claimant in the first instance has the right to select his forum.

In these cases some parties have already intervened; others making claim for reimbursement have asked the right to intervene. Some of them are residents and some nonresidents of the state of Missouri. The Attorney General and his associates object to such interventions. But it is the opinion of this court that such interventions are of no legal concern to either the state of Missouri or any officer thereof. I believe that such persons who elect to come into this court, with the consent of the railway companies, and have their cases promptly adjudicated, and with judgments thereon, if not promptly paid, should have the right to come into this court.

So that the decree in each of these 13 cases will be a dismissal of the bill of complaint without prejudice, with judgment for costs, and a vacation of all orders for injunctions, but with the right of any party seeking to proceed in this court will have the right to so do. And for that purpose a master will be appointed. But those claimants who do not thus elect to come into this court will not be bound so to do by any order of this court. They are left free to go to such courts as they may select.

The decrees will be accordingly.

Ex parte GYTL et al.

(District Court, D. North Dakota, S. E. D. January 20, 1914.)

1. ALIENS (§ 53*) — DEPORTATION — COUNTRY TO WHICH ALIEN MAY BE DEPORTED.

Immigration Act Feb. 20, 1907, c. 1134, § 35, 34 Stat. 908 (U. S. Comp. St. Supp. 1911, p. 518), which provides that the deportation of aliens found to be unlawfully within the United States "shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States, or if such embarkation was for foreign contiguous territory to the foreign port at which said aliens embarked for such territory," construed in connection with sections 20 and 21, which require the deportation of an alien to be to the "country whence he came," as to the last provision applies only to aliens who embarked for contiguous territory with intent to enter the United States therefrom, and not to such as enter a contiguous country with the intention of remaining there and who become domiciled there, although they may afterward enter the United States.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 53.*]

2. ALIENS (§ 53*)—DEPORTATION—COUNTRY TO WHICH ALIEN MAY BE DEPORTED.

Petitioners emigrated from Austria to Canada, having tickets for Winnipeg, where each had relatives or friends. They were admitted by the Canadian authorities and remained and worked in Manitoba for periods

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of from 6 to 18 months, when they were employed as members of a threshing crew by a farmer living in North Dakota, near the Canada line, who took them to his place, where they worked until arrested, and after hearing were ordered deported. They did not know that they had gone outside of Canada and did not intend to do so, nor did either they or their employer know that their crossing the line was in violation of law. *Held* that, while they were subject to deportation, the Department had no authority to order them deported to the ports from which they embarked for Canada, but, since that country had received them and they had become domiciled there, they should be returned to Canada as the country whence they came.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 53.*]

3. HABEAS CORPUS (§ 109*)—RELIEF—DISPOSITION OF PERSON.

Under Rev. St. § 761 (U. S. Comp. St. 1901, p. 594), which authorizes the court in habeas corpus proceedings "to dispose of the party as law and justice require," it is not confined to simply remanding or discharging a prisoner, and in case of an alien held for deportation may order his deportation to a country other than that required by the order of the Department, where such order was unauthorized by law.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 97, 98; Dec. Dig. § 109.*]

4. ALIENS (§ 53*)—DISABILITIES—"COUNTRY WHENCE HE CAME."

The phrase the "country whence he came," as used in Immigration Act Feb. 20, 1907, c. 1134, §§ 20, 21, 34 Stat. 904, 905 (U. S. Comp. St. Supp. 1911, p. 511), authorizing deportation of an alien to the country whence he came, means the country in which the alien last had his domicile prior to his unlawful entry.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 53.*]

For other definitions, see Words and Phrases, vol. 2, p. 1653.]

Petition by Pyt Gytł, Tonyj Senkiw, Aleska Plyta, Wasyl Tabazcka, and Piotr Czuliniski for writ of habeas corpus. Order for detention modified.

Seth Richardson, of Fargo, N. D., and C. J. Murphy, of Grand Forks, N. D., for petitioners.

Edward Engerud, U. S. Dist. Atty., of Fargo, N. D., for respondents.

AMIDON, District Judge. This is a proceeding by habeas corpus to inquire into the cause of imprisonment of the above-named persons by a commissioner of immigration and the sheriff of Grand Forks county, N. D., acting under authority of such commissioner. All of the defendants are Austrians. Two of them arrived by steamer at Quebec, in the Dominion of Canada, in the month of April, 1912. Three of them arrived at the port of Halifax in May, 1913. They vary from 19 to 34 years in age and are in sound health. They were all examined by Canadian inspectors of immigration at the port of entry and passed. They all had through tickets to Winnipeg, and proceeded at once to that city, where they had acquaintances, and some of them relatives. They have since worked as common laborers upon railroads and farms in the province of Manitoba. In the month of September, 1913, they were at work as harvest hands near the village

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of Gretna, which is located on the Canadian side of the international boundary. Having completed their job, they went to Gretna, for the purpose of taking the train back to Winnipeg. While they were spending the evening in a hotel there, one Napoleon Longtin solicited them to work for him as members of a threshing crew. They accepted the employment, and four of them were taken in an automobile and one in a carriage to Longtin's farm. The journey was made when it was very dark, late at night. The farm is situated on the American side of the line, about three miles from the boundary. The petitioners did not know that they were being taken into the United States, and would not have gone there if they had known. Neither did they know that it was illegal for them to enter the United States. Longtin himself knew nothing of our Alien Labor Law, and was quite unaware that he was violating its provisions.

The men worked for him as members of his threshing crew until October 2d, when they were arrested by an immigration inspector. They were all examined by him under oath, and their testimony taken in shorthand, and it is now before me as part of the return to the writ. They had no counsel, but gave their evidence with transparent candor. As part of his report, the inspector used the following language as to each alien:

"Attention is especially called to the fact that this alien claims that he was virtually kidnapped and taken into the United States against his will. Considering his attitude and willingness to answer all questions put to him, I believe he is telling the truth."

The inspector further found, however, that these aliens were in the United States in violation of law: (1) Because they entered under a contract to perform manual labor; (2) because they entered by wagon road instead of a port, and without inspection; (3) because they were persons likely to become a public charge.

The aliens all testified, however, that they were in perfect health, and had been since their arrival in Canada, and there was no evidence whatever to support the last finding. Each man had \$45 on his person at the time of the arrest. The inspector reported the evidence and his findings to the Secretary of Commerce and Labor, who thereupon issued his warrants directing that petitioners be deported to the country whence they came.

In the meantime Longtin had been arrested for violating the Alien Labor Law, and bound over to the grand jury, and the deportation of the aliens was suspended in order that they might be used as witnesses upon his trial. At the next term of court Longtin was indicted, and was arraigned for plea in the month of December, 1913. Upon his examination, it appeared that he was a man of substance and character in the community where he had lived for many years; that he owned a half section of land upon which he resided with his wife and children; that he had never been arrested before, or charged with any crime. He made a frank statement of what he had done, and informed the court that he was not aware that he was violating any law, but was simply trying to get laborers to thresh his grain. Counsel for the government confirmed his statements as the result of their investiga-

tion. A plea of guilty was then entered. The court, considering the offense to be without any wrongful intent, imposed a fine of \$5 as a sufficient vindication of an innocent violation of the law. A short time thereafter a civil suit was brought against Mr. Longtin by the government, in which it is sought to recover a penalty of \$5,000 and costs because of his bringing these aliens into the United States. This is the minimum penalty fixed by the statute. That case is still pending.

The aliens have been detained in jail. After the case against Longtin had been disposed of, they supposed that they would be permitted to return to Canada. It was then that they learned for the first time that the government contemplated deporting them to Austria. Thereupon their counsel sued out a writ of habeas corpus, to test the right of the Commissioner of Labor to deport them to that country. The facts above recited as to Mr. Longtin are a part of the records of the court. The petition and return disclose the facts as to the petitioners, and it is conceded by the government that the Secretary of Labor at the time he issued his warrants had before him no evidence except that which is now before the court.

It is clear from the evidence that petitioners are illegally in the United States. It is equally clear that their entry was the result of an innocent mistake on their part, and on the part of Mr. Longtin. It is the right and duty of the Department of Labor to deport them, but this power ought to be exercised by a just government with scrupulous regard to the rights of petitioners. They do not cease to be human beings simply because they are aliens, nor are they wholly outside of the protection of the Constitution. The evidence presenting no controverted issue of fact, the determination of the country to which they should be deported is wholly a matter of law, and the decision of that question by administrative officers is not binding upon the court.

[1] The question involved turns upon sections 20, 21, and 35 of the Immigration Act of February 20, 1907. The two first sections require that any alien who enters the United States in violation of law shall be deported to the country "whence he came." Section 35 reads as follows:

"That the deportation of aliens arrested within the United States after entry, and found to be illegally therein, provided for in this act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States, or if such embarkation was for foreign contiguous territory, to the foreign port at which such aliens embarked for such territory."

These three sections are to be read together, and a meaning arrived at, if possible, which will give effect to all their provisions. In the great majority of cases the alien comes direct from the country of his nativity, and in case of deportation should be returned there. The Department, as the cases on the subject show, has been zealous to make this a universal rule. That would simplify matters. But, like most universal rules, it will work cruel hardship in individual cases. The general rule under the statute clearly is that the alien shall be deported to the country whence he came. This, of course, is not necessarily the country of his nativity or citizenship. Section 35 gives a specific definition of the words "whence he came" in certain cases. The first

clause of that section deals with aliens who embark directly for some port of the United States. They are to be deported to the place from which they embark. The second clause deals with aliens who embark for the United States, but land at some foreign contiguous territory. In my judgment the last clause, like the first, is confined to aliens who embark "for the United States." It was a well-known evil at the time the statute was passed that aliens seeking to enter the United States in violation of its laws frequently landed either in Mexico or Canada, and passed into the United States across the long and unguarded international boundary lines. The last clause was intended to meet that evil. If Mexico or Canada was simply used as a front porch for entering the United States, then the alien was to be dealt with the same as if the entry had been made at one of our own ports. The statute, however, clearly requires that, in order to come within its provisions, the alien must have embarked "for the United States." The words "such embarkation" import into the second clause the embarkation referred to in the first clause, and that is an embarkation "for the United States." By this I do not mean that, in order to come within the provisions of section 35, the alien must have had a through ticket to some point in the United States at the time he embarked from the trans-Atlantic or trans-Pacific port. All that is required in order to bring him within the statute is that he should have formed the intent or purpose of entering the United States as the final object of his embarkation. *Ex parte Wong Yon* (D. C.) 176 Fed. 933, 940, 941. This is not inconsistent with his stopping in Canada, and presently renewing his journey for the United States. It is wholly a question of intent to be gathered from all the facts and circumstances. When these are subject to different inferences, the finding of the Labor Department would be conclusive upon the courts. An alien whose ultimate object was to enter the United States might tarry for some considerable time in Canada for the purpose of eluding or deceiving the immigration officers. In any such case his entry into the United States pursuant to a previous intent so to do would justify and require his deportation to the trans-Pacific or trans-Atlantic port at which he embarked. This interpretation will, in my judgment, fully meet the evil which the last clause of section 35 was intended to provide against.

[2] The present case does not fall within the above rule. The evidence leaves no room for doubt that these aliens never intended to enter the United States. They came to Northwestern Canada with the intent of making it their home. Their tickets read to Winnipeg; they were examined at the port of entry by the Canadian inspectors of immigration, and passed, and received into the population of that country. Having been thus received by the proper Canadian authorities, the United States is certainly doing its northern neighbor no wrong by returning them there. These aliens have kindred and friends in Manitoba; part of them have resided there for a year and six months, and others for six months. By their conduct they have shown clearly that their intent was to make that country their domicile. The evidence shows, and the inspector has found, that their entry into the

United States was an innocent mistake. Surely, under this state of facts, neither justice nor law requires their deportation to Austria. To do that would impose upon them a punishment such as civilized countries have heretofore inflicted only for the gravest offenses. *Fong Yue Ting v. United States*, 149 U. S. 698, 739, 740, 13 Sup. Ct. 1016, 37 L. Ed. 905. It would also be a wrong to Canada. She has welcomed these men into her population. They have entered the United States without any wrongful purpose. In turning them back we ought to return them to the country whence they came, that is, the country where they had their domicile, and into which they were welcomed after a full compliance with law. It was insisted at the hearing that to return them there would be a violation of understandings between the two nations, and agreements made between their Labor Departments. I have carefully scrutinized all that has been presented in support of their claim, and find nothing which sustains it. The Canadian immigration law is much less stringent than ours. It excludes paupers and persons diseased in mind or body or who have been convicted of crime involving moral turpitude. The petitioners come within none of these classes, and, so far as I can discover, there is nothing in any Canadian statute, regulation, or in any agreement between that country and the United States, which requires their deportation to Austria. Having made Canada their home, that is the country whence they came into the United States. Their domicile there exempts them from the provisions of section 35 of our statute, because their entry into the United States was no part of their purpose when they embarked at the trans-Atlantic port.

[4] In my judgment, the phrase "the country whence he came," as used in the Immigration Act, when sections 20, 21, and 35 are considered together, means the country in which the alien last had his domicile prior to his unlawful entry into the United States. This is the rule fairly deducible from the decisions on the subject. *Lui Lum v. U. S.*, 166 Fed. 106, 92 C. C. A. 90; *United States v. Redfern* (C. C.) 186 Fed. 603. Same case under title of *United States v. Ruiz*, 203 Fed. 441, 121 C. C. A. 551; *United States v. Sisson*, 206 Fed. 450, 124 C. C. A. 356; *In re Mah Wong Gee* (D. C.) 47 Fed. 433.

There are some general observations in the last paragraph of the opinion in *Frick v. Lewis*, 195 Fed. 693, 701, 115 C. C. A. 493, which indicate a different interpretation of the statute. These observations, however, were not necessary to the decision, and, when the facts of that case are examined, nothing is found which conflicts with the interpretation above indicated. In that case the petitioner, a Russian, entered the United States at the port of New York in 1904. After residing in the state of Michigan for six years, but without becoming an American citizen, he crossed the river to the Canadian city of Windsor for the purpose of introducing a woman into the United States for immoral purposes. He was in Canada only an hour, and, so far as the decision shows, that was the only time he was ever in that country. It was held that he was subject to deportation to Russia. Clearly he ought not to have been deported to Canada, because that country had never received him into its population, neither did he embark for

it when he came from the latter country. He left Russia with the intent of residing in the United States and had resided there for six years. If he was to be deported by the United States, clearly Russia was the country to which he should be sent. If Canada has never received an alien, and his presence there was only the temporary sojourn of a traveler, it is manifest that Canada would not be the country "whence the alien came" within the meaning of the immigration law. Such an interpretation sticks in the mere words of the statute, and disregards its purpose.

[3] What ought the court to do in the present case? The Commissioner of Immigration has a legal right to detain the petitioners; but he has no legal right to detain them for the purpose of deporting them to Austria. The warrant issued by the Acting Secretary of Labor simply commands the commissioner of immigration "to return the said alien to the country whence he came." The warrant is probably void for indefiniteness. *Ex parte Yabucanin* (D. C.) 199 Fed. 365. From the return, however, it appears that the Secretary intended that the commissioner should deport petitioners to Austria. This is the meaning which he and the Commissioner attach to the indefinite words of the warrant. In my opinion the warrant as thus interpreted is illegal. Under section 761 of the Revised Statutes (U. S. Comp. St. 1901, p. 594), the court is not confined to simply remanding or releasing petitioners, but may compel a proper and lawful disposition of them. The Supreme Court in *Storti v. Massachusetts*, 183 U. S. 138, 143, 22 Sup. Ct. 72, 74 (46 L. Ed. 120), quoting this statute, said:

"The command of the section is 'to dispose of the party as law and justice require.' All the freedom of equity procedure is thus prescribed; and substantial justice, promptly administered, is ever the rule in habeas corpus."

See, also, *In re Gut Lun* (D. C.) 84 Fed. 323. The court evidently overlooked this statute in *United States v. Williams* (D. C.) 187 Fed. 470.

It is therefore ordered that judgment be entered in each of these cases directing the Commissioner of Labor, in whose custody the petitioner is, to deport him forthwith to the Province of Manitoba, in the Dominion of Canada, and forbidding such commissioner, or any person acting under his direction or authority, or under the direction or authority of the Secretary of Labor, to deport said petitioner to any other place than above specified, or to restrain him of his liberty longer than shall be reasonably necessary to execute such judgment.

MURRAY et al. v. SOUTHERN BELL TELEPHONE & TELEGRAPH
CO. et al.

(District Court, E. D. South Carolina. July 25, 1913. On Petition for Rehearing, January 13, 1914.)

1. REMOVAL OF CAUSES (§ 86*) — PETITION FOR REMOVAL — VERIFICATION — "DULY VERIFIED."

Under section 29 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1095 [U. S. Comp. St. Supp. 1911, p. 142]), which provides that a petition for removal shall be "duly verified," what constitutes a due verification depends somewhat on the contents of the petition. Conclusions of law stated as grounds for the removal do not require verification, and where facts alleged as the ground are positively stated, a verification that the facts are true except such as are alleged on information and belief is sufficient.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

For other definitions, see Words and Phrases, vol. 3, p. 2265.]

2. REMOVAL OF CAUSES (§ 86*) — VERIFICATION OF PETITION FOR REMOVAL — AMENDMENT.

A verification of a petition for removal which is only slightly and not substantially defective may be amended by leave of court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

3. REMOVAL OF CAUSES (§ 61*)—SEPARABLE CONTROVERSY—JOINDER OF CAUSES OF ACTION.

Under the system of practice and pleading in South Carolina, a complaint, in an action against a telephone company and its agent, which alleges that while plaintiffs were conversing over a long distance wire of the company they were compelled to discontinue before the expiration of the time for which they paid, in violation of the company's contract and of its duty as a public service corporation, and also alleges that abusive and indecent language was used toward plaintiffs over the wire by defendants, states two distinct and separable causes of action, the first of which is against the defendant company alone and entitles it to remove the cause where the requisite diversity of citizenship exists between it and the plaintiffs.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. § 61.*]

At Law. Action by Joseph Murray and Mary Elizabeth Murray against the Southern Bell Telephone & Telegraph Company and Forest McDuffie. On motion to remand to state court. Denied.

J. P. K. Bryan, of Charleston, S. C., and R. L. Weeks, of St. George, S. C., for plaintiffs.

Smythe & Visanska and W. H. Grimbail, both of Charleston, S. C., for defendants.

SMITH, District Judge. This cause came on to be heard upon an application to remand the same to the court of common pleas for Dorchester county in the state of South Carolina, and, due notice having been given of said application, counsel on both sides having been heard, it is thereupon ordered and adjudged as follows:

The action is an action at law originally instituted in the court of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

common pleas for Dorchester county in the state of South Carolina. Thereupon the defendant the Southern Bell Telephone & Telegraph Company filed a petition for removal of the action to this court upon two grounds: First. That there was involved in the action a controversy wholly between the plaintiffs, who were citizens of the state of South Carolina, and the defendant the Southern Bell Telephone & Telegraph Company, a citizen of the state of New York and a nonresident of the state of South Carolina. Second. That in all the controversies set up in the complaint herein as constituting the causes of action herein the Southern Bell Telephone & Telegraph Company is the real and only defendant, and that Forest McDuffie, the other defendant, who was a citizen of the state of South Carolina, was merely joined as such for the purpose of preventing the removal of the action to this court for trial, and that his joinder was there fraudulent.

The plaintiffs have moved that the cause be remanded to the court of common pleas for Dorchester county upon the following grounds:

1. That the statute requires the petition for removal to be "duly verified" and the petition in this cause is not duly verified.
2. That there is no separate controversy in the cause in that the complaint alleges but one single cause of action and tort.
3. That no scienter is alleged in the petition on the part of the plaintiffs herein as to the fraudulent joinder of the defendant Forest McDuffie; that is, there is no allegation in the petition for removal that at the time of the joinder the plaintiffs well knew that the said Forest McDuffie was not a proper party defendant nor responsible as such upon any cause of action set up in the complaint and that his joinder was therefore not made in good faith, but was fraudulent.

[1] 1. As to the sufficiency of the verification of the petition:

The Judicial Code of the United States, § 29, prescribes only that the petition shall be "duly verified." The "due" verification of a petition would somewhat depend upon the contents of the paper and the circumstances of the case. Where a petition for removal is filed upon the ground that the cause of action set up in the complaint is one arising under the Constitution or laws of the United States, it would be a matter to be determined as a conclusion of law upon an inspection of the complaint. There would be no matters of fact to be set up in the petition to be verified. The swearing by a petitioner that the matters of law alleged by him in his petition as cause for removal would be no verification. The only verification required in such case should be a proper verification that the party purporting to make the application to remove does actually make the same.

[2] The only matters in a petition for removal which the party seeking removal can verify under oath are matters of facts. The citizenship of the Southern Bell Telephone & Telegraph Company appearing on the face of the complaint itself in this case, the petition for removal alleges only two matters of fact as to which the verification would apply. These are the citizenships of the plaintiffs as being citizens of South Carolina, and that McDuffie was not in the employ of the defendant the Southern Bell Telephone & Telegraph Company; but the petition refers to as annexed to it the affidavit of McDuffie, which is in correct form and made positively and is duly verified, which leaves

the only matter of fact pleaded in the original petition for verification the citizenship of the plaintiffs. The verification to the petition is that the facts stated in the petition are true to the knowledge of the deponent save as to those matters therein stated upon information and belief. In the petition the statement as to the citizenship of the plaintiffs is not made upon information and belief, but is stated positively. On the whole therefore in the opinion of the court the petition in this case is "duly" verified. Even if it were not verified in the case of so small an irregularity as in the present case, the court would permit an amendment to be made in the affidavit of verification appended to the petition, so as to conform in all respects to the requirements.

[3] II. As to the existence of a separable controversy:

Is there involved in the cause of action set up in the complaint two different and separable causes of action? And is one of these causes of action one which is wholly between the plaintiffs and the defendant the Southern Bell Telephone & Telegraph Company? The complaint alleges: That the defendant the Southern Bell Telephone & Telegraph Company is a public service corporation maintaining a telephone line between St. George, S. C., and Columbia, S. C., passing through Branchville, S. C., and as such was subject to the performance of the duties of a public service corporation in that respect. That the plaintiff Joseph Murray at St. George paid to the defendant the Southern Bell Telephone & Telegraph Company its toll of 50 cents for three minutes' conversation over its wires to his coplaintiff Mary Elizabeth Murray, then Griffin, in Columbia, S. C. That by the agreement this 50 cents was to cover the three minutes' uninterrupted use of the wire to talk. That whilst so talking "the defendants jointly and concurrently in breach of the said contract and in willful and wanton disregard of the rights of the plaintiffs, and of their public duty and service then and there owing to the plaintiffs by the defendants maliciously, knowingly, wrongfully, and insultingly, in the hearing of the plaintiffs, and by use of said telephone wires then being used by plaintiffs, made grossly obscene, indecent, and insulting remarks to the plaintiffs, and thereby broke up the conversation between the plaintiffs," and prevented the plaintiffs from continuing the conversation by the uninterrupted use of the telephone wire, to their damage \$50,000.

A telephone company in the state of South Carolina is a public service corporation; it is not strictly a common carrier, but it belongs to the same class of corporations as the public carrier class, and as such, while not subject to the same stringent rules which govern in ascertaining the liability of common carriers, yet it is bound to supply all alike who are in like circumstances with similar facilities under reasonable limitations for the transmission of news without any discriminating whatsoever in favor of nor against any one. *State v. Telephone Co.*, 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870. It would also be its duty in the performance of its service to the public to perform it with all due regard to the rights of the public and the individuals using its system for the purpose of communication. Whenever any person contracts with it for the use of its wires, it is similar in general character to the contract with a railroad company for the shipment of a piece of freight over its lines, and the failure of

a public service corporation in either case to properly perform its duties in furnishing the service would be a breach of its obligation for which it would be responsible in compensatory damages. By the procedure and pleading of South Carolina there is in actions at law a recognized and established difference, as separate and distinct causes of actions, between causes of action in tort for negligence or breach of contract, and causes of action for willful tort. Causes of action based upon breach of the duty of a public service corporation to a party entitled to avail himself of such services, arising out of negligence or failure in the performance of duty, has been decided to be inconsistent in nature and wholly distinct and separate from the cause of action arising from willful and gross negligence or willful tort. They may under the statute of the state of South Carolina with regard to pleading be commingled or "jumbled" together so as to be stated so as to include in one statement both causes of action. This, however, in the view of the Supreme Court of the state of South Carolina, does not do away with the fact that the causes of action are distinct. The statute allows two separate causes of action to be embodied in one statement, but leaves them still separate causes of action, as to one of which a nonsuit can be granted, while the case is allowed to go to the jury as to the other. *Machen v. Telegraph Co.*, 72 S. C. 260, 51 S. E. 697; *Baldwin v. Cable Co.*, 78 S. C. 421, 59 S. E. 67; *Taylor v. Railroad Co.*, 81 S. C. 578, 62 S. E. 1113.

Under this view of the South Carolina Supreme Court, the present complaint appears to state two separate and distinct causes of action. One is against the Southern Bell Telephone & Telegraph Company as a public service corporation for failing to perform its duty in affording to the plaintiff the uninterrupted use of the wire for the purpose of communication for the period for which he paid. This is a distinct and independent cause of action between the plaintiffs and the defendant the Southern Bell Telephone & Telegraph Company, for its breach of contract or tortious failure to perform its duty in this respect. It constitutes a controversy which can be wholly determined as between the plaintiffs and the Southern Bell Telephone & Telegraph Company, without the presence of any other party and one in which no other party would be a proper party.

The other cause of action alleged is a willful tort or invasion of the plaintiffs' rights due to the invasion of the personal rights of the plaintiffs, when using the wires; that is, by the alleged willfully indecent and improper words and declarations of the defendants.

Inasmuch as a corporation can speak only through its agents who are natural persons, this allegation must be taken to refer to the defendant Forest McDuffie. It is a charge that McDuffie through the opportunity given him by his employment by the Southern Bell Telephone & Telegraph Company took advantage of the occasion by his language to so insult and offend the plaintiffs as to drive them from the use of the wires, and for his conduct in that regard it is claimed that both employer and employé are responsible.

This would seem, under the procedure in South Carolina, to constitute an independent cause of action for willful and punitive dam-

ages; but it would be one wholly distinct and independent of the cause of action against the defendant corporation for a breach of its contract and failure to perform its duty. Under the common-law theory of pleading, this separation would not exist; as at common law punitive or exemplary damages were not allowed as resting upon a separate and independent cause of action, but only went to intensify and aggravate the damages which would be given in a cause of action based upon compensatory damages. At common law mere willfulness or motive did not constitute a separate and independent cause of action. There must be some overt breach of the plaintiff's legal rights, and in an action of trespass on the case on such breach or cause of action punitive or exemplary damages based in some cases upon the motive with which the original tort was committed could be awarded in addition to compensatory damages, as in intensification or increase of those damages due to the aggravated character of the injury committed.

Such would appear to be the more simple and logical rule. The cause of action in each case may depend upon the same facts. Exactly the same testimony may be necessary to sustain either alleged cause of action. The rule in South Carolina splits up the causes of action arising from the same facts so as to make one separate and independent cause of action rest upon the breach of a legal duty, and another rest upon the motive or manner in the committing the breach, so as that under the law of South Carolina damages may be sued for and recovered for the motive and manner of an alleged breach of legal duty, although the breach itself did not occasion even nominal actual damages.

So that under the practice in the state courts of South Carolina in common-law cases the complaint herein presents two independent separate controversies on either of which an independent nonsuit could be ordered by the court and the cause sent to the jury on the other alone. The plaintiffs could have brought this action on either alone, or they could, if they had seen fit, have brought separate and independent actions to one of which the Southern Bell Telephone & Telegraph Company would have been properly the sole defendant. As it appears that there are two separate and distinct causes of action or controversies set up in the complaint herein in one of which there is a controversy existing wholly between the plaintiffs and the Southern Bell Telephone & Telegraph Company which can be determined wholly and entirely between them without the presence of any other party defendant, the case is one under the statute properly removable to this court, it is unnecessary to consider the question as to the fraudulent joinder, and the motion to remand is, accordingly, refused.

On Petition for Rehearing.

This matter came up to be heard upon a petition for a rehearing upon the order of this court filed July 25, 1913, refusing a motion to remand.

The application for rehearing was upon the ground that the complaint in this case is solely for a tort jointly committed by the de-

fendants for which they are jointly liable. The complainants therefore claim that the court was in error in its previous order holding that there were two different causes of action set up in the complaint, as to one of which there was a controversy solely between the plaintiffs and the defendants the Southern Bell Telephone & Telegraph Company.

The plaintiff claims that the willful breach of the contract in effect justified an action in tort, and that where a tort occurs all tort-feasors, including therein employer and employé, are by the law of South Carolina jointly liable. The question, as it is an action at law, is to be decided mainly upon the principles adjudicated as governing similar actions at law in the state courts of South Carolina. A great deal of confusion has arisen with regard to the distinction between actions on contract and actions on tort. Originally the general definition of an action arising on contract was where the action was either to recover the amount due under the contract, or for damages for the breach of the contract. The breach of the contract has been also held to be, not an action on contract, but an action in the nature of an action on tort for damages for the unlawful breach of the contract. But the general definition of an action on contract was supposed to include both an action to recover the amount due under the terms of the contract, as well as an action to recover for the damages for the breach of the contract. An action in tort was supposed to be distinguished from that of an action on contract inasmuch as it arose entirely independent of any contract or agreement of the parties and wholly out of reciprocal and respective duties fixed by law. In many cases, however, the lines between the two classes of cases was difficult of ascertainment. Some torts appeared to arise out of a condition of affairs produced by a breach of contract, i. e., the parties occupied a certain relation towards each other by virtue of contract, and upon its breach action might be taken by one party against the other, not strictly within the line of an action for a breach of the contract, but arising from the duties imposed by law upon the parties respectively by virtue of their relations created by contract, and which action has been characterized as one in tort.

When an action is brought in such cases, therefore, it may be difficult to ascertain from involved and uncertain allegations in the complaint whether the plaintiff is suing for a breach of the contract, or whether he is suing for the tort from which he claims to have suffered by the act of the other party independent of the contract itself, but simply occurring by the situation consequent upon the contract, or whether he is suing upon both. If he was suing upon a tort wholly and independently, it may be a case in which the master and servant are jointly responsible. The master is not responsible jointly with the servant for all of the torts of the servant. He is responsible only for such torts as were committed in the line and the scope of the employment of the servant. He is never liable for willful and malicious acts of the servant committed wholly outside of the scope of his employment. In the state of South Carolina, however, the doctrine has been established that for acts of trespass to person

or property committed by the servants of common carriers, or similar employés, while in the course of the employment, even in the execution merely of the duties as employé, but in charge of the appliances and apparatus for the purposes of such employment, the master and the employé are jointly liable. The servant is not as a rule liable to third parties for breach of the master's contract, or for the performance of that contract or for his own nonfeasance in the course of his employment under his duty to his master. The difference perhaps may be better illustrated by an example. A servant under the law of South Carolina is liable together with his master for tortious acts of misfeasance or tort in the nature of trespass upon the person or property of third parties, such as the negligence of an engineer in injuring a person in the operation of a train, or the misconduct of the conductor towards a passenger during transportation. The servant is not liable to a third party for his mere nonfeasance in a matter of leading to the breach of the contract by his master; as in the case of a bricklayer employed upon the construction of a building when the master is under contract to finish it within a certain period. If the negligence or nonfeasance of the bricklayer employed by the master operates to prevent the performance of the contract within the stipulated period the servant would not be liable to the other party to the contract.

Speaking generally, the servant is not responsible for the damages resulting from the breach of the master's contract, but only for such damages as may be inflicted by some negligent or willful tort of his own. In the present case the complaint seems to set up two causes of action. It distinctly alleges that the action against the defendants was for an act done in breach of the contract. Next, that it was in willful and wanton disregard of the rights of the plaintiffs and their public duty and service then and there owing to the plaintiffs for which punitive damages are asked. The joinder of these two different causes of action seems to be allowed by the practice of the state courts of South Carolina. In the case of *Cave v. Seaboard Air Line Ry. Co.*, 77 S. E. 1017, decided April 7, 1913, the Supreme Court of South Carolina decides expressly that for the carrier's breach of a contract in the case of a carrier's failure to perform its contract for transportation or of its duty to the public the passenger's remedy is an action for damages. That would appear to mean that the plaintiff in such cases has two causes of action against the carrier: One, for the breach of the carrier's contract made between the carrier and the plaintiff personally; the next, for the breach of the carrier's duty to the passenger as part of its duty to the public for its failure to perform that duty to the particular plaintiff. That court further holds that there can be another cause of action, to wit, the conduct of the conductor in insulting and humiliating the passenger, for which the plaintiff could recover punitive or vindictive damages from both the carrier and its employé.

The Supreme Court of South Carolina in brief, in this case, seems to hold that, in the case of a public service corporation transporting passengers, a passenger wrongfully ejected has three causes of action:

First, an action for damages for breach of the contract of transportation. Second, an action for damages for the breach of duty by failure of the carrier to perform the duties which by law such a public service corporation owed to the public, including the particular plaintiff. Third, a cause of action for punitive damages for the improper and wrongful action of the employé of the defendant the conductor in his treatment of the plaintiff at the time of the breach of the contract. These three causes of action are held by the Supreme Court of South Carolina as causes of action which can be set up and recovered upon as separate causes of action in actions at law in the state courts of South Carolina. To the two first causes of action, viz., that for breach of the contract of transportation, and that for breach of the duty of a public service corporation such as a common carrier to a person whom it engaged in transporting, are causes of action arising upon contract and wholly against the corporation. The last cause of action for punitive damages for the action of the conductor being for negligence or tort of the employé committed by him in the scope and the line of his employment is one which the plaintiff has the right to bring against the master and servant jointly. This last cause of action under the rules of pleading and practice prevailing in the state courts of South Carolina could be instituted alone, without any action being brought upon the two first-mentioned causes of action.

This rule in South Carolina as mentioned in the first order made is different from the common-law rule. Under the rule at common law there would be but one cause of action in this case, viz., failure of the defendant to perform its contract of transportation, that contract being in effect one, the particular contract to be transported between two particular points as paid for by the passenger being treated as a contract made and having written in it as a part of the particular contract the duties due by the public service corporation to the passenger under such a contract. The punitive damages at common law would not be a separate cause of action, but would be simply an intensification or aggravation of the damages arising from the tortious act of the conductor in the performance of his duty. Under the common-law rule of practice and pleading, the conductor could properly be joined in an action brought for that purpose, the cause of action being one and the cause would not be removable; but where, as under the practice and law in the state of South Carolina, the causes of action are declared to be wholly separate and independent, and which can be set up or sued upon separately, they are held to constitute separate and independent controversies. Such being the case, under the language of this complaint a controversy is therein set up in the shape of a recovery sought against the defendant for the breach of contract. It is a separate independent cause of action, and one which can be sued upon and recovered upon separately and is a controversy existing wholly between the plaintiff and the defendant the Southern Bell Telephone & Telegraph Company, and the case would be removable upon the ground of a separable controversy.

It is therefore ordered that the motion to rehear and reconsider the previous order in this case made refusing the motion to remand is hereby refused.

ELIOT NAT. BANK v. GILL, Collector of Internal Revenue.

(District Court, D. Massachusetts. December 29, 1913.)

No. 395.

1. INTERNAL REVENUE (§ 9*)—SPECIAL EXCISE TAX ON CORPORATIONS—COMPUTATION OF NET INCOME TAXES.

Tariff Act Aug. 5, 1909, c. 6, § 38, par. 2, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), which provides that the net income of a corporation, on which the special excise tax imposed by the section shall be assessed, shall be ascertained "by deducting from the gross amount of the income * * * (4) all sums paid by it within the year for taxes imposed under the authority of the United States or of any state, * * *" does not entitle a bank located in Massachusetts to deduct from its gross income taxes assessed on its shares of stock by the city or town in which it is located under Rev. Laws Mass. c. 14, §§ 9-18, which require the bank to pay such taxes, but give it a lien on the shares and interest of the stockholder for the amount paid; such taxes being clearly imposed upon the shareholder and not upon the bank or its property.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

2. INTERNAL REVENUE (§ 25*)—SPECIAL EXCISE TAX ON CORPORATIONS—"FALSE RETURN"—POWER OF COMMISSIONER TO AMEND.

Under the provision of Tariff Act Aug. 5, 1909, c. 6, § 38, par. 5, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 950), relating to the imposition and collection of special excise taxes on corporations, which authorizes the Commissioner of Internal Revenue in case a return made by a corporation is "false or fraudulent" to amend such return at any time within three years and assess and collect the correct amount of tax, an incorrect return is "false" although made in good faith under a mistake of law, and the commissioner has power to amend such a return even after the tax under the original return has been paid.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 72, 73; Dec. Dig. § 25.*]

For other definitions, see Words and Phrases, vol. 3, p. 2670.]

3. INTERNAL REVENUE (§ 25*)—SPECIAL EXCISE TAX ON CORPORATIONS—POWER TO AMEND RETURN.

The provision being that in case of such false or fraudulent return the commissioner shall make an amended return "upon the discovery thereof at any time within three years after said return is due," the corrected assessment is not required to be made within the three years.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 72, 73; Dec. Dig. § 25.*]

4. TIME (§ 9*)—INCLUDING LAST DAY—STATUTES.

The general rule for the construction of statutes, which require an act to be done within a specified period from or after a day named, is to exclude such day and to include the last day of the specified period.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.*]

At Law. Action by the Eliot National Bank against James D. Gill, Collector of Internal Revenue. Judgment for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Edwin H. Abbot, Jr., of Boston, Mass., for plaintiff.
Asa P. French, U. S. Atty., and James S. Allen, Jr., Asst. U. S. Atty., both of Boston, Mass., for defendant.

BINGHAM, Circuit Judge. This action was brought by the Eliot National Bank against James D. Gill, collector of internal revenue for the Third district of Massachusetts, in the superior court for the county of Suffolk, and was afterwards transferred into this court by writ of certiorari.

The declaration contains three counts for money had and received. In the first count plaintiff seeks to recover \$338.25, with interest from March 15, 1913. In the second and third counts for \$369 and \$377.20, respectively, with interest from April 28, 1913. The sums sought to be recovered represent certain taxes paid by the plaintiff for the years 1909, 1910, and 1911, under the provisions of the Corporation Tax Law of August 5, 1909, 36 Stat. L. c. 6, § 38, pp. 112-117 (U. S. Comp. St. Supp. 1911, p. 946). The case is here upon an agreed statement of facts with authority in the court to draw such inferences from the facts agreed upon as may be warranted.

[1] The plaintiff is a national bank, located and doing business in the city of Boston. On May 1, 1909, and on April 1, 1910 and 1911, the shares of the capital stock of the bank were assessed by the city of Boston, under the provisions of Revised Laws of Massachusetts, c. 14, §§ 9-18, inclusive, and under the provisions of St. Mass. 1909, c. 490, pt. 3, §§ 11-20. The tax assessed by the city upon the shares of the bank for 1909 was \$33,825; for 1910, \$36,900; and for 1911, \$37,720.

Returns were made by the plaintiff to the collector of internal revenue for the three years in question for the assessment of the corporation tax, and taxes based upon such returns were levied and paid. On or before February 27, 1913, the Commissioner of Internal Revenue discovered that in making these returns the bank had deducted from its gross income the amount of taxes stated above and paid by it each year to the city of Boston. Thereupon the commissioner, having made or caused to be made an amended return, assessed an additional tax for each year upon the bank upon the amounts so deducted, which additional taxes the bank paid under protest. This suit is brought to recover the sums so paid.

The federal statute imposing the tax provides:

"Sec. 38. First. That every corporation, joint-stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any state or territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any state or territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive * * * of certain amounts therein specified, which may be deducted.

"Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint-stock company or association, or insurance company received within the year from all sources, * * * (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein."

The first question presented is whether the bank had the right under this clause to deduct the taxes levied under the provisions of Massachusetts Revised Laws, c. 14, §§ 9-18, which it had paid to the city of Boston.

The Revised Laws of Massachusetts, in chapter 14, provide:

"Sec. 9. All the shares of stock in banks, whether of issue or not, existing by authority of the United States or of the commonwealth, and located within the commonwealth, shall be assessed to the owner thereof in the city or town in which such bank is located, and not elsewhere, in the assessment of state, county and town taxes, whether such owner is a resident of said city or town or not. They shall be assessed at their fair cash value on the first day of May, first deducting therefrom the proportionate part of the value of the real estate belonging to the bank, at the same rate as other moneyed capital in the hands of citizens is by law assessed. The persons who appear from the books of the banks to be owners of shares at the close of the business day last preceding the first day of May shall be deemed to be the owners thereof.

"Sec. 10. Every such bank shall pay the tax so assessed to the collector or other person authorized to receive the same at the time when other taxes in the city or town become due. If not so paid, said tax, with interest thereon at the rate of twelve per cent. per annum from the day when it became due, may be recovered from said bank in an action of contract by the collector of such city or town.

"Sec. 11. The shares of such banks shall be subject to the tax paid thereon by the corporation or by the officers thereof, and the corporation and the officers thereof shall have a lien on all the shares in such bank and on all the rights and property of the shareholders in the corporate property for the payment of said taxes.

"Sec. 12. The cashier of every such bank shall make and deliver to the assessors of the city or town in which it is located, on or before the tenth day of May in each year, a statement under oath showing the name of each shareholder, with his residence and the number of shares belonging to him at the close of the business day last preceding the first day of May, as the same then appeared on the books of said bank. If the cashier fails to make such statement, said assessors shall forthwith obtain a list of the names and residences of shareholders and of the number of shares belonging to each. They shall, forthwith, upon obtaining such statement or list, transmit a copy thereof to the tax commissioner; and shall, immediately upon the ascertainment of the rate per cent. upon the valuation of the total tax in such city or town for the year, give to said commissioner written notice thereof, and also of the amount assessed by them upon the shares of each bank located therein.

"Sec. 13. Said commissioner shall thereupon determine the amount of the tax assessed upon shares in each of said banks which would not be liable to taxation in said city or town according to the provisions of chapter twelve; and such amount shall be a charge against said city or town. He shall, in like manner, determine the amount of tax so assessed upon shares which would be so liable to taxation in each city or town other than that in which the bank is located; and such amount shall be a credit to each city or town. He shall forthwith give notice in writing by mail or at their office to the assessors of each city or town thereby affected of the aggregate amount so charged against and credited to it; and they may within ten days after notice of such determination appeal therefrom to the board of appeal constituted under the provisions of section sixty-five."

"Sec. 18. The assessors of a city or town, upon request of any person resident therein who is the owner of any shares in such banks or other corporations which, under the provisions of clauses nine and ten of section five of chapter twelve, would be entitled to exemption from taxation, shall give to him a certificate stating such fact; and the treasurer of such city or town, upon request therefor, and the deposit with him of such certificate, shall pay over to such owner the amount so collected in respect of such shares, immediately upon the allowance made to such city or town under the provisions of this chapter."

There can be no doubt but that the clause in the federal statute providing for the deduction from the gross income of a corporation of "all sums paid by it within the year for taxes imposed under the authority of * * * any state" means taxes imposed upon it and not upon some other person or corporation. No other reasonable conclusion could be drawn from the language used.

This being so, it is contended by the plaintiff that, inasmuch as under the provisions of the Massachusetts statute the bank is compelled to pay a tax assessed upon the shares of the stockholders, or, in case of default, is made liable to an action of contract for such tax, with interest at the rate of 12 per cent., the tax is in legal effect assessed upon the bank, and that the bank upon paying it discharges its own obligation, and is therefore entitled to have it deducted in ascertaining its net income in the assessment of the federal tax. But this is clearly not the true construction of the Massachusetts statute, and is not the one which has been placed upon it either by the state or federal courts. The bank, having paid the tax, is under the statute given "a lien on all the shares in such bank and on all the rights and property of the shareholders in the corporate property for the payment of said taxes." And, while the statute does not expressly give the bank a right of action over against the individual stockholders to recover from each of them their proportionate part of the tax which it has paid, it is evident that as the bank in the payment of the tax acts under compulsion of law and not voluntarily, and the payment is for the benefit of the stockholders, that a contract will be implied in law entitling it to recover from each stockholder his proportionate part of the tax, as money paid by the bank for the stockholder's benefit. *Home Savings Bank v. Des Moines*, 205 U. S. at page 518, 27 Sup. Ct. 576, 51 L. Ed. 901. In that case it was said that:

"The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves as the debt and in behalf of the shareholders, leaving to the corporation the right to reimbursement of the tax paid from their shareholders, either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another at his request can recover the amount from him."

Then, again, in *Van Allen v. Assessors*, 3 Wall. 573, 18 L. Ed. 229, it was held that:

"The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. * * * The interest of the

shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the states, under the limitations prescribed."

In addition to the provisions of the statute giving the bank, upon payment of the tax, a lien upon the shares and all the rights and property of the shareholders in the corporate property for the payment of the tax, and in addition to the implied obligation of the stockholders to repay the bank the money so paid, there are other provisions in the statute which require the tax when collected to be credited to the towns in which the stockholders reside (section 13); and that allow stockholders who are entitled to exemptions (section 18) to recover from the city or town in which they reside the money paid by the bank to discharge their proportion of the tax. All this makes it certain that the tax is upon the stockholder and not upon the bank, and that in paying it the bank does so as agent.

My conclusion, therefore, is that as the taxes paid to the city of Boston in the years in question were not assessed upon the bank but upon the shareholders, and were paid for their benefit, the bank is not entitled to have them deducted in ascertaining its net income, as was done in its returns to the Commissioner of Internal Revenue in the years 1909, 1910, and 1911.

[2] Was the Commissioner of Internal Revenue vested with authority to amend the original returns of the bank and assess additional taxes thereon for the years 1909, 1910, and 1911; he not having discovered the error in the returns until after the taxes assessed on those returns had been paid?

In the third subdivision of section 38 of the Corporation Tax Law, it is provided:

"Third. * * * said tax shall be computed upon the remainder of said net income of such corporation, * * * for the year ending December thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, * * * subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, * * * has its principal place of business, * * * in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, etc.

"Fourth. Whenever evidence shall be produced before the Commissioner of Internal Revenue which in the opinion of the commissioner justifies the belief that the return made by any corporation, * * * is incorrect, or whenever any collector shall report to the Commissioner of Internal Revenue that any corporation, * * * has failed to make a return as required by law, the Commissioner of Internal Revenue may require from the corporation, * * * making such return, such further information with reference to its capital, income, losses, and expenditures as he may deem expedient; and the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of such return, or for the purpose of making a return where none

has been made, is hereby authorized, by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matters required to be included in the return of such corporation, * * * and to require the attendance of any officer or employé of such corporation, * * * and to take his testimony with reference to the matter required by law to be included in such return. * * * Upon the information so acquired the Commissioner of Internal Revenue may amend any return or make a return where none has been made.

"Fifth. All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon; and in case of any return made with false or fraudulent intent, he shall add one hundred per centum of such tax, and in case of a refusal or neglect to make a return or to verify the same as aforesaid he shall add fifty per centum of such tax. In case of neglect occasioned by the sickness or absence of an officer of such corporation, * * * required to make said return, or for other sufficient reason, the collector may allow such further time for making and delivering such return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax originally assessed unless the refusal, neglect, or falsity is discovered after the date for payment of said taxes, in which case the amount so added shall be paid by the delinquent corporation, * * * immediately upon notice given by the collector. All assessments shall be made and the several corporations * * * shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as above provided for, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, * * * immediately upon notification of the amount of such assessment."

In assessing taxes under this statute, the following steps are to be taken:

(1) The corporation is to make a true and accurate return of its income not later than March 1st in each year. Paragraph 3.

(2) Upon such return a tax is to be assessed and the corporation notified of the amount thereof on or before June 1st in each year. And the tax is to be paid on or before June 30th. Paragraph 5.

(3) If the commissioner, upon evidence produced before him, is of the opinion that a corporation has made an incorrect return, or is informed by the collector that a corporation has failed to make a return, the commissioner is authorized to designate a revenue agent to examine the books of the corporation and to take testimony, and, upon obtaining the desired information, to amend the incorrect return, or make a return, as the case may be. Paragraph 4.

(4) If the return made was incorrect, that is, false or fraudulent, or no return was made through failure or neglect, then the commissioner upon discovery thereof at any time within three years from March 1st of the year when the return was due, having obtained the desired information as above provided, and amended the return, or made one, may assess the tax, which is to be paid by the corporation on June 30th, or immediately upon notification of the amount, depending upon whether the notification is prior or subsequent to June 30th, in the year in which the return was due. Paragraph 5.

(5) If the information obtained discloses that the return was made with false and fraudulent intent, the commissioner is to add a penalty of 100 per centum to the true tax; and in case the corporation has refused or neglected to make a return before March 1st, or within the time as extended by the collector, not exceeding 30 days (which he may do when the neglect is occasioned by sickness or absence of the officers of the corporation required to make the return or for other sufficient reason), then the commissioner, having made a return and assessed the true tax, is authorized to add a penalty of 50 per centum to the tax. The penalties so added are to be collected at the same time, and in the same manner, as the tax on returns regularly made, unless the refusal, neglect, or falsity is discovered after the date fixed for the payment of the tax on returns regularly made. But if the discovery of either of these facts is not made until after that date, then the commissioner is authorized upon the discovery of either of them within three years after March 1st in the year in which the return was due, and having assessed the true tax as above stated, to add the penalty of 50 or 100 per centum to the true tax, according as the facts warrant, and to collect the same upon notice to the corporation. Paragraph 5.

The case discloses that the plaintiff, having paid the taxes assessed on returns which it had made in the regular course for the years above stated, on February 27, 1913, at the request of the commissioner, filed supplemental returns for each of those years; and that on March 1, 1913, the commissioner made the additional assessments here complained of.

The plaintiff takes the position that the commissioner had no authority to make the additional assessments after the taxes had been assessed and paid on the original returns, as the original returns were not made with a false and fraudulent intent; that the statute confers authority upon the commissioner to amend returns and assess taxes thereon after taxes have been assessed and paid in the regular course, only where the error in the original returns was inserted with a false and fraudulent intent, and not where, as in this case, the error or misstatement in the returns was made in good faith and under an erroneous construction of the law.

The question therefore narrows itself down to this: Does the word "false," as used in the phrase "false or fraudulent," in that clause of paragraph 5 authorizing the commissioner to assess additional taxes upon an amended return at any time within three years after the original return was due, mean an error or misstatement due to an honest mistake, or is it confined and limited to errors or misstatements made with an intention to mislead and deceive?

A false return, in the absence of an intention to mislead, is not a fraudulent one. That Congress in the enactment of this law so understood the meaning of the word and used it is disclosed by the language employed in a previous clause of the same paragraph, where it authorizes the imposition of a penalty of 100 per centum of the true tax in case the error in the original return proceeded from a false and fraudulent intent. In that clause it is manifest that it was

intended the commissioner should not have the power to impose a penalty of 100 per centum unless the error in the original return was false and made with an intent to deceive and mislead. And the reasonable inference is that if Congress had intended that the power of the commissioner in the assessment of taxes upon amended returns, either before or after the taxes assessed on the original returns were due and payable, should exist only in case the error or misstatement was inserted in the original returns with an intention to mislead and deceive, it would have used terms as plain and unambiguous as it did in conferring the authority to impose a penalty of 100 per centum; and that, as it did not employ such language, it should be held not to have so intended.

My conclusion on this branch of the case is that the commissioner was authorized to make the additional assessments even though the errors in the original returns were due to an honest mistake and were not discovered until after the taxes assessed in the regular course had been paid.

[3, 4] The defendant also contends that the additional assessment for the year 1909 is invalid, for the alleged reason that it was not made within three years from March 1, 1910, when the return for the year 1909 was due. This contention is without foundation. The statute does not require the additional assessment to be made within the three-year period. The limitation is upon the discovery of the error by the commissioner within the three years and not upon the making of the additional assessment. But however this may be, the additional assessment in this instance was made within three years from March 1, 1910, for that date is to be excluded in computing the time fixed by the statute. The general rule for the interpretation of statutes where time is to be computed from a particular day, as when an act is to be performed within a specified period from or after a day named—is to exclude the day thus designated and to include the last day of the specified period. *Sheets v. Selden*, 2 Wall. 177, 17 L. Ed. 822; *Trust Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 145, 11 Sup. Ct. 512, 35 L. Ed. 116; *Hicks v. National Life Ins. Co.*, 60 Fed. 690, 9 C. C. A. 218.

The petition is dismissed, with costs, and a decree will be entered accordingly.

In re ALABAMA COAL & COKE CO.

(District Court, W. D. Kentucky. December, 1913.)

1. BANKRUPTCY (§ 198*)—LIENS—ATTACHMENT—DISSOLUTION—PRESERVATION FOR BENEFIT OF ESTATE.

Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), provides that all levies, attachments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a bankruptcy petition shall be null and void in case he is adjudicated a bankrupt, unless the court shall order the lien preserved for the benefit of the estate, etc. *Held*, that such section dissolves all attachments obtained within four months before the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

beginning of the proceeding if it results in an adjudication, though the lien obtained by the levy may be preserved for the benefit of the estate, subject to the exception that the section does not impair the title obtained by a bona fide purchaser for value who shall have acquired the property without notice or reasonable cause for inquiry.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 289, 296-316; Dec. Dig. § 198.*]

2. BANKRUPTCY (§ 203*)—CLAIMS—LIENS—VALIDITY.

Where a bankrupt within four months prior to adjudication borrowed funds from claimant bank with which to liquidate the bankrupt's pay roll, and in good faith pledged certain accounts receivable as security for the loan, the bank taking under circumstances entitling it to the position of a purchaser for value without notice or reasonable cause for inquiry, as provided by Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), was entitled to the benefit of its security as against the lien of an attachment levied after the assignment, and sought to be preserved for the benefit of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 203.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Alabama Coal & Coke Company. On petition of the Bank of Waverly to review an order allowing its claim and a lien on specified accounts owned by the bankrupt against certain debtors and assigned to the bank, but denying its claim to a lien on the proceeds of one of such assigned claims against the Illinois Central Railroad Company. Reversed, with directions to allow the claim as secured to its full extent, and against the proceeds of the claim against the railroad company.

Drury & Drury, of Morganfield, Ky., for Bank of Waverly.

Vance & Heilbronner, of Henderson, Ky., for trustee and creditors.

EVANS, District Judge. On February 18, 1913, P. A. Blackwell & Co., instituted an action at law in the Henderson circuit court against the Alabama Coal Company upon an open account for \$1,-043.07. In their petition they alleged that the defendant had no property at that time in the state of Kentucky subject to execution, or not enough thereof to satisfy plaintiff's demand, and that the collection of said demand would be endangered by delay in obtaining judgment or a return of no property found. Upon this allegation and under the Code of Practice (Ky.) § 194, they prayed for and obtained an order of attachment directed to the sheriff of Henderson county upon which the plaintiff's attorneys made the following indorsement:

"The object of this attachment is to attach in the hands of the Illinois Central Railroad Company, any money or other thing owing by it to the Alabama Coal Company, or any of the defendant's property in the possession of said Illinois Central Railroad Company, to amount sufficient to satisfy plaintiff's demand sued on and the costs of this action.

"Vance & Heilbronner, Attorneys for Plaintiff."

The sheriff's return on the order of attachment is as follows:

"Executed on the within named Illinois Central Railroad Company by delivering to Geo. H. Waltz agent a true copy hereof Feb. 18, 1913, also on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Alabama Coal Company by delivering to A. M. Hobson agent a true copy hereof. This Feb. 29th, 1913.

"A. H. Abbott, S. H. C., by R. B. Eastin, D. S."

The summons issued by the clerk in the action was also directed to the sheriff of Henderson county, whose return thereon is as follows:

"Executed on the within named Alabama Coal Company by delivering to A. M. Hobson agent a true copy hereof. This Feb. 29, 1913.

"A. H. Abbott, S. H. C., by A. Hatchett, D. C."

On February 26, 1913, the plaintiffs P. A. Blackwell & Co., filed an amended petition, wherein they state:

"That by oversight the defendant in this action was styled Alabama Coal Company, whereas its true name is Alabama Coal & Coke Company."

In this amended pleading the plaintiffs restate their cause of action in full, and also their grounds for an attachment, and caused another order of attachment and another summons to be issued thereon in due form, and each of which was directed to the sheriff of Henderson county. On this attachment was also placed an indorsement in this language:

"The object of this attachment is to attach in the hands of the defendant, Illinois Central Railroad Company, any money, or other thing owing by it to the defendant Alabama Coal & Coke Company, or any property of the Alabama Coal & Coke Co., in its hands to an amount sufficient to pay plaintiffs' demand, and the costs of this action.

"Vance & Heilbronner, Attorneys for Plaintiff."

The sheriff returned the order of attachment:

"Executed on the within named Illinois Central Railroad Company by delivering to Geo. H. Waltz agent a true copy hereof. This April 8th, 1913.

"A. H. Abbott, S. H. S., by R. B. Eastin, D. S."

On the summons on the amended petition the sheriff made this return, to wit:

"Executed on the within named Illinois Central Railroad Company by delivering to Geo. H. Waltz agent a true copy hereof Feb. 26, 1913, also on Alabama Coal & Coke Company by delivering to A. M. Hobson agent a true copy hereof. This Feb. 29, 1913. A. H. Abbott, S. H. C. By R. B. Eastin, D. S."

The railroad company, though summoned as a garnishee, was never otherwise a party to the suit brought by Blackwell & Co. against the bankrupt.

Answering as a garnishee the order of attachment, the Illinois Central Railroad Company denied any indebtedness at that time, but subsequently, on the 30th day of May, 1913, it paid to the trustee the sum of \$1,445.66, and apparently this sum was due in February previously when the orders of attachment were issued.

This proceeding in bankruptcy was begun by certain creditors on March 8, 1913, and with the consent of the bankrupt the adjudication was made on April 1st, following. These two last-named dates being less than four months after the orders of attachment were issued, that fact, per se, discharged the attachment so far as the plaintiffs P. A. Blackwell & Co., were concerned; but under section 67f of the Bank-

ruptcy Act the latter, as well as the trustee, petitioned that the lien of the attachment might be preserved for the benefit of the estate, and an order to that effect was entered by the referee, and the propriety thereof has not been questioned.

On February 22, 1913, the bankrupt executed in Union county, Ky., its note payable on demand to the Bank of Waverly, located at Waverly in that county, for \$1,300 for money simultaneously loaned to the bankrupt to satisfy its pay roll, which pay roll represented the sums then due the laborers in its mines, and to secure the payment of the note the bankrupt assigned and pledged to the bank as collateral security certain accounts it had against divers individuals, including the Illinois Central Railroad Company. The bank proved its debt as one secured by the assignment and pledge referred to. Blackwell & Co. filed written objections to the allowance of the bank's claim as a secured debt. These objections were stated as follows:

"They deny that the Bank of Waverly on February 22, 1913, or at any other time, loaned to the bankrupt, the sum of (\$1,300.00) thirteen hundred dollars to meet a pay roll, or that simultaneously with the execution of said loan or advancement thereof, the bankrupt assigned or transferred to the Bank of Waverly any accounts for coal mined or sold by the bankrupt at Waverly, Ky., during the first half of the month of February, or that said bankrupt so transferred or assigned any of the accounts mentioned in said bank's proof of claim filed herein. That, if the Bank of Waverly ever loaned to the bankrupt the sum of (\$1,300.00) thirteen hundred dollars, or any other sum, it loaned same prior to February 22, 1913, and before the assignment or transfer of any of said accounts by the bankrupt to said bank, and within four months before the adjudication of bankruptcy herein, and said assignment is and was a preference under the Bankruptcy Act of 1898 and amendments thereto. Wherefore petitioners ask that the said claim be disallowed as a preferred claim, and if claim has been allowed as a preferred claim that the same be reconsidered by this court and the order allowing same to be set aside and held for naught and claim expunged."

Subsequently they filed what they called an amendment of their objections. In their amendment they only stated the facts respecting their attachments, and prayed that the lien thereof might be preserved for the benefit of the bankrupt's estate. They made no averment that the bank had any "notice" of the attachments when the pledge was made to it, nor did they make any allegation that the bank had any "reasonable cause for inquiry" when it loaned the money to the bankrupt which the pledge secured. Subsequently the trustee joined in and adopted all this.

After a hearing, the referee, on October 10, 1913, entered an order as follows:

"The objections of P. A. Blackwell & Co. and E. R. Morton, trustee, to the allowance of the claim of the Bank of Waverly as a lien claim, and the petition of the said Blackwell & Co. and the said trustee that the attachment lien obtained by the said Blackwell & Co. by suit in the Henderson county, Ky., circuit court be preserved for the benefit of the estate of the above-named bankrupt, having been heard, it is adjudged and ordered that the said objections be and the same are hereby overruled as to all of the accounts assigned, except as to the sum of \$1,043.07 of the account against the Illinois Central Railroad Company, the amount covered by the attachment of the said Blackwell & Co.; and that the said objections and petition be and the same are hereby sustained as to the sum of \$1,043.07 of the amount of the

said Illinois Central Railroad Company; and that the said attachment lien be and the same is hereby preserved for the benefit of the said estate.

"It is further adjudged and ordered that the claim of the said Bank of Waverly be and the same is hereby allowed for the sum of \$1,300, with interest from the 22d day of February, 1913, to the 8th day of March, 1913, with a lien upon the proceeds of the accounts against J. B. Easley & Son for \$172; Broadway Coal & Ice Company for \$24; Crescent Coal Company for \$45; and \$402.59 of the proceeds of the account against the Illinois Central Railroad Company."

The Bank of Waverly, by its petition filed on October 16th, claims that this order was erroneous in this, that thereby its claim was not adjudged to be a superior lien upon the entire account against the Illinois Central Railroad Company, and, upon that ground, seeks a review thereof.

In a written opinion the learned referee bases his order upon three propositions: (1) That the attachment created a lien under the law of Kentucky; (2) that the error in the name of the defendant in P. A. Blackwell & Co.'s suit was immaterial; and (3) that the Supreme Court having held in *First National Bank v. Staake*, Trustee, 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967, and *Rock Island Plow Co. v. Reardon*, Trustee, 222 U. S. 354, 32 Sup. Ct. 164, 56 L. Ed. 231, that the attachment lien in such cases shall be preserved for the benefit of the estate, that therefore the Bank of Waverly must be excluded from the benefit of its pledge to the extent of \$1,043.07, the amount of Blackwell & Co.'s debt. We need not question the accuracy of the referee's view that the attachment was valid, and that the misnomer was immaterial, nor the accuracy of his conclusion that the benefit of the lien of Blackwell & Co.'s attachment should be preserved for the benefit of the bankrupt's estate; but neither of these propositions reaches far enough to be of any decisive importance. The two cases cited by the referee obviously adjudicated claims entirely different from that of the Bank of Waverly.

[1] Section 67f of the Bankruptcy Act dissolves all attachments obtained within four months before the beginning of the bankruptcy proceeding if it results in an adjudication, though the lien obtained by the levy of the attachment may be preserved for the benefit of the estate. The section, however, provides that this shall not affect or destroy or impair the title obtained in the meantime by a "bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

In *Collier on Bankruptcy* (9th Ed.) p. 971, it is said:

"The proviso at the end of subsection 'f' corresponds to subsection 'd,' which has reference to liens other than through legal proceedings, as well as to a clause in the body of subsection 'e,' saving bona fide transactions from the penalties attending fraudulent transfers. It is also expressive of the law, and seemingly inserted for reasons of caution only."

Without copying the part of subsection "e" to which reference is made, it may be well to say that subsection "d" of section 67 is in this language:

"Liens given and accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded

according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act."

The law of Kentucky, it may be noted, does not require that pledges, such as that made in this instance, shall be recorded.

[2] Assuming, as the referee properly did, under authorities like *Sexton v. Kessler*, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995, 28 Am. Bankr. Rep. 85, and *Ward v. First National Bank of Ironton, Ohio* (C. C. A., 6th Cir.) 29 Am. Bankr. Rep. 312, 202 Fed. 609, 614, 12 C. C. A. 655, that the pledge of the collaterals carried title to the same as a valid security for the debt unless overreached by the attachment of the funds in the hands of the Illinois Central Railroad Company, we have concluded that the question now under consideration is not to be determined upon the doctrine of *lis pendens*, which was much urged at the argument, but must be determined upon the objections actually made to the bank's claim, and which constituted the pleadings on that phase of the subject, or else upon the proviso contained in section 67f if we can fairly bring the objections within that proviso. Instead, however, of opposing the bank's claim to priority upon the two grounds specified in the proviso in section 67f, the trustee and the objecting creditors in their original written objections based their opposition, first, upon a denial that the bank had loaned the money; second, upon the statement that simultaneously with the execution of the note the collaterals were not assigned or pledged to secure it; and, third, without stating the facts showing the preference, the legal conclusion is averred that the assignment of the accounts as collateral was a fraudulent preference. In the amendment to their objections they allege, as we have seen, the facts in reference to the attachment in the *Blackwell & Co.* suit, claim that the lien of that attachment should be preserved for the benefit of the estate, and assert that the Bank of Waverly's lien, if it had any, was subordinate to the lien of the attachment. Nothing was said in the objections as amended which insisted upon the equitable doctrine of *lis pendens*, nor was it claimed that under the proviso the bank either had "notice" or "reasonable cause for inquiry." Nor was the least proof offered of facts which would establish a preference under cases like *First National Bank v. Holt* (C. C. A., 6th Cir.) 18 Am. Bankr. Rep. 766, 155 Fed. 100, 84 C. C. A. 16, and *In re Pfaffinger* (D. C., Ky.) 18 Am. Bankr. Rep. 807, 154 Fed 523. The proof was perfectly clear that the bank did lend the money evidenced by the note filed with its proof of debt, and that simultaneously therewith the bankrupt in good faith pledged and assigned the accounts to secure the loan. The trustee and objecting creditors entirely failed to show that there was any unlawful or fraudulent preference. So that, while the attachment was preserved for the benefit of the estate, that result was subordinate to the superior lien and title of the pledgee bank.

This would seem to conclude the case upon all questions actually raised by the parties, but if we may assume (as we certainly do not, in fact) that the record somewhere or somehow adequately shows objections under the proviso in section 67f of the allowance of the

bank's claim as one entitled to priority, then Congress, having expressly specified in that proviso the precise conditions upon which a bona fide title is to be protected and sustained, we need not go beyond those conditions, because Congress, having included all the conditions it chose to give any force, by that inclusion excluded all other conditions. Those conditions were: (1) "Notice"; and (2) "reasonable cause for inquiry." As we have seen, the trustee and objecting creditors failed to allege the existence of either of those conditions. There was neither allegation nor proof that the bank, when it lent the money and took the collateral in pledge, had any notice of the suit in Henderson county in which service upon the bankrupt was not had until the 29th of February—one week after the loan was made by and the collaterals assigned and delivered to the bank. Nor was there either allegation or proof that the bank had notice of the bankrupt's insolvency. It may not be amiss in this connection to say that the creditors' petition for the adjudication shows that the bankrupt is a Kentucky corporation having its chief place of business in the town of Waverly, in Union county, in this state. On February 22, 1913, it applied for and obtained from the bank of Waverly the loan of \$1,300 for the purpose of meeting its pay roll. The proof shows that the money thus obtained was intended to be and in fact was promptly devoted to the payment of the amounts due its laborers. The borrower being engaged in mining, these laborers, under section 2487 of the Kentucky Statutes as amended, were entitled to priority in case of bankruptcy. Had the bank taken the precaution to have had the claims of these laborers assigned to it, subrogation to their rights would have been undeniable. This has been frequently decided by this court, and the right of the laborer to assign such claims is valuable in enabling him oftentimes to get his money long before the final settlement of the estate. Instead of taking assignments of the claims of laborers, the bank took other collateral. These facts seem to add strength to its equity and at least tends to show good faith and the absence of notice and reasonable cause for inquiry.

After a very careful consideration, we have reached the conclusion that the referee erred in not allowing the claim of the Bank of Waverly as one secured to its full extent and in not giving a lien upon the money collected upon the account of the bankrupt against the Illinois Central Railroad Company which was pledged to the bank, for the payment of such parts of its entire debt as were not paid out of the other collaterals mentioned in the referee's order of October 10th. Consequently the petition for a review must be granted, and the order of the referee reversed, with directions to allow the claim of the Bank of Waverly as a secured claim, and to cause the same to be paid in full out of the money collected by the trustee from the Illinois Central Railroad Company.

SMITH v. SMITH.

(District Court, D. Montana. February 7, 1914.)

No. 5.

1. GUARDIAN AND WARD (§ 147*)—ACCOUNTING—CHARGES.

Where a guardian used his ward's money to pay his own debts, it was his duty to disclose it in his account, and charge himself with the profits thereby made, or legal interest at the court's election.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 496; Dec. Dig. § 147.*]

2. GUARDIAN AND WARD (§ 53*)—ACTIONS—EVIDENCE.

Where a guardian who had used his ward's money to pay his own debts procured an order from the probate court, reciting that he had applied for authority to borrow the funds in his hands belonging to the minors at interest at the rate of 3 per cent. which authority was granted, and there was no evidence of the circumstances of its procurement other than its own recitals, they compelled the inference that the guardian concealed from the court that he had already used the ward's money, and misrepresented expressly or by implication that he then had it in his possession.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 232-241; Dec. Dig. § 53.*]

3. GUARDIAN AND WARD (§ 54*)—LIABILITY OF GUARDIAN.

Where a guardian, who had used his ward's money in payment of his debts, concealed this fact from the court in applying for authority to borrow his ward's money at a low rate of interest, the order so procured by fraud and imposition was voidable, and afforded no protection to the guardian, and he was liable for legal interest both before and after the order granting such authority, there having been no such disclosure as is required by Rev. Codes Mont. § 5376, which provides that a trustee may not take part in any transaction concerning the trust in which he has an interest adverse to that of his beneficiary, except when the beneficiary, with full knowledge of the motives of the trustee and all other facts concerning the transaction, permits him to do so, or when, the beneficiary not having capacity to contract, the proper court upon like information of the facts grants like permission.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 242-253; Dec. Dig. § 54.*]

4. GUARDIAN AND WARD (§ 28*)—LIABILITY OF GUARDIAN.

A guardian is a trustee, and is held to the strict accountability attaching to a trustee.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 99, 100; Dec. Dig. § 28.*]

5. JUDGMENT (§ 443*)—PROBATE DECREES—CONCLUSIVENESS—EQUITABLE RELIEF.

While decrees of a probate court though in their nature ex parte are generally conclusive, like all other decrees, judgments and proceedings, they may be attacked, set aside or rendered inoperative when procured by fraud, and a party is not estopped thereby from obtaining relief in equity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 785, 836, 838; Dec. Dig. § 443.*]

6. GUARDIAN AND WARD (§ 117*)—ACTIONS BY WARD AGAINST GUARDIAN.

Where a guardian misappropriated his ward's money and thereafter procured an order by concealing such fact, authorizing him to borrow the ward's money at a low rate of interest, and subsequently accounted and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was discharged, and the ward thereafter sued in a United States court to recover legal interest for the use of the money by the guardian, that court did not sit in review of the state court, nor assume to set aside its decrees, but, as they were procured by fraud, would deprive the guardian of the benefit thereof and of the inequitable advantage derived thereunder.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 407-410; Dec. Dig. § 117.*]

7. JUDGMENT (§ 590*)—CONCLUSIVENESS—MATTERS CONCLUDED.

The uncle of certain minors purchased their father's property at executor's sale giving his notes therefor, was appointed their guardian, and paid by the executor the proceeds of the sale which he applied in payment of his own notes. Eighteen months later he procured an order from the probate court, authorizing him to borrow the funds in his hands belonging to the minors at a low rate of interest, concealing his prior misappropriation thereof. After his accounting and discharge, one of the wards, having learned these facts, sued to rescind the executor's sale and to recover his share of the property, with accrued profits. A judgment establishing the validity of the sale was affirmed by the Supreme Court of the state, and he moved for a rehearing on the ground that he was at least entitled to legal interest for the use of his money by the guardian, which rehearing was denied. *Held*, that such judgment did not bar an action to recover such interest; the right of action therefor not being in issue, nor determined nor open to determination in the former suit.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1035, 1063, 1064, 1102-1106; Dec. Dig. § 590.*]

8. EXECUTORS AND ADMINISTRATORS (§ 225*)—PRESENTATION OF CLAIMS—TIME FOR PRESENTATION.

Where a guardian used his ward's money in payment of his debts, and subsequently by concealing this fact obtained an order of the probate court, authorizing him to borrow the ward's money at a low rate of interest, a claim for legal interest for the use of the ward's money was not one arising upon contract within a statute of Montana, requiring claims against a decedent's estate arising upon contracts to be presented to the executor or administrator within a limited time, and providing that any claim not so presented is barred, and that no holder of any claim shall sue thereon unless it is first presented, the fact that such claim, so far as priority of payment was concerned, had only the standing of a claim of a contract creditor not transforming it into a claim *ex contractu*; and hence an action could be maintained against the guardian's executor where the claim was presented before suit, though not within the time limited.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 789-800, 802, 803, 805; Dec. Dig. § 225.*]

9. LIMITATION OF ACTIONS (§ 84*)—SUSPENSION—ABSENCE FROM STATE.

Under Rev. Codes Mont. § 6458, providing that if when a cause of action accrues against a person he is out of the state, the action may be commenced within the term limited after his return to the state, and that if after the cause of action accrues he departs from the state, the time of his absence is not a part of the time limited for the commencement of the action, absence from the state of a debtor's personal representative after his death suspends the running of limitations, since, though the literal reading of the section might support a contrary instruction, it must yield to the legislative intent to suspend limitations whenever absence from the state of the party defendant prevents effective prosecution of a cause of action, and section 6214 expressly provides that the rule of the common law that statutes in derogation thereof are to be strictly construed has no application to that Code, and that its provisions are to be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

liberally construed with a view to effect its objects and to promote justice.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 439-448; Dec. Dig. § 84.*]

10. GUARDIAN AND WARD (§ 125*)—ACTIONS BY WARD AGAINST GUARDIAN—LACHES.

The uncle of certain minors purchased their father's property at executor's sale, and was subsequently appointed guardian for such minors, received the proceeds of the sale from the executor, and used them in paying his notes given for money borrowed with which to purchase such property. Eighteen months afterwards without disclosing such misappropriation, he procured an order from the court authorizing him to borrow the funds in his hands belonging to the minors at a low rate of interest, and subsequently accounted and was discharged. Complainant, one of the minors, as soon as his suspicions were aroused concerning the transaction, brought suit in a state court to rescind the executor's sale and recover his share of the property with accrued profits, and though he failed, the action was tried upon the evidence taken in a suit by his sister in a United States court in which she succeeded, indicating that he was not culpably negligent in adopting that remedy. With reasonable promptness, thereafter he commenced a suit to recover legal interest for the use of his money by the guardian. There had been no change of conditions except the death of the guardian and no loss of evidence. *Held*, that the action was not barred by laches.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 428, 429; Dec. Dig. § 125.*]

In Equity. Suit by William Smith against Mary M. Smith, as executrix of the will of John M. Smith, deceased. Decree for complainant.

C. B. Nolan and Wm. Scallon, both of Helena, Mont., and T. J. Hoolan, of St. Louis, Mo., for complainant.

R. Lee Word and H. G. & S. H. McIntire, all of Helena, Mont., for defendant.

BOURQUIN, District Judge. This is a suit by a former ward against the executrix of the will of his deceased guardian. The bill alleges that in his lifetime the guardian in possession of the ward's money appropriated and converted the same; that 18 months thereafter the guardian applied to the court of his appointment in this state for an order authorizing him to borrow said money at interest at the rate of 3 per cent. per annum, therein concealing from said court his said appropriation thereof and misrepresenting that it was in his possession, which order was made; that thereafter the guardian presented accounts including his final account, to said court, wherein he did not disclose his appropriation of said money, did not present any excuse for failure to invest it for the ward's benefit, and did not charge himself with any interest thereon prior to said order, and thereby fraudulently and by imposition procured the court to settle the same; that when the ward attained majority the guardian settled with him on the basis of the final account, thereby depriving the ward of a large amount of interest rightfully his due. The bill pleads excuses to avoid laches, and the prayer is that all decrees of settlement of the guardian's account be set aside or held for naught, that a new account be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stated, and that complainant have and recover from defendant as executrix the balance due thereon, alleged to be about \$24,700. The answer denies appropriation and conversion of said money, denies concealment from and misrepresentation to the court, denies anything due, and pleads insufficiency of the bill in part to state a cause of action in equity, *res judicata*, limitations, and laches.

The evidence is brief and without conflict. It appears therefrom that in 1899 the estate of the ward's deceased father was in administration in this state. The heirs were complainant and his two sisters. The property thereof was here located and the guardian here resided. The principal of said property was sold at executor's sale, and was purchased for \$85,000 by the wards' uncle, who was thereafter, by a court of this state, appointed their guardian. He borrowed money upon his notes at interest of 9 per cent. per annum to pay for it. When he paid, the executor redelivered the money to the amount of about \$82,000 to him as guardian, and with it he paid his said notes. Eighteen months later the said court made an order wherein is recited that the guardian applied for authority to borrow "the funds in his hands belonging to said minors" at interest, rate 3 per cent. per annum, which authority was granted. Thereafter the guardian presented accounts, one of them his final account, to said court, reciting his receipt of the money, but not his use thereof, not charging himself with interest prior to said order, and not setting out any excuse for failure prior to said order to invest the money for the wards' benefit. Decrees of settlement of said accounts were entered. The ward attained majority in October, 1906, the final account was settled December 14, 1906, the balance thereby shown due the ward, \$23,954, was paid him on December 15, 1906, and an order discharging the guardian was made December 27, 1906. When complainant received the balance due him, he had no knowledge that the guardian had used the money prior to the order authorizing him to borrow it, and had no knowledge of the aforesaid concealments from and misrepresentations to the court. His suspicions were first aroused by some information received from his sister in or about August, 1907, and he then commenced in the aforesaid court a suit against the guardian, wherein he alleged the purchase by the guardian of the property of his deceased father's estate was fraudulent, had been rescinded by complainant, and prayed for recovery of his distributive share of said property and accrued profits. The guardian died without Montana in October, 1908, and defendant herein was appointed executrix of his will in November, 1908, and substituted defendant in said suit. In the meantime complainant's sister brought a like suit to that aforesaid in this court, wherein the testimony of the guardian and other witnesses was taken before the guardian's death, and the suit aforesaid of this complainant in the state court was tried upon the evidence submitted herein in his sister's suit. The sister's suit may be found reported at 182 Fed. 540, 105 C. C. A. 78; 199 Fed. 689, 118 C. C. A. 127. Judgment went for defendant, and, establishing the validity of the purchase involved, complainant appealed to the Supreme Court of the state, and the judgment was affirmed. See 45 Mont. 535, 125 Pac. 987. Thereupon

complainant moved for a rehearing, in part upon the ground that at least he was entitled to interest upon his money used by the guardian prior to the order authorizing the latter to borrow it, and that the suit should be remanded, with leave to amend the complaint as a basis for its recovery. This was resisted by defendant, and was denied by the Supreme Court, apparently on November 14, 1912. March 14, 1913, complainant presented a claim consistent with the cause of action of the instant suit to defendant executrix, and May 17, 1913, commenced this suit based upon said claim.

[1, 2] From complainant's majority until the guardian's death the latter was within Montana but six months, and thereafter until this suit commenced defendant was within Montana but 15 months. At all the times aforesaid the guardian, ward, and defendant were citizens of Montana, and defendant now is a citizen of Montana, save that complainant when this suit was commenced was a citizen of California. It would seem that the complainant is entitled to the relief prayed for. In so far as the answer depends on the ground that the bill in part is insufficient to constitute a cause of action in equity, it is aimed at mere matter of inducement, which may be ignored and the bill be yet sufficient. The facts clearly show the guardian violated his duty to the ward. He had neither legal nor moral right to use the ward's money to pay his, the guardian's, debts, but, having done so, it was his legal duty to disclose it in his accounts and charge himself with the profits he thereby made, or legal interest, at the court's election. His failure therein was constructive, if not actual, fraud. In the matter of the court's order authorizing the guardian to borrow the ward's money at less than a moiety of the legal rate of interest, there is no evidence of the circumstances of its procurement other than its own recitals. These compel the inference that the guardian not only concealed from the court that 18 months before he had used the ward's money, but also that he misrepresented to the court, expressly or by implication, that he then had in his possession the ward's money intact. Here again was fraud, constructive or actual, however lacking the guardian, a fiduciary, may have been of evil motive or intent.

[3, 4] The order so procured by fraud and imposition upon the court, was voidable, and when challenged, as here, affords no protection to the guardian. As though never made, the guardian is liable to the ward even as in the matter of the use of the money prior to the order. The relation of a guardian to his ward and to the court is fiduciary. In him is reposed trust and confidence. He is a trustee, and held to the strict accountability attaching to a trustee. The court has statutory power to authorize a trustee, and so a guardian, to enter into a transaction involving the trust, and in which he has an interest adverse to the beneficiary, but only when the trustee discloses to the court full knowledge of his motives and of all other facts which might affect the court's decision. Section 5376, R. S. Montana.

[5] This disclosure was absent here. Had it been made, it is inconceivable that the order also would have been made. It is the contention of the defense, however, that the order and the decrees of settlement of the guardian's accounts and his discharge are conclusive and

forbid any relief herein to complainant. It is true that decrees of a state court in probate, though in their nature *ex parte*, there being in fact no adversary proceedings, are generally conclusive, but, like all other decrees, judgments, and proceedings, they may be attacked and set aside, or rendered inoperative, when procured by fraud. The party thereto against whom they operate is not estopped from obtaining in a court of equity relief from them. It may be such relief could be procured in the court of their origin, by complainant in the instant suit in the state court of the decrees involved, but that is no reason why another court, this court in the instant suit by virtue of its equity jurisdiction and attaching by reason of diverse citizenship of the parties, may not and is not bound to give relief according to the recognized rules of equity.

[6] Herein this court does not sit in review of the state court, nor inquire into mere irregularities and errors, nor assume to set aside the decrees involved, but since said decrees were procured by fraud, it will deprive defendant of the benefit of them and of inequitable advantage derived under them. See *Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870.

This is equally true of the order and the guardian's discharge.

[7] The plea of *res judicata* is not well founded. The former suit had no double aspect, and was based solely on rescission of a sale and to recover the specific property and accrued profits. It terminated by a judgment establishing the validity of the sale and denying the right to rescind. The instant suit is based on misappropriation by the guardian of money received from said sale, and to recover interest as damages because thereof. Surely this suffices to demonstrate *res judicata* does not apply. True, the petition for rehearing in the former suit sought to secure leave to change the cause of action therein to that herein, to reverse the theory of the former suit, but it was resisted by defendant and denied by the court. The cause of action herein was not in issue, nor determined nor open to determination in the former suit.

[8, 9] In the matter of limitations, defendant's principal contention is that complainant's claim was not timely presented to the deceased guardian's executrix. The statute involved provides, amongst other things, that in the administration of estates "all claims arising upon contracts" must be presented within a limited time, that "any claim not so presented is barred forever," and that "no holder of any claim" shall maintain an action thereon unless it is first presented. Complainant's claim was presented prior to suit, but not within a limited time. The statute distinguishes between claims arising upon contracts, that is, originating in contracts, and all other claims. Now, a claim against a guardian like that at bar does not arise upon contract. The relations between a guardian and ward are not contractual, but are fiduciary and created by law. The guardian's duty and obligation to deal justly with the ward are not of agreement, but are imposed by law. And his breach thereof by fraud, as here, sounds in tort, and while the action may take the form of a suit in equity for an account-

ing, the gist of it is the guardian's fraudulent breach of an obligation imposed by law—is fraud. In so far as complainant seeks interest in excess of that received upon the money used by the guardian by virtue of the court's order authorizing the guardian to borrow it, his claim does not rest upon nor arise upon the transaction in the nature of a contract so authorized by the court. The order, being voidable for the guardian's fraud, has been repudiated by complainant, and he demands his dues arising not at all from contract, but from the obligation imposed by law, viz., that the guardian pay at least legal interest upon the ward's money used by him without lawful authority. It is defendant's contention that for a deceased trustee's breach of trust like that here involved, the beneficiary has but the right of a simple contract creditor, and so his claim is one arising upon contract within the meaning of the statutes aforesaid. The position of the beneficiary is like unto that of a simple contract creditor, in that he has no lien upon the estate and no priority. But this does not transform the claim from one *ex delicto* to one *ex contractu*, going only to its rank or status in the matter of its payment from the assets of the estate. It satisfied the statute to present the claim before suit. The general statute of limitations relied upon by defendant is recognition that the gist of the suit is fraud. This statute is that the period prescribed for the commencement of an action is "within two years * * * for relief on the ground of fraud or mistake," computed from the aggrieved party's discovery of the facts constituting the fraud or mistake. Section 6458, R. S. Montana, provides that:

"If when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

Another section provides that if a person against whom a cause of action exists dies without the state, the time which elapses between his death and the expiration of one year after the issuance within the state of letters testamentary, is not a part of the time limited for the commencement of an action against his personal representative. It is defendant's contention that section 6458, *supra*, is an exception to the general statute of limitations, to be strictly construed, and not to include personal representatives of debtors, since they are not within its letter. If this be sound, the instant suit is barred. But it is the statute law of Montana that strict construction of statutes derogatory of the common law is abolished, and all statutes are to be liberally construed with a view to effect their objects and to promote justice. Section 6214, R. S. At common law, neither absence from the realm nor death suspended the operation of limitations. This was an evil, and tended to defeat justice, in that at such times there could be no service of process and no effective prosecution of a cause of action. The object of section 6458, *supra*, was to furnish a remedy. The evil to be remedied and the object to be accomplished thereby attach no less to the case of absence of a personal representative than to the case of absence of a debtor. Prosecution to effect and justice are hampered

equally in both cases. The reason for the statute is as potent in one as in the other. And though the literal reading of section 6458, *supra*, may support defendant's contention, it must yield to what must be assumed to have been the legislative intent, that is, to suspend limitations whenever absence from the state of the party defendant, be he debtor or personal representative, prevents effective prosecution of a cause of action. And so are the cases, *Hayden v. Pierce*, 144 N. Y. 512, 39 N. E. 638; *Smith v. Arnold*, 1 Lea (Tenn.) 378; *Wilkinson v. Winne*, 15 Minn. 159 (Gil. 123). And see *French v. Davis*, 38 Miss. 218; *Cotton v. Jones*, 37 Tex. 34.

[10] Under all the circumstances of this case, complainant has not been guilty of laches. As soon as his suspicions were aroused, he commenced the action in the state court. Although he mistook his right and remedy, it was not culpable negligence, as is evidenced by the fact that, though he failed, his case was tried upon the evidence taken in his sister's suit in this court, and which herein succeeded. When he failed, with reasonable promptness he commenced the case at bar. It is to recover for breach of trust obligations. The guardian is dead, but otherwise there appears no change of conditions, no loss of evidence.

The court is of the opinion that complainant is entitled to recover in the amount prayed for, viz., \$17,015.23 and legal interest from June 14, 1908, to date, and costs.

Decree accordingly.

In re WYLLY.

(District Court, E. D. New York. December 2, 1913.)

1. BANKRUPTCY (§ 314*)—PROVABLE CLAIMS—NOTES GIVEN FOR CORPORATE STOCK.

A transfer of corporate stock not stamped as required by Tax Law N. Y. (Consol. Laws, c. 60) § 270, as re-enacted by Laws 1910, c. 38, is not void, although under section 278 no action can be maintained thereon and notes given for the stock are valid and provable in bankruptcy.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 469–473, 478, 483–487, 489, 490; Dec. Dig. § 314.*]

2. BANKRUPTCY (§ 407*)—DISCHARGE—OBTAINING PROPERTY BY FALSE STATEMENT—"OBTAINING PROPERTY ON CREDIT."

A transfer of corporate stock to a bankrupt for which he gave his notes secured by a pledge of the stock and a further agreement by the seller to extend the time for payment of a debt of the corporation then due, with no additional security except the bankrupt's promise to pay the debt, constituted an obtaining of property on credit by the bankrupt within the meaning of Bankr. Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1496), and, where it was induced by a materially false statement in writing made by the bankrupt as to his financial ability, is a bar to his discharge.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 729–731, 737, 738, 740–751, 758, 760, 761; Dec. Dig. § 407.*]

In the matter of Thomas S. Wylly, Jr., bankrupt. On application for discharge. Denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Atwater & Cruikshank, of New York City (Edward L. Blackman, of New York City, of counsel), for objecting creditors.

William H. Good, of Brooklyn, N. Y. (A. J. Dittenhoefer, of New York City, of counsel), for bankrupt.

CHATFIELD, District Judge. The special commissioner has reported that the bankrupt should be denied discharge. He has found that the bankrupt made a false statement in writing upon the 22d day of September, 1910, upon which he obtained property on credit, that the bankrupt knew the falsity of the statement and also knew that reliance was to be placed upon the statement in estimating the circumstances relating to a contract which the bankrupt was then on the point of making with certain parties who thereby became his creditors. The commissioner has made a statement of this transaction, the parties have presented the facts at length in their testimony and briefs, and in general the circumstances as they occurred are not contradicted.

[1] The bankrupt purchased an interest in a corporation of which he received one-half the capital stock, and the certificate of stock therefor was immediately delivered as security for the note which he made for the purchase. This note was also signed by the owner of the other one-half interest in the stock of this corporation, and the certificates for the entire stock were deposited with the vendor as security. The corporation itself was thrown into bankruptcy, upon the failure to pay this note, by the creditors who sold the stock to the present bankrupt and who held the certificate therefor as collateral. Certain obligations amounting to about \$13,000, and already overdue at the time of the purchase by the bankrupt, were extended as a part of the consideration for the transaction, and were guaranteed by the corporation; new notes being given therefor by the present bankrupt and his fellow stockholder. The bankrupt made no payment for his stock other than that represented by the promissory notes above referred to. This transfer of stock obtained with said notes was not then stamped with the revenue stamps required by statute, and the bankrupt alleges that the transaction was therefore void.

But as has been held in *Bean v. Flint*, 204 N. Y. 153, 97 N. E. 490, the sale was not void. The New York statute (section 278 of the Tax Law) forbids legal proceedings in the state courts based on the transfer of stock for which the notes were given, and forbids receipt of proof thereof in evidence, but the notes showing the debt are not thereby invalidated and can be proved in bankruptcy.

[2] The bankrupt alleges that no credit was extended to him, inasmuch as he gave his note secured by collateral as a part of the purchase price.

It must be held, however, that an agreement to forego the collection of money then due and the actual transfer of stock in a corporation in return only for the same security against the corporation as had existed before, but with the additional promise to pay by the bankrupt, was an obtaining of credit within the meaning of the bankruptcy law, even though consideration in the form of a promissory note was furnished at the time. In *re Dresser* (D. C.) 144 Fed. 318.

The bankrupt also alleges that the commissioner was wrong in holding that the transaction in question was within the phrase "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit" (section 14b, subd. 3), because the bankrupt alleges that this section of the statute is applicable only to a transaction consisting of the purchase of merchandise or removal of goods and the extension of credit therefor.

But, again, the statute cannot be limited to such a narrow construction. The transfer of an interest in the capital stock of a corporation, carrying with it the management of the corporation through record and ostensible ownership, and an extension of time for payment (unless that payment be secured by adequate collateral), is a giving of credit and an obtaining of property within the meaning of the section.

In the present instance the collateral represented substantially the same interest in the copartnership which one of the vendors had at the time of the purchase. If the bankrupt was successful in making the stock of the corporation of sufficient value to protect the obligation to pay therefor, then the question of credit would have been removed from the situation. If, on the other hand, the bankrupt obtained control and possession of the assets of the company and had the right to conduct its business through the ownership of the capital stock transferred, but if by his management the value of the property of the corporation depreciated or remained no more than sufficient to meet its obligations, exclusive of paying the stockholders, then the personal credit of the purchaser (who is the bankrupt in this instance) would be the only asset available. Inasmuch as the testimony shows that the corporation had not been making money, that its stock was not marketable in the ordinary sense, and that the aid of some one with ability and capital was desired, together with the fact that a sale to the holder of the remaining one-half interest in the stock was rejected because of his lack of responsibility over and above his interest in this company, all goes to show that the transfer was not a sale upon the sufficiency of the security or collateral deposited with the stock.

The special commissioner has found that the vendors relied upon the statement which he found to be false, and this seems to be in accord with the testimony, although it may not have been the "sole" reliance charged in the specification.

It appears that an affidavit sufficient to bring the purchaser within the language of the New York Penal Code, if its statements proved to be false, was insisted upon by the vendors, and that the purchaser, the present bankrupt, refused to sign the same. He did, however, finally sign a statement as to the showing made by his books some few weeks before, and stated that his books he believed were correct in their statement of his assets and liabilities. He further stated that his personal assets outside of his business exceeded his liabilities by \$20,000, and the commissioner has found this statement to be false, in that it failed to mention a claim then in litigation which was decided adversely to the vendors, and under which he was then apparently obligated to the extent of some \$12,000. The special commissioner states the circum-

stances as to this transaction, and his finding (which in general seems to be in accord with the testimony) should not be disputed. It is to the effect that the bankrupt could not have believed a statement to be true which did not show this large obligation. The special commissioner has also found that the bankrupt knew in fact that reliance (in the sense of credit) was being placed upon this statement, even though he refused to execute an affidavit which might bring him within the letter of the criminal statute. This finding, again, is supported by the testimony and should not be disturbed.

Another item of obligation of some \$10,000 which the bankrupt swore would not in his opinion be urged against him was not of such a nature as to show falsity if omitted by the bankrupt. The special commissioner has so found, but has concluded that without this item the statement was plainly false.

The testimony indicates that the bankrupt tried to avoid the making of any statement upon which he thought that he could be held. But he did make a statement which he knew was required by the attorney for the other side, and which was the only evidence in their possession from which to judge the worth of his promise as evidenced by the promissory note. This note, as has been said, was the only consideration over and above the rights which the vendors then had in the property transferred, and the special commissioner's finding that the vendors relied upon the statement which ultimately proved false, that the bankrupt knew that the statement was false, and that he knew of the reliance of the vendors on the same (although he did not know the extent of his responsibility therefor), seems to be correct.

The cases cited, such as *In re Mintzer* (D. C.) 197 Fed. 647, *Firestone v. Harvey*, 174 Fed. 574, 98 C. C. A. 420, and *In re Braverman* (D. C.) 199 Fed. 863, are all cases in which actual reliance upon the statement subsequently proving false is not shown. See, also, *Novick v. Reed*, 192 Fed. 20, 112 C. C. A. 408. In the present case the relation of the parties and the management of the entire transaction indicates that the vendors sold something which was not proving valuable to themselves, to some other party in whose hands they hoped it might prove more valuable, and that they were induced to do so by their inquiry and belief in the bankrupt's business ability as evidenced by his financial condition. They also insisted upon a statement by him as to this financial condition so as to hold him to full responsibility for the premises upon which they had based their conclusions as to his business ability and also their expectation that his personal responsibility would be of value to them if the property sold did not produce more in his hands than it had in their own.

Such a transaction shows a reliance upon the truth of statements which, if not made, would have overthrown the belief that credit should be given, and, as the findings of falsity and knowledge on the part of the bankrupt are sustained by the testimony, the report of the commissioner should be confirmed and the discharge denied.

**PACIFIC CREOSOTING CO. v. THAMES & MERSEY MARINE INS.
CO., Limited.**

(District Court, W. D. Washington, N. D. January, 1914.)

No. 4354.

1. INSURANCE (§ 478*)—MARINE INSURANCE—CONSTRUCTION OF POLICY—WARRANTY AGAINST PARTICULAR AVERAGE—"ON FIRE"—"BURNED."

A clause in a marine policy on cargo, "warranted free from particular average unless the vessel or craft or the interest insured be stranded, sunk or on fire," is not to be construed as equivalent to the older form in which the word "burned" was used instead of "on fire," and, in the light of the rule that such contracts are to be construed most favorably to the insured if some structural part of the vessel was actually on fire, it is sufficient to open the warranty clause.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1230-1238; Dec. Dig. § 478.*]

2. INSURANCE (§ 415*)—ACTION ON MARINE POLICY—DEFENSES.

To an action on a marine policy on cargo which covered "the risk of craft and/or raft to and from the vessel," it is not a defense that a lighter employed to land the cargo, on which a loss occurred, was not seaworthy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1111; Dec. Dig. § 415.*]

3. INSURANCE (§ 402*)—RISKS AND CAUSE OF LOSS—MARINE POLICY.

There is no implied warranty in a policy on cargo that the goods are seaworthy for the voyage, and, where the vessel was seaworthy when the voyage commenced and the cargo was in good condition when received, the insurer is liable for a loss during the voyage from external causes.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1088-1090, 1093, 1103-1105; Dec. Dig. § 402.*]

In Admiralty. Suit by the Pacific Creosoting Company against the Thames & Mersey Marine Insurance Company, Limited. Decree for libellant.

See, also, 184 Fed. 947.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for libellant.
Brady & Rummens, of Seattle, Wash., for claimant.

NETERER, District Judge. This action is founded on a marine policy insuring a cargo, 2,753 drums of creosote oil in the British ship "Sardhana," shipped from London, England, to Eagle Harbor in Puget Sound, Wash., "including the risk of craft, and/or raft to and from the vessel." There is also incorporated in the policy by attaching to the margin a printed slip, which is not a part of the printed form, the following:

"Warranted free from particular average, unless the vessel or craft or the interest insured be stranded, sunk or on fire. * * *"

General average and salvage charges payable according to foreign statement or York-Antwerp rules, or 1890 rules, if in accordance with the contract of affreightment. Including all risks of craft and boats, "including all risks of transshipment and of craft, lighterage and/or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

any other conveyances * * * from the vessel until safely delivered in the warehouse. * * *” In the body of the printed form of the policy:

“It is declared and agreed that Corn Fish Salt and Fruit Flour and Seed are warranted free from average unless general or the ship be stranded sunk or burnt.”

It is alleged that by reason of storms encountered on the voyage the cargo was battered and damage resulted by loss of creosote oil, and after arriving at the port of discharge a gale caused the barge used for lightering the cargo to capsize, and thereby four drums were lost and a large salvage expense incurred. On November 18th, a fire broke out in the after 'tween decks of the ship while lying in the port of Oak Harbor, behind the bulkhead forward of the lazarette. The following was entered in the log of the ship, and is sustained by the evidence:

“November 18th. Stevedores continued to discharge the cargo and at 5 p. m. finished for the day. 291 further drums were discharged. About 9:30 p. m. smoke was discovered issuing from the after hatch, by one of the crew, who immediately notified the master and then gave the alarm. This alarm was responded to by the crews of the ship Jupiter, the S. S. Hornelen, and the employés of the Pacific Creosoting Company, who brought with them several chemical fire extinguishers. The master went below through the lazarette and saw the reflection of the fire over the top of the bulkhead between the after 'tween decks and the lazarette. The after 'tween decks were still full of cargo. After considerable trouble the fire was extinguished, and it was then discovered that the aforesaid bulkhead, together with the door thereof (the bulkhead was built in the vessel), and the dunnage in the after 'tween decks, were burned, and some of the ship's stores in the lazarette were damaged by water and chemicals. The origin of the fire was not discovered.”

[1] The respondent claims exemption from liability on account of the “free from particular average” warranty; that the “Sardhana” was not “on fire”; that no recovery for the four drums lost on the lighter or for the salvage expenses can be had, because the lighter in question was unseaworthy; that no recovery can be had in any event, it not being shown that any creosote was lost; and that, if lost, it was not on the ship at the time of the fire, and the “F. P. A.” clause does not apply; and that it is not shown what loss occurred because of perils insured against.

It is strenuously urged that the fire was not sufficient to delete the “F. P. A.” warranty, and reliance is placed on the *Glenlivet*, Prob. p. 48, decided in 1893, and cited by the Supreme Court of the United States in *London Insurance v. Companhia, etc.*, 167 U. S. 149, 156, 17 Sup. Ct. 785, 42 L. Ed. 113. In the form of policy previous to the *Glenlivet* Case, the word “burned” was used in the “F. P. A.” clause. After this case was decided the words “on fire” were substituted for the word “burned.” No case has been suggested where the words “on fire” have ever been before the courts in the same relation in any other case. The change of the words must have been made for a purpose. These words, as stated by Judge Hanford in passing upon the exceptions to the libel in this case in (D. C.) 184 Fed. 949, are not synonymous. The policy sued on in the body thereof with relation to “corn,” etc., uses the terms sunk or “burned” and in the margin with

relation to the cargo especially provides sunk or "on fire," clearly evidencing a purpose in the minds of the parties to distinguish from the former term and construction. The testimony of Mr. Beckett, an average adjuster of London, England, shows that, "under clauses * * * containing the words 'on fire,' it is the practice of the adjusters in England to consider the warranty open if some structural part of the vessel has been actually on fire." It is clear that "on fire" used in the policy was not to be considered as was "burned" in the Glenlivet Case. The warranty is drawn in the nature of an exception to the liability of the insurer and is strictly construed against him. Judge Morrow, Circuit Judge, in *Canton Ins. Offices v. Woodside*, 90 Fed. 301, 305, 33 C. C. A. 63, 68, said:

"In the case at bar the intention of the parties is not expressed as clearly as it might be, and hence any doubt that there may be is to be resolved in favor of the insured and against the insurer. A policy of insurance is a contract of indemnity, and is to be liberally construed in favor of the insured. *Yeaton v. Fry*, 5 Cranch, 335 [3 L. Ed. 117]; *National Bank v. Insurance Co.*, 95 U. S. 673, 679 [24 L. Ed. 563]; *Steel v. Insurance Co.*, 2 C. C. A. 463, 51 Fed. 715, 723, and cases there cited; 1 Arn. Ins. (6th Ed.) § 295. If the policy will fairly admit of two constructions, that one should be adopted which will indemnify the insured."

"The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself." *National Bank v. Insurance Co.*, 95 U. S. 673, 24 L. Ed. 563.

"If the company by the use of the expressions found in the policy leaves it a matter of doubt as to the true construction to be given to the language, the court should lean against the construction which would limit the liability of the company." *London Assurance v. Companhia, etc.*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113.

The fire, as shown by the evidence, was on some structural part of the ship, and endangered the ship by actually burning some part of it, and this was sufficient to open the warranty clause.

[2] The contention that the lighter in question was unseaworthy cannot be sustained. The provisions of the policy include "the risk of craft and/or raft to and from the vessel."

"The warrant of seaworthiness which is implied as to the ship does not extend to lighters employed to land the cargo." *Arnold on Marine Insurance* (8th Ed.) § 689; 19 Am. & Eng. Encyc. of Law (2d Ed.) 1002; 25 Cyc. 645; *Lane v. Nickerson*, L. R. 1 C. P. 412.

The burden to show unseaworthiness, if that were material, is upon the respondents. *Nome Beach, etc., v. Munich Assurance Co.* (C. C.) 123 Fed. 820. There is no testimony before the court to establish such condition.

[3] The bill of lading or shipping receipt for the cargo recites:

"Shipped in good order and well-conditioned by Blagden, Waugh & Company, in and upon the good ship called the *Sardhana* * * * 2,753 drums of creosote oil."

The captain of the ship was asked:

"Was not all of the cargo in apparent good order and condition when received on said ship? Yes, I rejected what we considered bad drums."

The ship's log recites, and these facts are in evidence:

"Sept. 26. It was noticed that by the soundings in the pump well that there was an increase of liquid which appeared to be mostly creosote."

"Nov. 3. Similar conditions were encountered, and the cargo again worked badly."

The witness Wylie testified:

"The creosote escaped into the hold of the vessel partly on account of the severe weather and partly on account of the original weakness of the drums, and the leakage of creosote was to some extent due to the screw bungs working out."

On the arrival of the ship at its port of discharge, it was found that there had been lost during the voyage the difference between the cargo received and that delivered, which is claimed in the libel.

"There is no implied warranty in a policy on goods that the goods are seaworthy for the voyage." 2 *Arnold on Marine Insurance* (8th Ed.) § 689.

The ship "Sardhana" being seaworthy when she left London, the cargo in good order and condition when received on the ship, the damage to the drums being external, and it conclusively appearing that there was a loss of cargo, the libellant is entitled to recover his damage. *The Peter der Grosse*, L. R. 1 P. D. 414; *Nome Beach, etc., v. Munich Insurance Co.* (C. C.) 123 Fed. 827.

Under the terms of the policy, and the warranty being open by reason of the ship being "on fire," the respondents are liable for the total damage claimed. 26 Cyc. 682; *London Assurance Co. v. Companhia*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113; 1 Cyc. 884A; *Thames & Mersey Marine Insurance Co. v. Pitts*, 7 *Aspinwall's Maritime Cases* (N. S.) 302.

A decree may be entered accordingly.

JOHNSON v. LATTY.

(District Court, N. D. Ohio, E. D. December 15, 1912.)

No. 7688.

DIVORCE (§ 324*) — DECREE — SUPPORT OF CHILDREN — LIABILITY FOR NECESSARIES.

A decree, divorcing plaintiff from defendant, gave her the custody of their infant child and adjudged that he pay plaintiff \$100 a month until February 1, 1909, and \$108.33 for five years thereafter, out of which the child was also to be cared for, but declared that, in the event of plaintiff's marriage, the alimony should from that day cease, but defendant should not be thereby relieved from his liability to support the child. *Held*, that plaintiff having remarried and having expended certain sums in Ohio, Indiana, Illinois, and Virginia for necessities furnished the child, she was entitled to recover reimbursement therefor pursuant to such decree under the laws of each of such states.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 826; Dec. Dig. § 324.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
210 F.—61

In Equity. Suit by Edith Pettit Johnson against Samuel D. Latty. On demurrer to plaintiff's amended petition. Overruled.

Squire, Sanders & Dempsey, of Cleveland, Ohio, for plaintiff.

M. B. & H. H. Johnson, of Cleveland, Ohio, for defendant.

DAY, District Judge. This matter arises on a demurrer filed to the plaintiff's first amended petition. In this pleading the plaintiff alleges, in substance, that on October 26, 1892, she was married to the defendant; that on October 9, 1900, there was born to the plaintiff, as a result of this union, Helen Marie Latty; that on July 2, 1904, the court of common pleas of Cuyahoga county, Ohio, rendered a decree divorcing the plaintiff from the defendant, giving her the custody of the child, adjudging that the defendant should pay to the plaintiff \$100 a month until February 1, 1909, and \$108.33 a month for five years, beginning March 1, 1909, with the privilege of discounting the future payments as alimony, out of which the child was also to be cared for, and further provided that:

"In event of the marriage hereafter of Edith Pettit Latty, the alimony herein allowed shall from that date cease and determine. Samuel D. Latty shall not, however, be thereby relieved from his liability to support Helen Marie Latty."

It is alleged that this decree is still in force; that up to and including January 31, 1905, the defendant paid the alimony as ordered in the decree; that on February 1, 1905, the plaintiff married one H. D. Johnson; that thereafter the defendant made no further payments to the plaintiff; that the plaintiff has paid sums aggregating \$10,000 for the support, education, and maintenance of the child; that of said sums about \$1,000 was expended in Ohio, about \$6,000 in Indiana, about \$1,000 in Illinois, and about \$2,000 in Virginia; and that by reason of the foregoing facts she is entitled to reimbursement from the defendant in the sum of \$10,000.

The demurrer directly raises the question whether the divorced husband is liable for the necessities furnished, in each of the four states, Ohio, Indiana, Illinois, and Virginia. Counsel agreed, upon oral argument, that the court might consider an agreement entered into between the parties, prior to the divorce decree; but I do not find it necessary to consider this agreement, in order to decide the question as submitted to me on demurrer. The question which is presented for decision is whether or not the divorced husband, under this divorce decree, is liable for the necessities furnished by the wife for the minor child in the several states.

It must be borne in mind that the divorce decree after providing for alimony, and after providing for a release of this alimony, in case of the wife's remarriage, specifically provides that the defendant shall not, however, be thereby relieved from his liability to support Helen Marie Latty. It is well established in Ohio that the obligation of a father to provide reasonably for the support of his minor child, until the latter is in a position to provide for his own support, is not impaired by a decree which divorces the wife by reason of the husband's misconduct and gives to her the custody, care, and culture of the child,

and allows her a sum of money as alimony, but with no provision for the child's support. *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 542. This is one of the acknowledged leading cases of the country, bearing upon the subject now under consideration. It is contended by the defendant that by the law of Indiana no obligation is imposed upon a divorced husband to reimburse his former wife for sums by her expended for necessities, furnished to their children, granted to her custody, unless, of course, the divorce decree ordered such reimbursement. The defendant cites, in support of this doctrine, the cases of *Husband v. Husband*, 67 Ind. 583, 33 Am. Rep. 107, and *Ramsey v. Ramsey*, 121 Ind. 215, 23 N. E. 69, 6 L. R. A. 682. In both of these cases, there was no provision made in the divorce decree for the support of a minor child or children. The reading of these cases makes it plain that, if the divorce decree provides for the support of the child, a claim on behalf of the divorced party would be sustained. In the case at bar, the divorce decree, in providing for the alimony in aggregate amounts, provides that from that sum the plaintiff is to care for the child, Helen Marie Latty, and further provides that the obligation of the father to support the child shall not be, by reason of the remarriage of the mother, a release of the father from the obligations to pay the amount which might be strictly termed alimony. The two Indiana cases recognize the doctrines that the obligation springs from an implied contract. But the court says, in the *Ramsey Case*, at page 220 of 121 Ind., at page 71 of 23 N. E. (6 L. R. A. 682):

"Slight evidence may sometimes warrant the inference that a contract for the infant's necessities is sanctioned by the parties. The evidence of a contract may grow out of any infinite variety of circumstances."

In the case of *Conn v. Conn*, 57 Ind. 325, the court of Indiana, dealing with the suggestion relating to the support of minor children, says:

"The decree does not deny the right of the children to be supported and educated by their father, nor is he absolved from such obligation by the decree. Such right and obligation are the same as though no divorce had been decreed, or the custody of the children had not been given to the mother."

The case of *Logan v. Logan*, 90 Ind. 107, recognizes and establishes the doctrine in Indiana that, when a divorce is granted, the court has full authority to provide for the support of the children. At page 111 of 90 Ind., the case of *Husband v. Husband*, 67 Ind. 583, 33 Am. Rep. 107, is considered, and it is held to conflict in no way with this decision. The court says, referring to *Husband v. Husband*:

"This was an action by the divorced wife against the divorced husband, to recover from him for the support of a child, whose custody had been awarded to her when the divorce was granted. It is held, simply, that having taken a decree for divorce and the custody of the child, without having obtained a provision for its support, she could not recover in the manner attempted."

In *Leibold v. Leibold*, 158 Ind., at page 60, 62 N. E. 627, the court holds that, when a father has so conducted himself that it is necessary and proper to deprive him of the custody of his minor child, he is not thereby relieved from his duty to support such child. The court cites,

with approval, from Bishop upon Marriage and Divorce, §§ 1223-1224, wherein this authority says:

"It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, to which they are not parties, or to enable the father to convert his own misconduct into a shield against parental liability."

Considering the Indiana authorities, I reach the conclusion that, under the law of Indiana, the divorced husband, under this Ohio decree of divorce, is liable for necessities furnished the minor child.

It is contended that, while the decisions of Illinois are not so explicit as the decisions of Indiana, yet that under the Illinois law the plaintiff would not be entitled to a recovery. The case of *Dawson v. Dawson*, 110 Ill. 279, and the case of *Johnson v. Johnson*, 36 Ill. App. 152, are cited in support of this doctrine.

The case of *Dawson v. Dawson* is not at all instructive, and has no bearing on the question here presented.

The case of *Johnson v. Johnson* raises the question of the sufficiency of an alimony allowance, which, under the decree provided for what might strictly be termed alimony, and the support of the child, and in no way discusses the question presented by this case at bar.

On the contrary, it is the well-established law of Illinois that a decree dissolving the marriage relation, giving the custody of the children to the mother, allowing a sum in gross as her alimony, does not impair the obligation of the father to support the children. *Plaster v. Plaster*, 47 Ill. 290; *Steele v. People*, 88 Ill. App. 186; *Konitzer v. Konitzer*, 112 Ill. App. 326. So it is very clearly established that the defendant is liable for the child's support under the circumstances of this proceeding.

No cases are cited by either side, citing the liability of the divorced husband for the child's support, under the law of Virginia; but section 3795C of the Virginia Code of the issue of 1904 renders the father primarily liable for the support of the child, and doubtless the law of Virginia is the law of most of the states of the Union, that the husband, under the circumstances of the situation presented by this petition, is liable for the support of a minor child whose custody has been granted to the wife, with a provision for support in the divorce decree.

The obligation is recognized by the Supreme Court of the United States in *Dunbar v. Dunbar*, 190 U. S. 351, 23 Sup. Ct. 761, 47 L. Ed. 1084. The Supreme Court, in holding that a father's obligation to support his minor children is not relieved by proceedings in bankruptcy, says:

"At common law, a father is bound to support his legitimate children, and the obligation continues during their minority. We may assume this obligation to exist in all the states. In this case the decree of the court provided that the children should remain in the custody of the wife, and the contract to contribute a certain sum yearly for the support of each child during his minority was simply a contract to do that which the law obliged him to do; that is, to support his minor children. The contract was a recognition of such liability on his part."

The facts stated in the petition plainly indicate that in the divorce decree it was the intent of the parties that Edith Pettit Latty should be divorced from her husband; that she should have the custody of their child, Helen Marie Latty, during her minority; that the divorced husband, Samuel D. Latty, should pay to this divorced wife certain sums of money, out of which payments the divorced wife was to care for the child so far as the alimony would pay; that is, that out of this gross sum she should pay for the child's support, but providing further in the decree that if Latty, the divorced husband, was relieved from paying the alimony, he should not be relieved from his liability for the support of the child. It is clearly the intention of the parties that even in case of remarriage the defendant should not be relieved from supporting his child. This was his common-law obligation; this is his obligation under the laws of the state of Ohio; and under the facts in this case, with the provisions of this divorce decree, it is the law of Indiana, of Illinois, and of Virginia.

The demurrer will be overruled, with exceptions granted.

In re H. B. HOLLINS & CO.

Ex parte HOGEBOOM.

(District Court, S. D. New York. February 9, 1914.)

PLEDGES (§ 19*)—COLLATERAL SECURITY—DRAFTS.

Where a bankrupt deposited collaterals to secure acceptances of foreign bills of exchange by R. & Sons, and the bankrupt, as an inducement to complainant's assignor to purchase certain bills drawn against such collaterals, informed it that the drawee had agreed to accept the drafts, and that the drawer had deposited collaterals against the acceptances, the collaterals operated as security for the bills before as well as after acceptance.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 58-63; Dec. Dig. § 19.*]

In Bankruptcy. In the matter of bankruptcy proceedings of H. B. Hollins & Co. On petition of John L. Hogeboom for the application of the proceeds of certain collaterals to the payment of the bankrupt's drafts. Report of referee granting such relief affirmed.

This is a motion to confirm the report of a special master. The petition was filed against a receiver in bankruptcy and is stated at length below. The receiver answered, and the issues were referred to a special master, before whom the receiver admitted all the allegations of the petition. Upon the facts as so found, the master reported in favor of the petitioner and directed that the collaterals mentioned in the petition should be used in payment of the drafts.

The following are the allegations of the petition:

I. That the International Banking Corporation, hereinafter mentioned, is, and at all the times hereinafter mentioned was, a corporation duly organized and existing under the laws of the state of Connecticut.

II. That at all the times hereinafter mentioned, Ernest Ruffer, Maurice Ruffer, and Richard de Neufville were, and still are, copartners doing business under the firm name of A. Ruffer & Sons, at No. 39 Lombard street, London, England, where at all such times they conducted and still conduct a general banking business.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

III. That on or about April 21, 1911, the said A. Ruffer & Sons entered into a contract in writing with the bankrupts pursuant to which contract the said A. Ruffer & Sons agreed to accept drafts of the equivalent of about \$125,000, outstanding at any one time and drawn upon them by the said bankrupts against deposit of collateral security by the said bankrupts with a New York depositary for account of A. Ruffer & Sons.

IV. That, pursuant to the said agreement, the said bankrupts, prior to drawing the drafts hereinafter described, deposited with the Equitable Trust Company, a New York corporation carrying on business at No. 37 Wall street, in the borough of Manhattan, city, county, and state of New York, certain collateral security to the account of A. Ruffer & Sons, and that the said A. Ruffer & Sons had previously thereto accepted the said Equitable Trust Company as a depositary under the said agreement.

V. That the said collateral security consisted of the following: 50M Detroit, Toledo & Ironton Ry. Receiver's certificates. 20M Toledo, St. Louis & Western R. R. 4. 2M Distillers Securities 5. 100 U. S. Steel preferred shares. 100 Car Foundry shares. 100 St. Paul shares. 100 British American Tobacco shares. 100 Mackay, Commercial Cable Company shares.

VI. That on or about November 7, 1913, the said bankrupts drew against the said collateral security their certain drafts or bills of exchange upon the defendants, payable 90 days after sight; the said drafts consisting of the following: £2,500, £2,500, £2,500, £2,500, £2,500, £2,500, £589 5s. 6d., amounting in all to the sum of £15,589 5s. 6d. sterling, being the equivalent of \$75,000, payable at the maturity of the bills, and that the said drafts or bills of exchange are the only ones drawn by said bankrupts and now outstanding against the said securities.

VII. That on or about November 7, 1913, the said bankrupts offered for sale the said drafts or bills of exchange hereinbefore described, and represented to the said International Banking Corporation that said drafts or bills of exchange were drawn pursuant to agreement existing between the said bankrupts and the said A. Ruffer & Sons, and that the said International Banking Corporation thereafter and on the same date purchased the said drafts or bills of exchange paying for them the sum of \$74,579.10, said sum being the value in exchange on that day of £15,589 5s. 6d., being the equivalent of \$75,000, payable by bills of exchange in pounds sterling at 90 days after sight.

VIII. That, at the time of each drawing of drafts or bills of exchange under the said agreement, the said bankrupts wrote and mailed to the said A. Ruffer & Sons a letter in the form hereto annexed marked "Exhibit A," and made a part hereof, except that in the said Exhibit A the dates and amounts are left blank.

IX. That on or about October 10, 1913, the said bankrupts had drawn their drafts or bills of exchange upon the said A. Ruffer & Sons in the sum of £10,429 14s. 2d., sterling, the equivalent of \$50,000, against securities other than those above described, which securities were also deposited with the said Equitable Trust Company by the bankrupts, and that said drafts or bills of exchange were duly accepted by the said A. Ruffer & Sons pursuant to the said agreement.

X. That prior to the purchase by the said International Banking Corporation on November 7, 1913, of the drafts or bills of exchange described in paragraph VI of this petition, it had been the custom of the said bankrupts so to deposit specific securities for the account of A. Ruffer & Sons, and then to draw drafts or bills of exchange upon said A. Ruffer & Sons against said specific securities, as in said agreement provided. That it is a well-known and established custom in dealings between New York and foreign bankers to engage in business transactions in the manner herein described; that is, where bills of exchange are drawn by a New York banker upon a foreign banker, such drawings are against specific security, of all of which facts and custom the said International Banking Corporation had knowledge and relied upon at the time it purchased the drafts or bills of exchange hereinbefore described.

XI. That on or before November 21, 1913, the said A. Ruffer & Sons refused to accept any or all of the said drafts or bills of exchange so purchased by the said International Banking Corporation, giving as a reason for such

refusal that prior to the presentation to them of the said drafts or bills of exchange for acceptance a petition had been filed by the creditors of the said bankrupts for their adjudication as bankrupts.

XII. That on November 21, 1913, and subsequent to the matters hereinbefore set forth, the said International Banking Corporation duly assigned to your petitioner by instrument in writing all cause or causes of action to it belonging because of the matters above stated, and also all its right, title, and interest in and to the securities hereinbefore described, and that your petitioner is the owner and holder of the said drafts or bills of exchange purchased as aforesaid by the said International Banking Corporation.

XIII. That by reason of the matters aforesaid your petitioner became the owner of an interest in the said securities against which the said drafts or bills of exchange so purchased by its assignor were drawn, equal to \$75,000, payable in pounds sterling at the rate of exchange prevailing at the time of such payment, with interest thereon, if payment delayed after the maturity of the said drafts or bills of exchange, and the expense to which it had been put by reason of the said refusal of A. Ruffer & Sons, to accept the said drafts, but that the receiver is unwilling to recognize the said interest of your petitioner and desires an order of court, and the said Equitable Trust Company refuses to surrender the said securities to your petitioner, except with the consent of the said receiver.

Charles C. Deming and W. W. Lancaster, both of New York City, for petitioner.

George M. Mackellar, of New York City, for receiver.

HAND, District Judge (after stating the facts as above). The seventh article of the petition alleges that the drawer represented to the purchaser that the "drafts were drawn pursuant to agreement existing between" the drawer and the drawee. The petition in the tenth article alleges that it was a well-known and established custom in such cases for the New York banker to deposit against these drafts specific security, and that of this custom the purchaser had knowledge and relied upon it. The representation must therefore be interpreted as equivalent to the drawer's statement as an inducement to the purchaser that the drawee had agreed to accept the drafts and that the drawer had deposited collateral against the acceptances. I do not think that the drawer should be thought to have said this only to persuade the purchaser that the drawee would accept because he had agreed to accept, but also to persuade him because securities had been deposited against the acceptances. The turning point of the case then becomes this: Should this representation as to the collateral be limited to the period after acceptance, or should it be interpreted as extended on the purchaser's behalf so as to cover the whole period during which the draft was outstanding?

The Court of Appeals of the State of New York, in *Muller v. Kling*, 209 N. Y. 240, 103 N. E. 138, in the case of an express representation that the acceptance would be secured, has held that the security inured as well to the purchaser before acceptance as after. In that case Judge Gray suggests that the interview between the drawer and the purchaser must have meant something relative to the purchaser's proposed action. It must have been intended to induce him to buy the draft by assuring him that at some time he would have the benefit of the collateral. That the period which he should have that benefit should include the time before acceptance I think is clear, for the following reasons: Be-

fore acceptance the holder has the security only of the drawer; after acceptance he has the security of both drawer and drawee. To assure the holder that he may rely upon the drawer's collaterals can hardly in reason be interpreted as covering only that period when he has the credit of both drawer and drawee. That would be to secure him while he has the security of two names and leave him unsecured while he has but one of the two, which is a most unlikely purpose to attribute to the parties. I can well understand how the contrary might be true, if acceptance relieved the drawer, and so left the holder with the obligation only of a foreign acceptor about whom he might be supposed to know little; but I can see no reason why, when the drawer is representing that there are securities against his own obligations, he should be thought to intend those obligations only during a time when they were already secured by the added obligation of the drawee. Any purpose to induce the purchaser to buy on the faith of the collateral ought to include, I should think, the whole time when he held them.

As I view the case, therefore, it does not present the question of a drawer securing the drawee and selling the draft without any representation. It is therefore not necessary to consider the propriety of the ruling in *Watts v. Shipman*, 21 Hun, 598, which seems to go to the extent of allowing the holder recourse against the collateral in that case. *Marine Fire Insurance Bank v. Jauncey*, 3 Sandf. 257, is not to the contrary. In the first place, the drawee had accepted, and the purchaser was of course entitled to the security if there was security. The only question was whether the cotton was general assets or specifically pledged, and the court held it was general assets which the drawee might apply generally on his account, as he did. I can hardly think that any general questions of equity arise, or that *Hurley v. Atchison, Topeka & Santa Fé Ry.*, 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729, has any application. The question is, of the interpretation of the parties' intention, and is equitable only in the sense that all such interpretations involve questions of equity. The case depends, I think, upon the fact that the drawer represented to the purchaser, among other things, that the draft was secured, and that this representation should be construed as the Court of Appeals construed it in *Muller v. Kling*, *supra*.

The report is affirmed, with costs.

SMITH v. REED et al.

(District Court, N. D. Ohio, E. D. September 16, 1912.)

No. 8243.

COURTS (§ 346*)—SERVICE BY PUBLICATION—ATTACHMENT—FEDERAL COURTS.

Jud. Code, § 51 (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]), provides that no civil suit shall be brought before either of the courts of the United States against any person by original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded on diversity of cit-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

izenship, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. Rev. St. § 915 (U. S. Comp. St. 1901, p. 684), declares that in common-law causes in the circuit and district courts plaintiff shall be entitled to similar remedies, by attachment or other process against the defendant's property, which are now provided by the laws of the state in which the court is held, and that such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process. *Held* that, though Gen. Code Ohio, § 11292, provides for the issuance of foreign attachments on the ground that the defendant is a nonresident, yet, it having been determined that personal service on the defendant is necessary to institute a suit in the federal courts, jurisdiction cannot be acquired by a federal court, of a defendant who is a nonresident of the state and district, by an attachment of his property within the division and district and a publication of the summons in accordance with the state law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 918; Dec. Dig. § 346.*]

Action by Charles B. Smith as administrator, etc., against William Reed and others. On defendants' motion to quash the service. Granted.

E. C. Chapman and R. B. & A. G. Newcomb, of Cleveland, Ohio, for plaintiff.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for defendants.

DAY, District Judge. In this case the defendant Reed has filed a motion asking the court to set aside and quash the service of summons herein upon said defendant, for the reason that the court has no jurisdiction over the person of said defendant.

An attempt was made to secure personal service upon the defendant, which service was plainly deficient. Accordingly no personal service was made upon the defendant, but an attachment was issued under a proper affidavit under the state practice, and the property of the defendant was seized. An affidavit for service by publication under the Ohio statute was filed and published according to law.

The question which arises, is this: Can this court acquire original jurisdiction of the defendant, William Reed, by proceedings in attachment, in accordance with the laws of Ohio, against the property of said Reed found within the limits of this division and district?

It might be said, in passing, that since the petition was originally filed by leave of court, it has been amended. This amendment does not change the parties to the original cause of action, nor does it change the original cause of action set forth in the original petition. The legal effect of the amendment is to render the petition as though it had originally read as amended, and this amendment establishes the existence of the jurisdiction from the commencement of the suit. *Carnegie et al. v. Hulbert*, 70 Fed. 209, 16 C. C. A. 498; *Bowden v. Burnham*, 59 Fed. 752, 8 C. C. A. 248.

The jurisdictional statute applicable to this case, is Act of March 3, 1875, c. 137, 18 Stats. at Large, 470, as amended by Act Aug. 13, 1888, c. 866, 25 Stats. at Large, 434, and is found in chapter 2, which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is a chapter on Jurisdiction of the so-called Judicial Code, being the act of March 3, 1911 (U. S. Comp. St. Supp. 1911, p. 150). This act gives to the District Court, formerly the Circuit Court, jurisdiction where there is a "controversy between citizens of the state and foreign states, citizens or subjects," where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.

Following this general ground of jurisdiction, as found in the act of March 3, 1875, as amended by the acts of March 3, 1887, and August 13, 1888, is this language:

"And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

In the Judicial Code passed March 3, 1911, as has already been observed, the jurisdiction of the District Court is found in section 24 under chapter 2 on Jurisdiction. The provision last quoted is found in section 51 of said act, under chapter 4, entitled Miscellaneous Provisions.

Section 915 of the Compiled Statutes of the United States reads as follows:

"Attachments:

"In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: Provided, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy." U. S. Comp. St. 1901, p. 684.

This court has adopted rules making the provisions of the Ohio Statutes relating to attachments applicable to proceedings in this court. The statutes of Ohio, under section 11,292 of the Ohio General Code, provide for the institution of foreign attachments on the ground that the defendant is a nonresident of the state of Ohio. This ground of attachment, on the basis of nonresidence, is specified in section 11,819 of the Ohio General Code.

There is no controversy but that under the statutes of the state of Ohio the commencement of a suit against a nonresident by attachment is authorized. It is, however, urged by counsel for the defendant that an attachment is but an incident to a suit, and that unless suit can be maintained the attachment must fall. In other words, unless this court has jurisdiction, not only over the person of the defendant, but also over the subject-matter, this suit cannot be maintained. And the fundamental question arises as to whether this court can acquire jurisdiction over an individual defendant residing outside of the district, by attaching the property of the defendant found within the district.

The language employed in section 51 of the Judiciary Act, providing that where jurisdiction is founded only on the act as between citizens of different states, and that suits shall be brought only within the residence of either the plaintiff or defendant, is insisted by the defendant to be not jurisdictional, but simply such language as gives the defendant a privilege which he may or may not assert at the proper time. It is important to note that this language is placed in the new Judicial Code among the miscellaneous provisions, and does not appear in the chapter conferring jurisdiction upon the court. This portion of the acts in reference to the citizenship of the parties to the suit was considered in the case of *Bogue v. Chicago, Burlington & Quincy R. R. Co.* (D. C.) 193 Fed. 728, 731, where the court said:

"Plaintiffs' counsel, both in oral argument and by brief, was utterly mistaken as to the effect of the statute prescribing the place of bringing an action. This statute is in no sense jurisdictional. The plaintiff has a legal right to bring his action in any district of the United States other than where both are citizens of the same state and there, in the event of lawful service, the case will go to a valid judgment, unless the defendant timely objects to plaintiff maintaining the case in a district other than where either the one or other resides. It is a mere privilege that the defendant can waive, or timely protest against. It is not jurisdictional."

Discussing the jurisdiction of the federal courts in attachment, *Foster on Federal Practice*, vol. 2 (4th Ed.), page 1254, says:

"These rules and the statute do not give a circuit or district court power thus to acquire jurisdiction over a person not a resident of the district nor served with process therein (citing cases). * * * It is doubtful whether the writ of attachment can be issued in a suit originally instituted in a federal court, before jurisdiction has been obtained by service of original process."

In the case of *Ex parte Railway Co.*, 103 U. S. 794, 26 L. Ed. 461, a suit was commenced in the United States Circuit Court for the District of Iowa against a citizen of Massachusetts, by which the plaintiff sought to acquire jurisdiction by attaching the defendant's property, on the ground that he was a nonresident. No personal service was made on the defendant, and on his setting up a plea to the jurisdiction, the court dismissed the suit and dissolved the attachment.

Chief Justice Waite, speaking for the court, at page 796 of 103 U. S. (26 L. Ed. 461), said:

"It is conceded that the person against whom this suit was brought in the Circuit Court was an inhabitant of the state of Massachusetts, and was not found in or served with process in Iowa. Clearly, then, he was not suable in the circuit court of the District of Iowa, and unless he could be sued, no attachment could issue from that court against his property. An attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall."

The doctrine announced by this opinion that an attachment is but an incident to a suit and must fall unless the suit itself can be maintained against the defendant, irrespective of the attachment, was again considered in the case of *Laborde v. Ubarri*, 214 U. S. 173, 29 Sup. Ct. 552, 53 L. Ed. 955. At page 174 of 214 U. S., at page 552 of 29 Sup. Ct. (53 L. Ed. 955), Justice Holmes, when delivering the opinion of the court said:

"There is presented here a subordinate question as to the right of the plaintiffs in error, who were also the plaintiffs below, to retain an attachment against property alleged to belong to two nonresident heirs of Pablo Ubarri. The District Court ordered the complaint to be dismissed as to these heirs and the attachment against any of their property to be dissolved, on the principle that has been laid down more than once by this court that in the courts of the United States 'attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall.' *Ex parte Railway Co.*, 103 U. S. 794, 796 [26 L. Ed. 461]. 'Unless the suit can be maintained' means, of course, unless the court has jurisdiction over the person of the defendant. See, further, *Toland v. Sprague*, 12 Pet. 300, 330, 336 [9 L. Ed. 1093]; *Chaffee v. Hayward*, 20 How. 208 [15 L. Ed. 851]; *Clark v. Wells*, 203 U. S. 164 [27 Sup. Ct. 43, 51 L. Ed. 138]."

It is contended by counsel for the plaintiff that a number of these cases, especially the case in 103 U. S., and the basic case of *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093, were decided when the statute contained a requirement that the suit could be instituted in the district in which the defendant was an inhabitant, or in which he might be found, and that since the additional legislation, providing that suit might be brought in the district of the residence of either the plaintiff or defendant, these decisions would lose their force. This would be if they were jurisdictional, but if the legislation in this respect only gives the privilege to the defendant and is not jurisdictional, these decisions referred to by Justice Holmes would have all of the force which it is contended by counsel for defendant they possess.

Counsel for plaintiff very ably contend that the case of the *Boston & Maine Railway v. Gokey*, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. Ed. 1002, expresses the position they take in this matter. It appears to me that the court held in the *Gokey* Case that the division superintendent of the railway was a known agent, and that service upon him in an attachment suit was proper under the Vermont Statutes. I cannot perceive that the court held in this case that the federal courts would take jurisdiction of a nonresident defendant solely by virtue of an attachment of property. It appears to me that the language in Justice Holmes' opinion, in the case of *Laborde v. Ubarri*, in 214 U. S., redeclared the doctrine of *Toland v. Sprague* and established it as the law which must be observed to a suit, and that unless the suit can be maintained, that is, unless the court has jurisdiction over the person of the defendant, the attachment must fall.

It is urged by counsel for plaintiff that in the case of *Clark v. Wells*, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. Ed. 138, and *Davis v. Cleveland, C., C. & St. L. Ry. Co.*, 217 U. S. 157, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907, the jurisdiction of the federal courts in foreign attachments is recognized. Both of these suits were originally instituted in the state court and service procured by attachment. The question arises on removal to the federal courts. Justice Day, in deciding the case of *Clark v. Wells*, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. Ed. 138, overruled the contention of the plaintiff that the effect of the removal was to render nugatory the attachment proceedings in the state court upon the express ground that section 4 of Removal Act March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 514) prohibited this. It is quite apparent in this decision last

referred to that the defendant by having the cause removed to the federal court waived the personal privilege contained in section 51 of the Judicial Code.

In a very recent case, that of *United States v. Brooke* (D. C.) 184 Fed. 341, which was a suit for the United States against two parties, arising out of the violation of the custom laws, in which the government sought to seize property of nonresidents, by warrant of attachment, without personal service, Judge Hazel says:

"The attachment granted herein must be vacated on the ground that jurisdiction has not been obtained over the person of the defendants. According to the moving papers, the defendants are residents of * * * England. * * *

"The authorities uniformly hold that to merely find property of a defendant in the district does not mean finding the defendant therein, for the purpose of bringing suit against him."

After referring to the Conformity Acts, the court said:

"But such provisions do not expressly or impliedly give a United States District Court jurisdiction of proceedings in rem against the property of a nonresident defendant who has not been personally served. The Supreme Court has held that the attachment is only an incident of the suit (citing 103 U. S. and 214 U. S.). And common-law actions can only be brought in the United States Circuit and District Courts in the district of which the defendant is an inhabitant, or in which he is found at the time of serving the process, or, to give the court jurisdiction, he must voluntarily appear."

The cases which hold that where a state court has acquired jurisdiction of the defendant, through its property, and could enter a judgment enforceable against such property, I think, can be distinguished from the facts and the situation here presented by the case at bar; it being held in these decisions that the defendants did not submit their persons to the general jurisdiction of the court, but that the property could be proceeded against up to the amount of the attachment in the state court.

It having been held, however, by the Supreme Court of the United States that personal service was necessary to institute a suit in the federal courts, these decisions commented upon by counsel for plaintiff would not be controlling.

Motion to quash service is sustained, and exceptions given to the plaintiff.

UNITED STATES v. WEBER.

(District Court, W. D. Washington, N. D. January 17, 1913.)

No. 2385.

1. COUNTERFEITING (§ 4*)—OBLIGATIONS USED UNDER AUTHORITY OF UNITED STATES—ELEMENTS OF OFFENSE—STATUTES—CONSTRUCTION.

Cr. Code § 150 (Act March 4, 1909, c. 321, 35 Stat. 1116 [U. S. Comp. St. Supp. 1911, p. 1633]), provides that whoever shall have in his possession or custody, except on authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed in whole or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in part after the similitude of any obligation or other security issued under the authority of the United States with intent to sell or otherwise use the same, shall be fined, etc. *Held*, that it was not a necessary element of such offense that the fraudulent obligation or security should purport on its face to be an obligation or security issued under the authority of the United States, nor that the similarity or resemblance should be so great as to deceive experts, bank officers, or cautious men, but it was sufficient if the fraudulent obligation bore such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States as was calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care when dealing with a person supposed to be honest.

[Ed. Note.—For other cases, see Counterfeiting, Cent. Dig. §§ 9, 10; Dec. Dig. § 4.*]

2. COUNTERFEITING (§ 19*)—SIMILITUDE OF GENUINE OBLIGATIONS—QUESTION FOR JURY.

In a prosecution for having in possession fraudulent security or obligation, made in whole or in part after similitude of an obligation issued under the authority of the United States in violation of Cr. Code, § 150 (Act March 4, 1909, c. 321, 35 Stat. 1116 [U. S. Comp. St. Supp. 1911, p. 1633]), whether such a similarity or resemblance exists between the fraudulent obligation and a genuine one as would be calculated to deceive an honest, sensible person of ordinary observation and care is ordinarily a question of fact for the jury.

[Ed. Note.—For other cases, see Counterfeiting, Cent. Dig. §§ 46-49; Dec. Dig. § 19.*]

3. COUNTERFEITING (§ 16*)—FALSE INSTRUMENTS—SIMILITUDE OF OBLIGATION ISSUED UNDER AUTHORITY OF UNITED STATES—INDICTMENT.

In a prosecution for having in possession an obligation executed in whole or in part after the similitude of an obligation issued under authority of the United States with intent to sell or otherwise use the same, etc., in violation of Cr. Code, § 150 (Act March 4, 1909, c. 321, 35 Stat. 1116 [U. S. Comp. St. Supp. 1911, p. 1633]), the indictment charged that defendant had in possession, with intent to use and defraud H. and others, a certain obligation made in part after the similitude of an obligation issued under authority of the United States, such obligation being made by fastening together, back to back, two notes, one purporting to have been issued by the Bank of the Empire State, and the other by the Bank of Howardsville, each of the denomination of \$10. The indictment then set forth the printed matter on each side of the note or obligation, and charged that in form, color, size, and in manner and style of display and printing and engraving, and in general appearance, the obligation was made, and intended to be made, after the similitude of an obligation issued under the authority of the United States, to wit, a United States treasury note of the denomination of \$10. *Held*, that from the description of the instrument as so alleged, it did not appear as a matter of law that the requisite resemblance and similitude did not exist so as to render the indictment demurrable.

[Ed. Note.—For other cases, see Counterfeiting, Cent. Dig. §§ 23-37; Dec. Dig. § 16.*]

James C. Weber was indicted for having in possession an obligation, after the similitude of an obligation or security issued under authority of the United States, with intent to sell and use the same. On demurrer to indictment. Overruled.

B. W. Coiner, U. S. Atty., of Tacoma, Wash.

Hammond & Hammond, of Seattle, Wash., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RUDKIN, District Judge. The indictment in this case was returned under section 150 of the Criminal Code of March 4, 1909, which provides, in part, as follows:

"Whoever shall have in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same" shall be fined and imprisoned, etc.

The indictment charges, in substance, that on the 12th day of October, 1912, within the Northern Division of the Western District of Washington, the defendant Weber knowingly and feloniously had in his possession, with intent to use the same and thereby defraud one Hibros, and other persons to the grand jurors unknown, such possession not being under authority from the Secretary of the Treasury, or other proper officer, a certain obligation made in part after the similitude of an obligation issued under the authority of the United States, said obligation being then and there made by attaching and fastening together, back to back, two notes, one purporting to have been issued by the Bank of the Empire State, and the other by the Bank of Howardsville, each of the denomination of \$10; said notes being so fastened together by the use of paste and other substances and means to the grand jurors unknown. The indictment then sets forth the printed matter on each side of the note or obligation, and charges that in form, color, size, and in manner and style of display and printing and engraving, and in general appearance the obligation was made, and intended to be made, after the similitude of an obligation issued under the authority of the United States, that is to say, after the similitude of a United States treasury note of the denomination of \$10. To this indictment the defendant has interposed a demurrer on the ground that it appears upon the face of the indictment that the obligation therein described was not made or executed, in whole or in part, after the similitude of a United States treasury note, or any other obligation or security issued under the authority of the United States.

The authorities bearing upon this question cannot be reconciled. It was held by Judge Amidon in *United States v. Barrett* (D. C.) 111 Fed. 369, on motion to quash, that a confederate bill of the denomination of \$50 was not engraved or printed after the similitude of an obligation or security issued under the authority of the United States. It was held by Judge Bellinger, in *United States v. Connors* (D. C.) 111 Fed. 734, that an obligation, purporting on its face to be a note issued by the State Bank of New Brunswick, in the state of New Jersey, was not engraved or printed after the similitude of any obligation or security issued under authority of the United States. A similar ruling was made by Judge De Haven in *United States v. Pitts* (D. C.) 112 Fed. 522, involving a note of the same bank. On the other hand, it was held by Judge Dyer, in *United States v. Williams* (D. C.) 14 Fed. 550, that it was not essential that the obligation should purport on its face to be an obligation issued under the authority of the United States. In *United States v. Stevens* (D. C.) 52 Fed. 120, it

was held by Judge Paul that the question whether a note purporting to be issued by the Bank of Mecklenburg, N. C., was engraved or printed after the similitude of an obligation or security issued under the authority of the United States was for the jury. In *United States v. Fitzgerald* (D. C.) 91 Fed. 374, Judge Hanford of this district submitted to the jury the question whether a certificate for 100 shares of the capital stock of the Denver Mining Company, of the par value of \$1,000, was engraved or printed after the similitude of a United States bond for the sum of \$1,000. In the recent case of *United States v. Ryan*, pending in this district, Judge Donworth submitted to the jury the question whether a note or bill, consisting of two state bank notes pasted together, as in this case, was made or executed, in whole or in part, after the similitude of an obligation or other security issued under the authority of the United States.

All these cases except the last arose under section 5430 of the Revised Statutes (U. S. Comp. St. 1901, p. 3671), which does not differ materially from the statute now under consideration. The former used the words, "engraved and printed after the similitude of any obligation or other security issued under the authority of the United States," while the present statute used the words, "made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States." If there is any difference between the two statutes, the provision contained in section 150 of the Criminal Code, is broader than the provision contained in section 5430 of the Revised Statutes, by reason of the use of the words, "in whole or in part."

This is not a counterfeiting statute. It is a statute to protect the obligations and securities issued under the authority of the United States, and the power of Congress to enact such a law is not questioned.

[1-3] I am further of opinion that the true rule of construction, and the rule supported by the weight of authority, is the rule adopted and followed by the judges of this district. Under that rule it is not necessary that the fraudulent obligation or security should purport on its face to be an obligation or security issued under the authority of the United States. Nor is it necessary that the similarity or resemblance should be so great as to deceive experts, bank officers, or cautious men. It is sufficient if the fraudulent obligation bear such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States, as is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest. If the fraudulent obligation is of that character, the offense is made out, and whether such a similarity or resemblance exists is, in ordinary cases, a question of fact for the jury. It is extremely difficult to describe a treasury note or other currency on paper; and, when the written description contained in the indictment is supplemented by the charge that the fraudulent obligation is in form, color, size, and in manner and style of display, and of printing and engraving thereon and in general appearance, made, and intended to be made, after the

similitude of an obligation issued under the authority of the United States, the court is unable to say as a matter of law that the requisite resemblance or similarity does not exist

The demurrer is therefore overruled.

In re KRAMER et al.

(District Court, E. D. Pennsylvania. February 6, 1914.)

No. 4344.

1. BANKRUPTCY (§ 136*) — CONCEALMENT OF PROPERTY — ORDER TO DISMISS — CONTEMPT PROCEEDINGS.

Where bankrupts were ordered to pay over money alleged to have been withheld from the trustee, and, in proceedings to adjudge them guilty of contempt in failing to comply with the order, they both testified that they did not have possession or control of the money and were unable to comply with the order, the court was authorized to examine the testimony taken before the referee in order to determine whether the bankrupts' denial was false and fraudulent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

2. BANKRUPTCY (§ 136*) — CONCEALMENT OF ASSETS — FAILURE TO PAY — CONTEMPT.

Where bankrupts were ordered to pay over certain withheld funds to the trustee, and their testimony before the referee was a network of inconsistencies, evasions, and deliberate falsehoods, their subsequent denial that they had possession of the money which they had abstracted from the bankrupts' estate, and were therefore unable to comply with the order, was insufficient to relieve them from punishment for contempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Harry Kramer and Michael Muchnick. Rule to attach the bankrupts for contempt in failing to pay over to the trustee certain funds alleged to have been retained by them and which they were ordered to pay over. Rule absolute. See, also, 209 Fed. 627.

Carr, Beggs & Steinmetz and Alfred T. Steinmetz, all of Philadelphia, Pa., for trustee.

Furth, Singer & Bortin and Emanuel Furth, all of Philadelphia, Pa., for bankrupts.

THOMPSON, District Judge. By the finding and order of the referee, as modified and affirmed by the learned Circuit Judge, it has been authoritatively determined that at the time of bankruptcy the partners, Harry Kramer and Michael Muchnick, bankrupts, were in possession and control of the sum of \$4,092.21, and that Michael Muchnick, individually, was in possession and control of the further sum of \$16,732.94, which should have been paid to the trustee.

As stated by Judge Young in the case of Epstein v. Steinfeld, 210

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 210 F.—62

Fed. 236, decided in the Circuit Court of Appeals for the Third Circuit January 2, 1914:

"This is the first stage of the proceeding. The second stage is to determine whether or not the property required is still in the possession or control of the bankrupt and that he is physically able to deliver it to his trustee. The correct practice at this stage of the proceedings has been authoritatively stated by Judge Gray in *American Trust Co. v. Wallis*, 126 Fed. 464 [61 C. C. A. 342], in the following language: 'If the bankrupt denies that he has possession or control of the property, or if a third person in possession thereof claims to hold it, not as the agent or representative of the bankrupt, but by title adverse to him, and there is no evidence to indisputably show that such denial or claim is false or fraudulent, and that the case is one of simple concealment or refusal on the part of the bankrupt or the one in possession to deliver up the property as ordered, it would be an unwarranted stretch of power on the part of the court to resort to a summary proceeding for contempt, for the enforcement of its order. In the absence of fraud or concealment, the bankrupt court can only order the delivery of property to the trustee which the bankrupt is physically able to deliver up, having the same in his possession or control. If it shall appear that he is not physically able to deliver the property required by the order, then confessedly proceedings for contempt, by fine and imprisonment, would result in nothing, certainly not in a compliance with the order. The contempt in this case could only be purged by a reiteration of the physical impossibility to comply with the order whose disobedience is being thus punished. An order made under such circumstances would be as absurd as it is inconsistent with the principles of individual liberty.'"

[1] At the hearing on the present rule, both bankrupts went upon the stand and denied that they had possession or control of the money which they were ordered to pay to the trustee. If therefore there is no evidence to indisputably show that such denial or claim is false or fraudulent, and that the case is one of simple concealment or refusal upon the part of the bankrupts to deliver up the property as ordered, the proceedings for contempt for the enforcement of the order should be dismissed. The primary fact of possession by the bankrupts at the time of bankruptcy having been established, their testimony at the hearing upon the present rule constituted merely a flat denial that they had within their possession or control the money or that any other person held it for them. Both of the bankrupts testified as to their present employment, their manner of living, and the amount expended by them for living expenses since the bankruptcy with the apparent purpose of proving that they were not spending beyond their present earnings. In order to assist in determining, therefore, whether it is indisputably shown that their denial or claim is false and fraudulent, the testimony taken before the referee has been examined and considered. The conclusion from that testimony is irresistible that the bankrupts, for a period of several months prior to bankruptcy by a deliberately arranged plan continuously carried out, withdrew from the partnership funds, for the purpose of fraud upon creditors, various sums amounting in the total to the sums which they had been ordered to pay to the trustee.

[2] A careful examination of the testimony of the two bankrupts taken before the referee shows numerous inconsistencies, evasions, and deliberate falsehood in their explanation of the purposes for which the money was withdrawn and of the disposition made of it. The

more the bankrupts attempted to explain the depletion of the firm's assets, the more hopelessly they convicted themselves of intentional falsehood. Under these circumstances their present naked denial that they now have in their possession or control the funds abstracted is unworthy of belief.

At the hearing counsel for the bankrupts took the position that, in view of the conclusiveness of the former order, the bankrupts should not now be called upon to further explain their disposition of the money, as the court could not at this stage of the proceeding consider the testimony taken before the referee, and therefore the only evidence for consideration at this time consisted in the fact of failure to obey the order and the testimony of the bankrupts in denial of present ability to pay. In other words, the first stage of the proceedings being completed, all testimony in relation to the matter in controversy must be produced *de novo*.

I cannot conceive that the rule laid down in *Trust Co. v. Wallis*, 126 Fed. 464, 61 C. C. A. 342, and the practice outlined in *Epstein v. Steinfeld*, can be distorted so as to shut out the testimony upon which the former order was based, and the record upon which the present rule was allowed. That testimony abundantly proves not only fraud and concealment, but is so strongly conclusive of perjury as to induce entire disbelief in the present denial of the bankrupts of their being in possession or control of the money ordered to be paid.

I am convinced therefore that the testimony of the bankrupts at the present hearing is false, and that the testimony taken before the referee is "evidence to indisputably show that such denial or claim is false or fraudulent, and that the case is one of simple concealment" on the part of the bankrupts. As it has been determined that the bankrupts were withholding and concealing the money at the time of their bankruptcy, the testimony as to their earnings and expenses of living does not affect their present ability to pay. I am not satisfied of the fact of present inability to pay, and the order entered December 22, 1913, must therefore be enforced.

And now, February 6, 1914, the rule is made absolute, the bankrupts are adjudged in contempt for failure to obey the order of December 22, 1913, and the marshal is directed to take them into custody and commit them to the jail of Philadelphia county; the said Harry Kramer and Michael Muchnick there to remain until they pay to Alfred T. Steinmetz, trustee of their estate in bankruptcy, the sum of \$4,092.21, and the said Michael Muchnick individually there to remain until he pays to the trustee the further sum of \$16,732.94.

In re DOUBLE STAR BRICK CO.

(District Court, N. D. California, First Division. February 5, 1913.)

No. 7316.

BANKRUPTCY (§ 71*) — PERSON SUBJECT TO ADJUDICATION — CORPORATIONS — DISSOLUTION.

That a California corporation had forfeited its franchise for nonpayment of the license tax, as provided by California Act March 20, 1905 (St. 1905, p. 493), as amended by St. 1906, p. 22, and St. 1907, pp. 664, 745, did not deprive the bankruptcy court of jurisdiction to administer its estate; the primary purpose of bankruptcy proceedings being the distribution of the debtor's property, the court taking hold of the res rather than the person of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 17, 86; Dec. Dig. § 71.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Double Star Brick Company. Application of Thomas B. Fernandez to set aside adjudication. Denied.

An application is made by creditors for the vacation of an order adjudicating the Double Star Brick Company a bankrupt. The order was entered January 23, 1912, in an involuntary proceeding, after written admission of insolvency, signed in the name of the brick company by three of its directors, one of whom was also its president, and another its treasurer, had been filed. The salient facts may be briefly stated as follows: The brick company was organized as a corporation pursuant to the laws of California on the 15th day of April, 1907. Under the terms of an act of the Legislature of California, approved March 20, 1905, as amended (Stats. Cal. 1905, p. 493; 1906, p. 22; 1907, pp. 664, 745) it became its duty to pay a license tax for the year 1911. Having failed to make the required payment, its default in the premises was, on the 15th day of September, 1911, reported to the Governor by the Secretary of State, and thereupon the Governor issued a proclamation declaring that the corporation's charter would be forfeited unless such license tax were paid by November 30, 1911, which proclamation was filed in the office of the Secretary of State and duly published as required by law. The tax was never paid, and upon the assumption that the brick company had no existence as a corporation on December 23, 1911, when the involuntary petition was filed, or upon January 23, 1912, when the adjudication was made, it is contended that the bankruptcy court was and is without jurisdiction to administer the estate. It should be added that during the year elapsing between the date of the adjudication and the date of this application numerous proceedings had been taken in the administration of the estate, one of which at least was by the trustee against the present applicants, who appeared and submitted themselves to the jurisdiction of the court without objection.

The California statute (St. 1906, p. 24) relied upon, after providing that all corporations shall pay an annual license tax and prescribing the duties of the Secretary of State and the Governor in cases of default, is as follows: "Sec. 9. It shall be unlawful for any corporation, delinquent under this act, either domestic or foreign, which has not paid the license tax or fee, together with the penalty for such delinquency, as in this act prescribed, to exercise the powers of such corporation, or to transact any business in this state (California), after the thirtieth day of November next following the delinquency. * * *

Section 404 of the California Civil Code is as follows: "The Legislature may at any time amend or repeal this part, or any title, chapter, article, or section thereof, and dissolve all corporations created thereunder; but such amendment or repeal does not nor does the dissolution of any such corporation, take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

W. S. Tinning, of Martinez, Cal., and R. C. Porter, of Los Angeles, Cal., for petitioner.

Daniel O'Connell, of San Francisco, Cal., opposed.

DIETRICH, District Judge (after stating the facts as above). In view of the fact that the applicant has presented his claim and has thus submitted the same to the jurisdiction of this court, and the further fact of his long acquiescence, it is a grave question whether his application does not come too late, and he is not estopped to raise the objection upon which he relies. In *re Ives* (D. C.) 111 Fed. 497; also 113 Fed. 911, 51 C. C. A. 541; In *re Billings* (D. C.) 145 Fed. 400. At least the application should not be granted unless it is clear that there is a want of jurisdiction of the subject-matter, and I am not satisfied that such is the case. It is to be admitted that in the decisions cited by the applicant (*Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 642, 103 Pac. 341; *Lewis v. Curry*, 156 Cal. 99, 103 Pac. 493; *Lewis v. Miller & Lux*, 156 Cal. 101, 103 Pac. 496; *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 578, 112 Pac. 454) there are expressions strongly supporting the view that the forfeiture of the charter of a corporation under the act referred to operates to terminate its very existence, but it is to be borne in mind that no question like that here involved was under consideration. Very clearly the primary, if not the only, purpose of the statute was to take away from defaulting corporations the power to act as such corporations; their privilege to do business is withdrawn as a penalty for their failure to pay the license fee or tax. It certainly was not the intention of the Legislature to impose any penalty upon, or to destroy, the rights of creditors. Were it not for these expressions of the Supreme Court of the state, I should not hesitate to hold that the statute operates simply to render corporations incompetent to transact business.

Apparently the Double Star Bick Company was insolvent and had committed an act of bankruptcy, and its property had therefore become subject to the jurisdiction of this court for bankruptcy purposes, prior to the forfeiture of its character. The primary purpose of a bankruptcy proceeding is the distribution of the property of the debtor; the court takes hold of the res rather than the person.

While the California statute under consideration makes provision for trustees to represent the defaulting corporation in the preservation of its property for the benefit of any persons entitled thereto, no specific scheme is outlined for the administration or distribution of the estate. In the present case it is admitted that these trustees voluntarily appeared and submitted to the adjudication, and consented to a distribution of the estate under the provisions of the bankruptcy act.

By section 8 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3425]), it is expressly provided that a proceeding shall not abate by reason of the death or insanity of the bankrupt. True there is no express provision for the administration of the estate of a deceased or insane person, where proceedings are not commenced prior to the death or insanity, and the jurisdiction of bankruptcy courts in such cases may be doubtful. But at least in involuntary proceedings I am inclined to think that an insane

person, though wholly incompetent in law, may be adjudged to be a bankrupt.

Perhaps still a better analogy to the present case is that of a partnership. It is familiar knowledge that under the Bankruptcy Act a partnership is deemed to be quite as much a legal entity as a corporation; the partnership estate is treated as distinct from that of the individual members of the partnership, and is so administered. But if the theory here urged is to be accepted, by parity of reasoning it must be held that a partnership may become insolvent and commit acts of bankruptcy, and thereupon the jurisdiction of the bankruptcy court may be defeated by the dissolution of the partnership, either through the voluntary agreement of the partners, or by reason of the death of one of them.

In view of these considerations I am decided to resolve such doubt as there is in favor of our jurisdiction and to retain control of the estate. To relinquish control now would give rise to many complications, and would be to the prejudice of those, who, with the knowledge, acquiescence, and apparent consent of the applicant, have incurred expense and delayed other action in reliance upon the validity of this proceeding.

FOUNTAIN v. DETROIT, M. & T. S. L. RY. CO.

(District Court, N. D. Ohio, W. D. July 10, 1913.)

No. 2415.

1. REMOVAL OF CAUSES (§ 112*)—PROCEEDINGS AFTER REMOVAL—OBJECTIONS TO PROCESS.

Sufficiency of process by which a suit has been commenced in a state court may be raised in a proper manner after removal to a federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 238; Dec. Dig. § 112.*]

2. PROCESS (§ 164*)—DEFECTIVE RETURN—CORRECTION BY AMENDMENT.

Where process has been properly served, but the return of the officer is insufficient, the defect may be corrected by an affidavit of the officer showing the facts.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 176, 239-248; Dec. Dig. § 164.*]

3. PROCESS (§ 164*)—RETURN—AMENDMENT.

Gen. Code Ohio, § 11288, provides that in an action against a railroad company summons may be served on any regular ticket or freight agent of the company, etc. In such an action the sheriff's return recited that he summoned the defendant by delivering to S., freight agent of the company, a true and certified copy of the writ, etc. *Held* that, though such return was defective for failure to state that the summons was served on the "regular" freight agent of defendant, such defect was cured by an affidavit of the officer that to his personal knowledge the person served was the regular freight agent of defendant railroad company, and that the word "regular" was not inserted in the return by oversight of the officer.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 176, 239-248; Dec. Dig. § 164.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At Law. Action by Noah Fountain, as administrator of the estate of Clarence J. Fountain, deceased, against the Detroit, Monroe & Toledo Short Line Railway Company. On motion to dismiss. Overruled.

O. S. Brumback and Erskine H. Potter, both of Toledo, Ohio, for plaintiff.

King, Tracy, Chapman & Welles, of Toledo, Ohio, for defendant.

DAY, District Judge. This suit was commenced in the common pleas court of Lucas county and later removed by the defendant to this court. The defendant, now appearing solely and specially for the purposes of the motion now under consideration, moves for an order vacating and setting aside the summons and service of summons by the sheriff of Lucas county.

[1] It is well established that, where a suit has been commenced in the state court and afterwards removed to the federal court, the sufficiency of the process can be raised in a proper manner after the removal. *Murphy et al. v. Herring-Hall-Marvin Safe Co.* (C. C.) 184 Fed. 495; *Webster v. Iowa State Traveling Men's Association* (C. C.) 165 Fed. 367; *Clark v. Wells*, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. Ed. 138; *Wabash Western Ry. Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 444, 30 Sup. Ct. 125, 54 L. Ed. 272. The defendant is an electric railway company operating a street railroad passing through two or more counties and owns and operates this electric railway in this manner.

Section 11288 of the General Code of Ohio provides, in part:

"The summons may be served upon any regular ticket or freight agent of such railroad company or street railroad company, or transportation company; or, if there be no such agent," etc., it provides for another manner of service.

The return of the sheriff in the common pleas court of Lucas county, omitting the formal parts of the return, is as follows:

"Received this writ April 17, 1913, and pursuant to its command, I summoned on the 22d day of April, 1913, the within named defendant, Detroit, Monroe & Toledo Short Line Railway Company, by delivering to L. M. Swartz, freight agent for said company, a true and certified copy of this writ, with indorsements thereon. The president or other chief officers of said company could not be found by me in Lucas county, Ohio.

"John Jackman, Sheriff,

"By C. D. Witaker, Deputy."

The return of the sheriff is defective because the return does not indicate that the company was served by serving the summons upon the regular freight agent of the defendant company. Later by leave of court first obtained, however, the plaintiff files the affidavit of Witaker, the deputy sheriff of Lucas county, which states in substance that, to the personal knowledge of the affiant, L. M. Swartz was the regular freight agent for the defendant railway company in the city of Toledo, Ohio, and that the word "regular" was not inserted in the return on the service in front of the words "freight agent" by reason of an oversight on the part of the deputy sheriff serving the process.

[2] The practice of permitting the filing of this affidavit is recognized and approved by the Supreme Court of the United States in *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, on page 445, 30 Sup. Ct. 125, on page 129 (54 L. Ed. 272), the court saying:

"These affidavits are made part of the record by a bill of exceptions, and we think they should have been considered upon the question of jurisdiction. As we have already indicated, the learned Circuit Court was in error in holding that the return of the sheriff in the state court concluded the parties, and had it considered the affidavits exhibited in the bill of exceptions, as in our view it should have done, the conclusion would have been reached that the weight of the testimony," etc.

[3] The affidavit indicates that the regular freight agent of the defendant company was regularly served by the sheriff of Lucas county.

The motion will, accordingly, be overruled, and exceptions granted to the defendant.

In re WASHINGTON STEEL & BOLT CO.

(District Court, W. D. Washington, N. D. January, 1914.)

No. 4717.

BANKRUPTCY (§ 244*)—DEPOSITIONS—AUTHORITY OF BANKRUPTCY COURT.

The provision of Bankr. Act July 1, 1898, c. 541, § 21b, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430), that "the right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force or such as may be hereafter enacted relating to the taking of depositions except as herein provided," confers on courts of bankruptcy the same powers in relation to the taking of depositions as are possessed by the federal courts in civil actions, and the proviso of section 41a, "that no person shall be required to attend as a witness before a referee at a place outside of the state of his residence and more than 100 miles from such place of residence," does not limit the authority given by Rev. St. § 863 (U. S. Comp. St. 1901, p. 661), to take the deposition of any witness who lives at a greater distance from the place of trial than 100 miles, whether within or without the state.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 244.*]

In the matter of the Washington Steel & Bolt Company, bankrupt. On objections by trustee to issuance of commissions to take depositions. Objections overruled.

James B. Murphy, of Seattle, Wash., for petitioner.
J. W. Russell, of Seattle, Wash., for trustee.

NETERER, District Judge. A petition has been filed together with notice with the referee to take the depositions of the hereinafter named witnesses. This petition and notice to take depositions has been duly served upon the attorneys representing the trustee, and request has been made that Samuel B. King, a notary public of Chicago, Ill., be appointed to take the deposition of J. H. Osborne; that John Christ, a notary public of Cœur d'Alene, Idaho, be appointed commissioner to take the deposition of C. F. Chafin of said city; and that J. W.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Hancock, a notary public of Spokane, Wash., be appointed to take the depositions of R. L. Webster and W. J. Ambrose in said city of Spokane. The petition sets out that each of these parties whose depositions are desired resides more than 100 miles from the place of trial or court in which the above matter is pending, and all except two reside out of the state. Objection is made by the attorney for the trustee to the appointment of commissioners and the issuance of commissions on the ground that there are no provisions of statute under which the commissioners could be appointed and the depositions taken; that the section of the statute under which the application is made appertains to actions pending, while bankruptcy proceeding is a special proceeding.

Section 876, Rev. St. U. S. (U. S. Comp. St. 1901, p. 667), provides:

"Subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into another district: provided, that in civil causes the witnesses living out of the district in which the court is held do not live a distance greater than 100 miles from the place of holding the same."

Section 863 of Rev. St. (U. S. Comp. St. 1901, p. 661), provides:

"The testimony of any witness may be taken in any civil cause * * * by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than 100 miles * * * or out of the district in which the case is to be tried; and to a greater distance than 100 miles from the place of trial. * * *"

Section 21b of the Bankruptcy Act, as amended June 25, 1910, c. 412, 36 Stat. 838 (U. S. Comp. St. Supp. 1911, p. 1498), provides:

"The right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided. (c) Notice of the taking of depositions shall be filed with the referee in every case."

Section 41 of the Bankruptcy Act provides:

"* * * That no person shall be required to attend as a witness before a referee at a place outside of the state of his residence, and more than 100 miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him."

I think it is apparent from the provisions of the act that it was the intention of Congress to confer upon courts the same jurisdiction and power relating to the taking of depositions in bankruptcy proceedings as are enjoyed by the courts in relation to civil actions.

This question is one of first impression in this court, nor is precedent presented from any of the District Courts. In the construction of statutes it is well settled that the general purpose intended to be subserved by the particular enactment under construction is to be considered, and that all provisions of the statutes which deal with the same subject are always to be taken into account.

Sections 863 and 876 were enacted prior to the Bankruptcy Act, and provide for compulsory attendance of witnesses within certain limits. The only limitation placed by section 876 was for the purpose of extending protection to the witness in not compelling him to appear except within certain limits, and section 863 afforded litigants an

opportunity of securing the testimony through a commissioner. The provisions of this section were clearly extended to bankruptcy proceedings by section 21b of the Bankruptcy Act.

It is contended that the provisions of section 41 required the attendance of witnesses residing within or out of the state and within the limit of 100 miles. From a consideration of the sections named, together with section 41, it manifestly appears, when the purpose intended to be subserved is taken into consideration, together with the provisions of section 863, that there was no intention to modify the powers or to limit any authority conferred by sections 876 and 863. I think that the general provisions of section 863 with relation to the taking of depositions apply to bankruptcy proceedings, and that the provisions of section 41 of the Bankruptcy Act are not an enlargement of section 863, R. S., but that it is brought by section 21 within the provisions of section 863.

The following authorities, while not deciding the matter at issue, would indicate the soundness of this conclusion: *In re Hempstreet* (D. C.) 117 Fed. 568; *In re Williams* (D. C.) 123 Fed. 321; *In re Robinson* (D. C.) 179 Fed. 724; *In re Cole* (D. C.) 133 Fed. 414; *Collier on Bankruptcy*, p. 386.

Let an order be entered in accordance with this opinion.

WITHOFT v. WESTERN MEAT CO. et al.

In re STONE CANON MERCANTILE CO.

(District Court, N. D. California, First Division. February 11, 1913.)

BANKRUPTCY (§ 287*)—SUIT BY TRUSTEE—CONVERSION OF PROPERTY BY CREDITOR.

Defendant, a creditor of bankrupt, assigned its account for collection to a commercial agency which brought suit thereon in its own name, and attached a stock of goods, and, after the bankruptcy, the goods were sold by the sheriff and the money applied in payment of the judgment. Defendant retained the beneficial ownership of the claim and was advised with prior to the sale and authorized the same. *Held*, that it was not protected by the fact that the suit was in the name of another, but was liable for conversion to the trustee of the bankrupt.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 444-447; Dec. Dig. § 287.*]

At Law. Action by T. W. Withoft, trustee in bankruptcy of the Stone Canon Mercantile Company, against the Western Meat Company and others. Judgment for plaintiff.

The suit was brought by the plaintiff to recover damages for the alleged conversion of a stock of goods belonging to the bankrupt. The Western Meat Company had assigned to the San Francisco Commercial Agency, for collection, its claim against the bankrupt, and thereupon the Commercial Agency commenced a suit in which the property of the bankrupt was attached, and thereafter sold by the sheriff to satisfy the judgment therein obtained.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Jos. Kirk and J. P. Keleher, both of San Francisco, Cal., for plaintiff.

Perry & Perry, of San Francisco, Cal., for defendant San Francisco Commercial Agency.

William P. Humphreys, of San Francisco, Cal., for defendant Western Meat Co.

DIETRICH, District Judge. Such defense as is put forward on behalf of the San Francisco Commercial Agency and the sheriff is necessarily involved in that of the Western Meat Company, and I need therefore refer only to the contentions urged by this last-named, and perhaps principal, defendant. Upon its behalf it is argued: (1) That it is without any liability whatsoever; and (2) that the value of the property seized and sold was comparatively small.

As to the first proposition, I am unable to escape the conclusion that Perry did not direct the sheriff to proceed with the sale until after he had laid the facts before the meat company's general attorney, and had been expressly authorized by him to take the course which was finally pursued. While there is little direct or positive evidence upon the point, the circumstances of the case leave little room for doubt that the managing officers of the meat company, with knowledge of the pendency of the bankruptcy proceeding, for the purpose of securing the payment of its claim in full, concluded to assume the risk involved, and expressly authorized Perry to proceed.

But even if we put aside such a view of the record, the defendant must still be held to be liable. That it turned this claim over for collection and authorized the attachment suit to be brought is not denied; nor does it seriously contend that it sold the claim or parted with control thereof. The suit was brought in the name of the commercial agency as a mere matter of convenience; the real beneficial ownership remaining in the meat company. It is not very material whether the commercial agency was a real, substantial corporation, or a mere "dummy." In the latter alternative it was nothing more than Perry doing business in the name of, and as, the San Francisco Commercial Agency; in the former, it was a corporation acting through Perry, its managing officer. So that, whether, as was testified to by one of the meat company's representatives, the claim was turned over to the agency for collection, or, as another one stated, it was turned over to Perry, it is clear that the meat company fully understood that the claim was in fact in Perry's hands for enforcement, and it is bound by what he did, within the apparent scope of his authority. If, in the interest of convenience and economy, the courts go so far as to recognize the right of a naked assignee of the legal title of a claim to maintain suit thereon, they certainly should not, and will not, permit the expedient to be turned into a means for the perpetration of fraud. The suit was in fact by and upon behalf of the meat company, although in the name of the commercial agency, and, having expected to receive, and having in fact received, the benefits of the enterprise, it must also be held to have assumed the hazards and must bear the losses thereof. To yield to its present contention would be to establish a most pernicious prac-

edent, and open wide the door for the most flagrant frauds upon the bankruptcy law.

Touching the value of the stock seized and sold, unfortunately the evidence is not entirely satisfactory. The most definite information comes from the plaintiff's witness Bevans, but it is not conclusive. The conversion of the goods did not take place as of the date of the attachment, for no wrong was committed by the meat company in bringing suit and causing the property to be attached. If, upon the commencement of the bankruptcy proceeding, the sheriff had abandoned the property, or if, upon the appointment of the trustee, he had turned it over, no one of the defendants would be chargeable with any wrongdoing. The wrong consisted in the denial of the superior right of the bankruptcy court, and the sale of the goods in defiance of such right. The value of the property is therefore to be measured as of about the time the sheriff's sale took place. No good purpose would be subserved by an attempt to discuss the testimony in detail so far as it bears upon the question of value, and I simply state the conclusion which I have reached, namely, that the goods at the time of their conversion were of the reasonable value of \$5,138.21. As I understand, the sheriff has paid over to the trustee \$408.21; the same being the net balance remaining in his hands after paying the claim involved in, and the expenses of, the attachment suit. Deducting this amount from the \$5,138.21, there is left a balance of \$4,730, which amount, together with interest thereon at the legal rate from February 3, 1910, the plaintiff is entitled to recover from the defendants. The interest should be calculated up to the date of the judgment, and the amount thereof added to the principal sum. Such judgment will, of course, carry interest from its date at the legal rate, and costs.

SMITH et al. v. ATCHISON, T. & S. F. RY. CO.

(District Court, D. Kansas, Second Division. October 29, 1913.)

No. 188.

REMOVAL OF CAUSES (§ 19*)—ACTIONS ARISING UNDER INTERSTATE COMMERCE LAW.

An action for damages for negligent handling of an interstate shipment of cattle, an attorney's fee for bringing such action, the penalty for failing to stop the shipment and feed the cattle, an overcharge in freight, and an attorney's fee for suing therefor, was an action arising under the Interstate Commerce Act, within Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1092 [U. S. Comp. St. Supp. 1911, p. 136]) § 24, par. 8, giving United States District Courts jurisdiction of all suits arising under any law regulating commerce, except those of which exclusive jurisdiction is conferred upon the Commerce Court; and hence it was removable to the United States District Court under section 28, providing that any suit arising under the laws of the United States of which the District Courts are given original jurisdiction by that title may be removed to the proper District Court, though there was no diverse citizenship, since the Interstate

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Commerce Act regulates the entire field of such commerce, and whatever rights plaintiff had were governed and controlled exclusively thereby.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37-46, 48, 52, 53; Dec. Dig. § 19.*]

At Law. Action by J. W. Smith and others against the Atchison, Topeka & Santa Fé Railway Company. On motion by plaintiffs to remand to the state court. Motion overruled.

Hackney & Lafferty, of Winfield, Kan., for plaintiffs.

Wm. R. Smith, of Topeka, Kan., and J. E. Torrence, of Winfield, Kan., for defendant.

POLLOCK, District Judge. The facts alleged in the petition of plaintiffs, briefly stated, are as follows:

Plaintiffs shipped 33 cars of cattle over defendant's line of railway from the station of Panhandle in the state of Texas to the city of Guthrie in the state of Oklahoma. A copy of one of the bills of lading covering the shipment made is attached to and made part of plaintiffs' petition. The petition contains five counts. Under the first the plaintiffs seek to recover the sum of \$11,905 by way of damages sustained by reason of the negligent manner in which the cattle were handled and transported by defendant company. Under the second, recovery is sought of an attorney's fee for bringing and prosecuting such action. Under the third, plaintiffs seek to recover \$500 by way of penalty provided by law for the negligent acts charged by plaintiffs against defendant in the first count of the petition. Under count 4, to recover \$200 alleged overcharges in freight on the shipment. Under the fifth, attorneys' fees for bringing and prosecuting an action for such recovery.

Defendant removed the case from the state court in which it was brought into this court. Plaintiffs have moved to remand.

As the parties are each and all citizens of this state no jurisdiction exists in this court on the ground of diversity of citizenship. If jurisdiction attached in this court by the removal taken, it must arise from the fact the action is one arising under the Interstate Commerce Act, and for that reason jurisdiction is conferred on this court by section 24 of the Judicial Code, which provides as follows:

Section 24, par. 8, provides:

Federal courts shall have jurisdiction "of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court."

And which, for the reason this court has original jurisdiction of such controversy, may be removed into this court when instituted in a state court under the provisions of section 28 of the Code, which, among other things, provides, as follows:

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the District Court of the United States for the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

proper district. Any other suit of a civil nature, at law or in equity of which the District Courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court, may be removed into the District Court of the United States for the proper district, etc."

Does this case arise under the Interstate Commerce Act? This must be determined from the case made by the plaintiffs in their petition filed in the state court.

As seen by the above statement, the shipment of which complaint is made was an interstate shipment, and being of such nature the Congress has undertaken to regulate shipments of that character and the states are powerless to exercise any control over the same by laws they may enact, or through principles of the law enunciated by the courts of such states.

In so far as recovery is sought under the third and fourth counts by way of penalty in failing to stop the shipment and feed the cattle, and for overcharge in freight paid, and any attorneys' fees that may be recovered for the same, undoubtedly arise under the Interstate Commerce Act and were properly removable.

As to the right of action presented by plaintiffs in the first and second causes of action, as Congress has by the Interstate Commerce Act undertaken to regulate the entire field of such commerce, and has created the rights and remedies for the redress of wrongs suffered by interstate shippers, I am of the opinion the rights of plaintiffs, whatever they may be, are governed and controlled exclusively by said act, and any recovery sought by the plaintiffs must be in accordance with the provisions of said act. *Nor. Pac. Ry. v. Washington*, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257; *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *McGoon v. Northern Pacific Ry. Co.* (D. C.) 204 Fed. 998.

It follows, the controversies of plaintiffs with defendant were such as are removable.

The motion to remand is therefore overruled.

Ex parte LOO SHEW UNG.

(District Court, N. D. California, First Division. February 10, 1914.)

No. 15,481.

ALIENS (§ 51*)—DEPORTATION—GROUNDS.

An alien employed as a cook in a house of prostitution is squarely within the provisions of Immigration Act (Act Feb. 20, 1907, c. 1134) § 3, 34 Stat. 899 (U. S. Comp. St. Supp. 1911, p. 502), providing that any alien who is "employed by, in and in connection with any house of prostitution" shall be deemed to be unlawfully within the United States and shall be deported.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 111; Dec. Dig. § 51.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Petition by Loo Shew Ung for a writ of habeas corpus. Denied.

Costello & Costello, of San Francisco, Cal., for petitioner.

Walter E. Hettman, Asst. U. S. Atty., of San Francisco, Cal., for respondent.

DOOLING, District Judge. The petition herein shows that Loo Shew Ung, born in China, was admitted into the United States as a merchant's son, and that, having been thereafter found employed as a cook in a house of prostitution in Bakersfield, he was arrested, and after a hearing ordered deported as one unlawfully within the United States, as defined by section 3 of the Immigration Act. Petitioner contends that his employment as a cook, not being in itself at all immoral, even though exercised in a house of prostitution, did not bring him within the class denounced by the section referred to above, and that the order of deportation is therefore unwarranted.

The portion of the act material to this proceeding is as follows:

"Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute, or who is employed by, in, or in connection with any house of prostitution, * * * shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this act."

If this language is to be given its ordinary meaning, and no reason appears why it should be distorted, petitioner comes squarely within its provisions, for he is an "alien employed by, in and in connection with a house of prostitution." The act itself does not limit its operation to any particular character of employment, but embraces employment of every description. It would require something more than judicial interpretation—it would require, indeed, judicial legislation—to take petitioner's case out of the plain letter of the act, and there is no reason to believe that the terms used were not selected for the very purpose of covering such employment as that in which petitioner was engaged.

The petition for the writ will be denied.